

DETERMINATION PANEL OF THE PENSIONS REGULATOR

ORAL REPRESENTATIONS HEARING

Held at

Jurys Inn Brighton
101 Stroudley Road
Brighton
Sussex
BN1 4DJ

on Thursday 13 December 2012

Before the Panel:

MR JOHN SCAMPION CBE
(Chair)

DAME ELIZABETH NEVILLE
MR ANTHONY STERN

Representation:

MR KEITH ROWLEY QC
Representing the Pensions Regulator

MR DAVID GRANT QC
Representing the Trustees of Jerome Group PLC

MR DAVID SIMPSON
Representing Worthington

From the shorthand notes of Ubiquis
Cliffords Inn, Fetter Lane, London, EC4A 1LD
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(at 10.00 a.m.)

1
2 CHAIR: I think we're all here. Good morning. Let me just introduce ourselves. My name is
3 John Scampion, Chairman of the Determinations Panel. I have with me Dame
4 Elizabeth Neville, and Mr Stern, both colleague Panel members. We have been
5 appointed by the Panel to make whatever determination in this matter is appropriate.

6 We're meeting this morning to consider action which has been asked of us, in
7 a warning notice which was sent on 6 September this year in respect of the Jerome
8 PLC retirement benefit plan. The warning notice was sent to the directly affected
9 parties identified by the Pensions Regulator at the time, which was the employer –
10 Worthington – and the Trustees at the time – Mr David Simpson and Mr Douglas
11 Ware.

12 Now, the warning notice, as we all know, seeks to persuade the Panel that an
13 Independent Trustee should be appointed to this Trust, to this scheme, with exclusive
14 power to act, together with other consequential provisions that flow in the wake of
15 making the appointment. The date for this hearing was settled some – quite some
16 weeks ago – I think all the parties here of course are aware of it. On 27 November, I
17 believe it should be said, a letter was sent to the Panel by Mr Simpson, explaining that
18 he and Mr Ware had resigned and that two new Trustees had been appointed – Mr
19 Robert Hodgetts and Mr Shola Adeniran.

20 Now, the letter contained no formal instruments of resignation or appointment.
21 They weren't produced in the letter. And so in the absence of those the Panel were
22 not in a position to come to a conclusion that the position concerning the directly
23 affected parties changed. And that was the situation that obtained until yesterday,
24 when a letter was sent electronically indicating that the formalities had been
25 undertaken and completed, and that Mr Hodgetts and Mr Adeniran were now Trustees
26 in the place of Mr Simpson.

27 I might just say, just to make it crystal clear, in passing, Mr Simpson is here
28 this morning, and he is here, clearly in the context not of a Trustee, but in the context
29 of a representative of the employer – Worthington. And that's the sense in which
30 you're representing, Mr Simpson, at this hearing.

31 MR SIMPSON: That's correct, sir.

32 CHAIR: Now, in response to that letter I should say this: that the Panel sent a letter on 28

1 November, signalling in that letter that since the case had been outstanding for quite
2 some months the position, particularly with regard to the security of scheme assets,
3 ought to be explained to the Panel – we felt it important, incumbent upon us. The
4 warning notice was outstanding, had not been withdrawn, we were seized of the case,
5 if you like, and we felt it incumbent upon us to understand what the current status was
6 of the scheme and particularly what the situation was concerning the scheme assets.
7 We felt that our responsibility asked no less of us than to do that, and hence we made
8 no other reaction to that letter than that the hearing would continue until
9 circumstances might change.

10 Now, the Trustees appointed by Mr Simpson have been in place, seemingly,
11 for some 14 days or so, and have made no contact with the Panel in relation to these
12 proceedings – until, that is, late yesterday, when we had, via the Regulator it has to be
13 said, some indication of their position. And we have a note now before us, prepared
14 by Mr Grant, who is here this morning of course representing those Trustees, setting
15 out, in outline, their position.

16 Now, the burden of that note seemed to me to be that the proceedings – these
17 proceedings today are unnecessary on the basis that Trustees have been put in place,
18 and that the next appropriate step is for a dialogue to take place between the Trustees
19 and the Regulator. With a view, presumably, and I think that here I am perhaps
20 putting words into the mouth of Mr Grant, which is a dangerous thing to do, but I
21 think with a view to persuading the case team at the Regulator that the warning notice
22 might be withdrawn that seems to be the position that you're advocating. I haven't –
23 I'm just making that as an assumption in order to, sort of, find a way of proceeding
24 this morning.

25 What I think we should do, against that background, then, is to ask Mr Grant if
26 he wants to say anything further in amplification of the note which we all received, I
27 guess, so that we know precisely what your position is in the context of these
28 proceedings – what you are saying we should do about these proceedings. When
29 we've heard that we'll hear you, Mr Rowley, if we may, in response to that, and then
30 whatever decision we make on that we will then move – if appropriate – to the
31 substantive issues raised by the case.

32 MR ROWLEY QC: Yes sir.

1 CHAIR: So if we could take that as a procedural point first, if I can put it that way, hear Mr
2 Grant, and then yourself. That seems to me to be the most appropriate way of
3 proceeding, and I hope we're all happy with that. Mr Grant?

4 MR GRANT: Yes, if I could have one minute, please. The first point is a relatively minor
5 one: one of the new Trustees, his surname is pronounced Adeniran –

6 CHAIR: Adeniran, forgive me –

7 MR GRANT: Not at all.

8 CHAIR: – that's my fault.

9 MR GRANT: It's entirely understandable, and that's why I had to check myself. The second
10 point is I'm grateful for the opportunity to speak first, and I was going to ask for that
11 ability, in any event, for these reasons. The new Trustees' position, in summary, is
12 that first of all the Panel has no jurisdiction today to take any decision, because there
13 is no warning notice against the new Trustees, which of course is a prerequisite of
14 section 96 of the 2004 Act.

15 Alternatively, if you think that's wrong, the first the new Trustees were aware
16 of the grounds of alleged conflict, unsuitability, was Mr Rowley's skeleton, which
17 was only obtainable – and I use those words carefully – yesterday afternoon, after I
18 had prepared the note. The position of the new Trustees followed the letter to which
19 you've referred, sir, from the Determinations Panel – I think from Ms Boyce – 28
20 November, explaining that the Panel's concerns were going to be security of assets
21 and also proof of the deed of appointment and removal. It's only yesterday when Mr
22 Rowley's detailed skeleton, in which points are levelled against the new Trustees in
23 relation to their suitability or otherwise.

24 The short point is that the new Trustees have not had opportunity to consider
25 those points. With reference to the words of this Panel in the Lehman case, as
26 repeated in Box Clever, in my submission if the Panel were to proceed today, that
27 would be contrary to concepts of natural justice and fairness, in that there would be no
28 reasonable opportunity to make meaningful and focused representations. There's no
29 warning notice against the new Trustees, no evidence as to their unsuitability – save
30 for the mere assertion contained in Mr Rowley's skeleton argument. As I said, that
31 was only accessible early afternoon.

32 No hard copy had been sent to Mr Simpson. No copy sent to either of the new

1 Trustees, whose postal addresses were provided to the Regulator. And, sir you may
2 well be unaware of this, but Mr Simpson was unable to access via the secure email
3 system the skeleton argument. And I then contacted Ms Katanka, I think it was – the
4 Regulator, to that effect, saying I had tried to do so using Mr Simpson’s login details,
5 and even I couldn’t access it. They simply weren’t on the system, whether because of
6 error or omission or whatever.

7 So the bottom line is, even allowing for the jurisdictional point, the first the
8 Trustees were aware of the case against them – by the Trustees I mean the new
9 Trustees – was Mr Rowley’s skeleton argument yesterday. There was no opportunity
10 to take instructions for them, to provide evidence in response to that. So accordingly
11 even if the Panel were against my primary submission on the question of jurisdiction
12 in my submission the appropriate thing to do is to adjourn in order, amongst other
13 things, for the Regulator to put forward its case against the new Trustees, should it
14 decide to continue with that.

15 And in any event, independent of that, for an opportunity for a dialogue to be
16 opened between the Regulator and the new Trustees. Sir you have said the new
17 Trustees have made no steps to contact the Regulator. That may be so –

18 CHAIR: The Panel I said.

19 MR GRANT: Sorry, the Panel. And that’s clearly a valid qualification. But equally, even if
20 the point is said of no attempts to contact the Regulator, the Regulator has not sent
21 any letters or correspondence directly to them. As I understand the only contact made
22 is a phone call by Ms Boyce to Mr Adeniran, asking him for confirmation that he was
23 a Trustee, which he gave. The meeting early on – one of the points in Mr Rowley’s
24 skeleton – the question has not – the issue has not been that the new Trustees have
25 failed to answer anything of them – nothing has been asked of them. Time must be
26 given for the Regulator to put forward points, which it may well have, legitimately or
27 otherwise, and for the new Trustees to respond to them. I’m happy to expand on this,
28 but I hope you understand the thrust of my clients’ position.

29 CHAIR: Thank you.

30 MR GRANT: One point – Mr Simpson reminds me that I only got to meet Mr Hodgetts on
31 Tuesday evening, whereupon my instructions were confirmed. But that is why my
32 note was late yesterday, for which I apologise, but it was produced in haste, as

1 probably can be seen from the number of errors in it – typographical, I stress – but that
2 is the position. Once – and that was done, again, I repeat, for the avoidance of doubt,
3 without knowledge of the Regulator’s position as set out in Mr Rowley’s skeleton.

4 CHAIR: Thank you Mr Grant. Mr Rowley?

5 MR ROWLEY QC: May it please you sir, first as to jurisdiction, can I say that I am
6 exceedingly surprised at the point that is being taken. None of the material is before
7 you to enable to consider whether there is any merit in that point, and in my
8 submission there isn’t, but there is also not the slightest hint of suggestion of that
9 point in Mr Grant’s note that was prepared yesterday afternoon. If it had been referred
10 to in the note then we could have had the material before you to enable you to deal
11 with it.

12 My learned friend hasn’t developed the point at all – he’s simply made an
13 assertion that you don’t have jurisdiction, and that is one thing you do have, because
14 the Panel is the master of its own procedure. What you have before you today is an
15 application, of which the three new Trustees – sorry, the two new Trustees, who were
16 appointed on 22 November, which is three weeks ago, of which they have had notice
17 prior to their appointment, because the evidence that is being put before you, which
18 emanates from Mr Simpson – board minutes of Worthington – clearly show that the
19 position was explained to Mr Hodgetts and Mr Adeniran that there were outstanding
20 proceedings brought by the Pensions Regulator, and they accepted the appointment on
21 that basis.

22 They were aware of this hearing. The Panel, in my submission, as master of
23 its own procedure – because the procedure is not prescribed by the 2004 Act – it’s a
24 matter for the Panel itself to exercise its case management powers in relation to any
25 matter that is before it. The Panel has, in our submission, jurisdiction as the master of
26 its own procedure, to treat Mr Hodgetts and Mr Adeniran as we have done in our
27 skeleton and the documents that we’ve lodged as directly affected parties.

28 So in the first place, in my submission it’s quite improper for the jurisdiction
29 point to be taken in the way it is, because it’s not been raised hitherto, and secondly
30 there’s no merit in it. So in the first instance you do have jurisdiction, because you do
31 have the power to decide what proceeding you should adopt in relation to this warning
32 notice, and that power extends to treating Mr Hodgetts and Mr Adeniran as parties to

1 the proceedings.

2 Jurisdiction aside, I'm then going to come to what, with respect, I would
3 describe as the cri de coeur, which asks for an adjournment – because that's what it is.
4 These are new Trustees who were appointed three weeks ago, knowing there were
5 proceedings today, since when they have done absolutely nothing. They have not
6 contacted the Regulator, they have not contacted the Panel, they have taken no steps at
7 all to participate in these proceedings until Mr Grant's note that was provided late
8 yesterday afternoon.

9 And no reason was offered to you as to why Mr Grant was not instructed until
10 Tuesday evening, Mr Hodgetts and Mr Adeniran knowing before they had been
11 appointed on 22 November that there was going to be a hearing today. What they
12 have done is to adopt an ostrich-like approach of seeking to ignore these proceedings
13 in the hope that they would go away. And of course, in that respect, there is a
14 precedent. Because this isn't the first time that new Trustees have been appointed
15 shortly before the date fixed for a warning notice.

16 That was what happened in June of this year, when the first warning notice
17 was due to be heard in early July. And let's just think, who was the person, who are
18 the people are responsible for that happening twice, for attempts to frustrate the proper
19 operations of this Panel in the exercise of its powers under the 2004 Act? One of
20 those persons is in this room – is Mr Simpson. He was responsible, with Mr Ware,
21 for what was done at the beginning of June 2012 to frustrate the first hearing. That is
22 what he and Mr Ware have now sought to do in respect of this hearing.

23 What is being suggested on behalf of the new Trustees, who can't even be
24 bothered to attend before the Panel this morning – and it's just worth, in my
25 submission, seeing what is said about why the new Trustees aren't here today. What
26 we are told is each has substantial prior engagements which cannot be moved. What
27 are those substantial prior engagements? Where are they? Why can they not be
28 moved?

29 Judges regularly get faced with applications for an adjournment of proceedings
30 on the basis that it's inconvenient to a litigant, and the judge says, 'Why is it
31 inconvenient? Where are you? Why can't you attend on that day? This is court
32 business. There are other parties to consider. Why can't you attend?' And the litigant

1 is required to give a proper explanation, and at that point the judge will then decide
2 whether or not it's appropriate to adjourn.

3 As regards this application to adjourn, no material has been put before you to
4 justify why they are not attending this morning. Now, as regards – and there is, of
5 course – what Mr Grant's submissions have completely overlooked is that there is
6 another interest in this proceedings. These aren't proceedings between – as in a
7 conventional civil action – two rival parties. The real interest here is not that of the
8 Regulator or of the new Trustees, it's of the members of the scheme.

9 This is a scheme which has been rudderless for at least six months and quite
10 possibly longer. And the suggestion that these proceedings should be adjourned this
11 morning in order to allow what is described as a dialogue between the new Trustees
12 and the Regulator is in my submission risible. If the new Trustees wanted a dialogue
13 with the Regulator, why haven't they contacted them? What we have here are two
14 people who have been appointed, effectively at the eleventh hour, with the deliberate
15 objective of preventing this Panel from performing its duties under the 2004 Act to
16 take steps to protect the interests of the members of this scheme on behalf of two
17 Trustees who are not even willing to attend, not even willing to explain why they
18 can't attend, and not willing to explain why they regard themselves as suitable people
19 to have the control of assets upon which members of this scheme depend for their
20 pensions.

21 It is, in my submission, an impertinent suggestion that these proceedings
22 should be adjourned on the application of people who have taken no interest in them
23 whatsoever. And that point itself is a compelling reason why you should proceed
24 today, because if these are people who are not prepared to take the remotest interest in
25 these proceedings how can it possibly be suggested that they are suitable people to
26 have the control of the affairs of the scheme?

27 So, in my respectful submission, there is nothing in the jurisdiction point,
28 because you've got the power to proceed this morning, and the application to adjourn
29 is completely devoid of merit, because what you have here are two new Trustees who
30 are simply trying to cock a snook at the proper procedure of the Panel, and I strongly
31 urge the Panel not to accede to what is quite obviously a deliberate delaying tactic.
32 And under those circumstances I would ask you to proceed with the hearing.

1 CHAIR: I would appreciate your comment on one of the submissions that Mr Grant made,
2 which was in relation to the skeleton argument. The skeleton arguments have been in
3 play for around a week, and the suggestion is that the new Trustees had not had an
4 opportunity to see them. It is the skeleton argument which contains the Regulator's
5 position, or case, against specifically the new Trustees.

6 MR ROWLEY QC: Well they were delivered by courier to the registered office, or – to the
7 correspondence address for the Trustees, which is Mr Simpson's address. They were
8 couriered to Mr Simpson's chambers on Friday of – I beg your pardon, sorry?

9 CHAIR: At the same time as everybody else received them?

10 MR ROWLEY QC: Well, at the same time that the Panel received them.

11 CHAIR: At the same time as the Panel?

12 MR ROWLEY QC: Yes.

13 CHAIR: Very well.

14 MR ROWLEY QC: They were not separately served on the new Trustees. They were served
15 in hard copy, because – and I can show you the emails – Mr Simpson has refused to
16 accept service of documents electronically. So they had to be served by courier at his
17 chambers in London on Friday afternoon. Which they were. And just as Mr Hodgetts
18 and Mr Adeniran knew that there was a hearing proceeding today, so Mr Simpson
19 knew that there was a hearing proceeding today. And if, as he now says, he was away
20 at that time, he should have had in place arrangements to deal with whatever might be
21 delivered to his chambers in his absence. So it's another example of somebody
22 simply ignoring the proper procedures of the Panel.

23 MR SIMPSON: Sir, may I address you? Mr Grant isn't representing the company today, the
24 directors today, even though he's kindly going to help out.

25 CHAIR: Well does the company have a position on this question of whether the proceedings
26 should go ahead today or not?

27 MR SIMPSON: Well, sir, yes. I'd like to pick up really on the skeleton argument matter. I
28 did, very early on in these proceedings, indicate to the Regulator that I wasn't willing
29 to accept service by email. So I've been waiting for the skeleton argument – there
30 weren't directions handed down about the dates on which skeleton arguments should
31 be exchanged or provided to us. I don't have a copy of the directive in front of me, I
32 can't remember the date that they should have been.

1 There are people in my office in London who regularly sign for things for me.
2 There has been no delivery – by post, by courier, or anybody else, of a skeleton
3 argument. We got the warning – the Section 72 notice delivered, but no skeleton
4 argument.

5 MR ROWLEY QC: Well I'm sorry to intervene –

6 MR SIMPSON: I've also looked at the electronic – secure electronic site, and even last night
7 it wasn't there. The only time I got a copy of the skeleton argument was when Doug
8 Ware – my fellow director – emailed me a copy when I was at home yesterday. Now,
9 the skeleton argument does require me to take some detailed research – come up with
10 some figures to dispute figures and that sort of thing. I wasn't in my office; I haven't
11 been able to do that.

12 In terms – if I can just address one or two things –

13 MR ROWLEY QC: Well, before we leave –

14 CHAIR: Please, please, let – you want to talk to us about other things than this skeleton
15 argument point?

16 MR SIMPSON: Well, just –

17 CHAIR: We'll come – I'll come back to that in a moment.

18 MR SIMPSON: Yes, of course.

19 CHAIR: Let's just deal – Mr Rowley, come back on the skeleton argument.

20 MR ROWLEY QC: Yes, well I've got a signed receipt, 10 December, at 18.10. At company:
21 David Simpson, 196 Temple Chambers, 3 to 7 Temple Avenue, London EC4Y 0HP.

22 CHAIR: Thank you. Now what are the other points you want to address us on, because I just
23 want to be clear about this: we are looking at an issue about whether this matter
24 should proceed. That's the question. Now, does the company have a position on that
25 that they want to establish with the Panel?

26 MR SIMPSON: I think the company would welcome some time to actually examine the
27 skeleton argument and put our arguments in place. And to do our research and come
28 up with the facts and figures that we'd need to counter certain issues in the skeleton
29 argument. I can answer as much as I've seen there, but that's in relation to the
30 skeleton argument.

31 CHAIR: And those are issues in relation to the substantive questions of this case?

32 MR SIMPSON: Yes.

1 CHAIR: Yes, well I think we will come to those or otherwise depending on the decision we
2 make on the adjournment question.

3 MR SIMPSON: No –

4 CHAIR: I don't want to hear any more about that at the moment.

5 MR SIMPSON: Okay.

6 CHAIR: At this stage – if it's appropriate I'll come back to you.

7 MR SIMPSON: Yes, of course.

8 CHAIR: Very well.

9 MR GRANT: Sir, may I reply briefly to what Mr Rowley said?

10 CHAIR: Well –

11 MR GRANT: I shall be brief.

12 CHAIR: I'll be indulgent. You made your submission, had a spirited response, yes, I'll be
13 indulgent. Come back, for me Mr Burton.

14 MR GRANT: Jurisdiction, Section 96, prescribes warning notice, as does the tribunal's own
15 procedure – this currently devolves from June, July 2008 onwards. The only
16 indication or exposition of the Regulator's position against the new Trustees is in that
17 skeleton argument. That is not, by definition, a warning notice. The Panel's mastery
18 of its procedure clearly has limits, and those are limits prescribed by statute.

19 In any event, as a matter of fairness and justice, having regard to the Lehman
20 test, it cannot be right for the Trustees to be made aware, and it's now common
21 ground that the skeleton argument wasn't sent to the new Trustees directly, whose
22 address the Regulator had, until earlier this week. And the Trustees only saw –
23 became aware of it – yesterday. The point set out there about the Trustees' suitability
24 are not substantiated by evidence. The Trustees need an opportunity to see them.

25 The timing is unfortunate – all the more so, given what happened in June, but
26 there is an asymmetry between then and now. In June the then Trustees were also the
27 directors, resigned from both positions, effectively under the stress of the litigation.
28 Now, the new directors remain – that's Mr Simpson and Mr Ware – a conflict arose.
29 And one of the points the Regulator was taking is that there was an inherent conflict
30 of interest.

31 You'll see from the response on behalf of Mr Simpson and Mr Ware they
32 acknowledged the possibility of conflict, but were of the view that conflict had not

1 materialised or manifested itself. It did – their position is – some weeks ago. And
2 they took the decision that they could no longer continue in place. So the timing's
3 unfortunate. To say that it is designed to frustrate the purposes of this procedure is
4 nothing more than assertion.

5 But the bottom line is, whether the merits of that are correct, whether the
6 ultimate decision taken by the tribunal is to appoint Independent Trustees with
7 exclusive powers or take no decision or to appoint an Independent Trustee with
8 powers, that needs time so the case can be put to the new Trustees and they can
9 consider it and respond accordingly. I'm grateful for the indulgence.

10 CHAIR: Mr Grant has said something further on the question of jurisdiction, Mr Rowley.

11 Do you want to come back on the jurisdiction point alone?

12 MR ROWLEY QC: Well – I've been accused of assertion, what you've received from Mr
13 Grant is assertion. We've not been referred to the cases, we've not been referred to
14 the legislation. The Panel – you haven't been referred to the procedure. It's an
15 extraordinary position to take – for someone to pursue a legal argument of which no
16 notice has been given, and without bringing on any of the legislation or authorities on
17 which that person is proposing to rely. A quite extraordinary way of proceeding.

18 But the core submission, on behalf of the Regulator, is that it is for the Panel,
19 determining its own procedure in relation to any particular application before it, to
20 decide what is the just and convenient way to proceed. There's nothing in the
21 legislation that prevents that, there's nothing in the Panel's procedure that prevents
22 that. So effectively, if that is the position, that the Panel proceed on the basis of what
23 is the just and convenient course, having regard to the position as it appears to the
24 Panel at the time of the hearing, that takes one to a second question, whether there
25 should be an adjournment. But in terms of jurisdiction, all that you've had from Mr
26 Grant is assertion, without reference to anything to support it.

27 CHAIR: Thank you. We're going to ask you to leave. We'll all retire. We'll retire and
28 make our decision.

29
30 **(The Panel went in camera from 10.30 a.m. to 11.20 a.m.)**

31
32 CHAIR: I'm going to respond to the submissions that have been made in two parts. The

1 submission was firstly that we had no jurisdiction, and secondly that if we had
2 jurisdiction the interests of fairness and natural justice dictate that we should not hear
3 the matter today. So far as jurisdiction is concerned, the Panel are satisfied that they
4 have it. The position is, in brief, this, as we understand it: at the time that the warning
5 notice is served by the Regulator, it is incumbent on them to serve it on the
6 individuals who they believe to be the directly affected parties. Which they did – at
7 the time the notice was served those who received it were directly affected parties, and
8 there were no others who failed to receive it.

9 Circumstances changed, but the Regulator, having got it right, in our
10 judgement, gives the Panel appropriate jurisdiction to hear it. If there has been a
11 change in directly affected parties, as we now know there has been, then the
12 responsibility transfers to the Panel in making any determination – they have to make
13 sure that the determination is sent to those who the Panel believe have regard to be
14 directly affected parties, which, if we reach that stage, we would.

15 The important thing, in our judgement, in our opinion, we have jurisdiction.
16 We come to the more difficult aspect of it, because the Panel do take very seriously, as
17 the cases that have been referred to indicate, the need to operate a procedure that is
18 fair to all the parties. But one of the cardinal ingredients of fairness is that those who
19 are affected by proceedings must have an opportunity to know them, and to be able to
20 respond in appropriate time. And we've looked very carefully at what has been said
21 by counsel on this aspect of the submission.

22 And after very careful – and, as you will have noticed yourselves, lengthy –
23 consideration, we have come to the conclusion that it would not be unfair to proceed
24 this morning, and we do proceed – intend to proceed – and the reason for that is this:
25 that the essence of the case in respect of the two Trustees, now appointed, who are not
26 with us, relates to their abilities, their experience and their competence to act as
27 Trustees.

28 They have – we are satisfied – we find, indeed, that they have the opportunity
29 to see the warning notice, to consider the scope of the warning notice, and they will
30 well know from that that the cardinal point in the notice put against the Trustees is
31 that they do not have necessary skill and knowledge for the proper administration of
32 the scheme in accordance with Section 7 of the Pensions Act 1995.

1 That is the hurdle that the warning notice is expecting the recipients of it to
2 consider, and satisfy the Regulator about, so that we are satisfied in putting forward a
3 CV in response to that once they were appointed they would have known the essence
4 of the features of the CV that would need to be outlined and underlined in order to
5 satisfy that requirement. They've have the opportunity – the CV has been put in, and
6 we've all seen that CV, and the Regulator has made a judgement, having looked at
7 that CV in accordance – I'm now looking at the skeleton argument that we have
8 before us from the Regulator, which is no more than half a page, the skeleton
9 argument, as it concerns the new Trustees. And the essence of that is that they lack
10 the skill, knowledge and experience of the administration of pension schemes.

11 And the Panel have drawn the conclusion that that assertion by the Regulator
12 in their skeleton argument is based upon the CV that has been provided by the
13 Trustees and has been seen and considered. And, as to the other aspects of it, that the
14 Trustees have not accepted the appointment in the appropriate way, all those matters
15 seem to relate to issues that arose at the time and after the time that they were
16 appointed, and there will be issues about which they themselves, the Trustees, will be
17 well aware. So we do find that they have had the opportunity to put before the Panel
18 appropriate issues, and to that extent they have done so, and it is a matter of
19 judgement, ultimately, that the Panel will make, whether in those CVs they have
20 satisfied the Panel that they are appropriate people to administer this scheme.

21 So, in brief, we find that the interests of natural justice would not be failed if
22 we heard the matter and we are fully proposed to hear the matter. So I'm going now
23 to just set out very briefly what we think is the appropriate procedure now. I'll ask Mr
24 Rowley to begin. It is a hearing based on submissions. There is no evidence being
25 called. We have had no notification of any witnesses. It's wholly on submissions.
26 We propose to hear you first, Mr Rowley. Mr Grant, we'll hear you next. And Mr
27 Simpson, we'll give you an opportunity to come third –

28 MR SIMPSON: Thank you.

29 CHAIR: – to make your submissions. My bid – my proposal, so far as timing is concerned,
30 is that we give you an hour, Mr Rowley, we give you an hour, Mr Grant, and I think
31 20 minutes, Mr Simpson.

32 MR SIMPSON: Yes, thank you.

1 CHAIR: I hope you'll feel that's adequate to fulfil the representations of the employer – and
2 that, I do stress, is what you are now here to do, to put forward to this Panel the
3 interests of the employer as directly affected party, and not in any way the matters
4 pertaining to interests of the Trustees. I hope you accept that.

5 MR SIMPSON: I do sir, but I would wish to refer to minutes –

6 CHAIR: Well –

7 MR SIMPSON: – relating to them –

8 CHAIR: – we'll see how we go, you'll have a fairly strict allocation of time. We have to
9 make sure we stick to those timings. If there is a problem with them I'd rather you tell
10 me now than at the end, or towards the end of your submission. Are you comfortable
11 with them now gentlemen?

12 MR ROWLEY QC: I might need perhaps an hour and a quarter – I'm simply conscious that
13 I'll be opening the matter, so I'll be taking you to material which, I mean, necessarily,
14 makes my submissions that bit longer, because I'll be the one primarily referring to
15 the documents, and others, as it were, piggyback on what I'm doing. I'll try to come
16 in within the hour –

17 CHAIR: Very well.

18 MR ROWLEY QC: – but I think I might need a little longer.

19 MR GRANT: It's always difficult following the coat tails without having seen the coat, but
20 I'd anticipate to be within the hour.

21 CHAIR: Very well. Thank you. Mr Rowland.

22 MR ROWLEY QC: May it please you sir, as you know, therefore, this is an application
23 under Section 7 of the 1995 Act for the appointment of a Trustee of the Jerome Group
24 PLC retirement benefits plan, and the sub-paragraphs of that section, or subsection,
25 which are relied on by the Regulator are sub-paragraphs (a), (c), and (d). The scheme
26 is a long-established scheme that was established by an interim Trustee in 1978. It's a
27 contracted out defined benefits scheme which provides benefits at a pool rate of one
28 eightieth of final pensionable salary for each year of service.

29 Its current governing documentation comprises addendum rules, as amended,
30 dated 31 January 2004. The present principal employer is the Worthington Group,
31 which is a stock exchange limited company. But Worthington's relationship with the
32 scheme might perhaps be described as accidental, because the scheme came, as it

1 were, attached to a company that Worthington acquired in 1998 – Jerome and Sons
2 Holdings PLC, which was the founder and original principal employer under the
3 scheme.

4 Worthington became principal employer in 2005, Jerome subsequently went
5 into liquidation and was dissolved. They were both involved in the textile trade, but
6 that activity ceased some time ago. Worthington's financial statements reveal
7 essentially only two assets. The first is a derelict industrial site in Keighley, in
8 Yorkshire, which is valued by its directors – not independently, valued by its directors
9 – at £4 million. And a 44% shareholding in what is described in the accounts as an
10 associated company, Trimmings by Design Limited, and the value of that
11 shareholding is put in the accounts at 140,000.

12 So it can be seen that the Keighley property, for whatever that may be worth, is
13 really the only asset of substance owned by the principal employer. If I can just
14 briefly, by reference to some of the documents, show you the financial position of the
15 scheme. The most recent Trustee's report and financial statements are to be found at
16 tab 76, beginning at page 721. They are for the period ending 5 April 2012. The
17 membership profile may be seen at page 726, 239 members – 89 deferred, 150
18 pensioners.

19 The assets can be seen at paragraph – sorry, page 740. The net assets
20 statement, showing investment assets of 7.95 million, that figure is broken down in
21 the notes to the financial statements, at page 743 – it's the bottom third of the page –
22 the text begins, 'The investments can be analysed as follows,' and you'll see first, two
23 types of pool investment vehicles, 4.98 million, and then what is described as 'loan
24 agreement,' 2.925 million, and that is the loan that we referred to in the Regulator's
25 skeleton argument as the 'Loan to Rangers' – Glasgow Rangers Football Club.

26 The scheme's most recent actuarial valuation is at an earlier date – it's 5 April
27 2010 – and one can find that at tab 16. And if one begins at page 189 one can see in
28 the introduction a summary of the results of that actuarial valuation, showing that as at
29 the 5 April 2010, on an ongoing basis – that's the scheme funding valuation – there
30 was a deficit of 2.945 million. So the scheme was 74% funded on that basis. On a
31 solvency valuation – that's buyout, assuming the scheme went into winding up and it
32 was necessary to purchase annuity policies in respect of members' benefits, only 58%

1 of those benefits could be provided.

2 One can then move on to page 236, please, to see the recovery plan, which
3 formed a part of – or which was agreed consequent upon that actuarial valuation – and
4 about a third of the way down the page, under the heading, ‘steps to be taken to ensure
5 the statutory funding objective is met,’ ‘to eliminate this funding shortfall Trustees
6 and the employer has agreed additional contributions will be paid as follows,’ and
7 then monthly contributions of £9,167 per month. And then the employer will
8 additionally pay 20% of its annual net profits, in each company year ending the third
9 of March.

10 And so one can see that the amount that the employer was going to pay on a
11 monthly basis was never going to discharge, or to eliminate the deficit, and the
12 elimination of that deficit is dependent upon what may happen in future as regards the
13 financial position of the employer. So the next step, I think, then, is to look at the
14 financial position of the employer, which – I’m going to pick up with the earlier of the
15 two sets of financial statements that we have. Those are for the period ending 31
16 2011, and they begin at page 243.

17 And I’d just ask you to note just a few points in that valuation. First, please,
18 the identity of the directors at that date, who were – this is at the top of page 245 –
19 they were Mr Cook and Mr Townsend. If you then please turn over to the Chairman’s
20 statement, which begins at page 246, and it’s from Mr Cook, who was then chairman
21 of the board, and it’s one short passage on page 247, in the third paragraph – and this
22 picks up the point that I made a few minutes ago about the valuation of the Keighley
23 property. It’s the paragraph beginning, ‘we remain confident.’ – saying, ‘we remain
24 confident we will receive significant planning permission. The board has therefore
25 reassessed the fair value of the property to 4 million, which we feel better represents
26 the value of the land at this time.’

27 So the four million figure is not an independent valuation, it’s what’s
28 described as a ‘reassessment’ by the board. And then one can see, if one turns on to
29 the balance sheet – at page 261 – one can see from the statement of financial position
30 how important this property is to Worthington. It’s shown as, under the heading,
31 ‘non-current assets’ as an investment property, valued at £4 million. And the total
32 assets of the company – 5.68 million. Moving down that column, liabilities of three

1 million, so net assets of 2.6.

2 So clearly the directors' reassessment of the property at four million has
3 produced a significant fortification of the balance sheet on the defendant – sorry, on
4 the directors' – own assessment. Those were the 2011 financial statements, which
5 were prepared on behalf of Mr Cook and Mr Townsend, who preceded Mr Simpson
6 and Mr Ware as directors of Worthington. The current financial statements are to be
7 found at tab 41, beginning page 462.

8 And again, just a few brief passages in the 2012 financial statements, starting
9 at page 465, please. This is the chief executive statement, which is from Mr Ware,
10 and it's the penultimate paragraph to which I'd wish to draw your attention. 'As I
11 mentioned on my appointment on 1 June 2012, I have introduced several potential
12 acquisitions to the company. We are currently progressing to due diligence on two
13 potential unquoted opportunities. Announcements will follow if and when
14 appropriate. To increase shareholder value it is important to bring other businesses
15 into the group in order to generate healthy profits.'

16 And it's my submission that when you look at the documents, what you'll see
17 is that what was intended here was that Mr Ware and Mr Simpson were going to
18 effectively speculate, using the one available asset of the employer – the Keighley site.
19 They were going to use that as a way, as it's put in Mr Ware's statement, of, you
20 know, acquiring – or investigating acquiring opportunities with a view to bringing
21 other businesses into the group. So they weren't just looking to realise the existing
22 assets for the benefit of the company's creditors – the principal creditor of which is
23 the scheme – they saw this as a vehicle through which they themselves could make
24 money.

25 And of course they could make money not at any risk to themselves, because
26 they would be using Worthington's assets. If it was successful, well, all well and
27 good. But if it was unsuccessful they wouldn't lose; the only people who would lose
28 would be the members of the scheme. Mr Simpson is described at page 470, under
29 the heading 'board composition,' which is about half a dozen lines down on the page,
30 and the second paragraph, Mr Simpson is the non-executive director, and he's
31 described in the report as being 'independent of management, and free from any
32 business or other relationship which could materially interfere with the exercise of his

1 independent judgement.’

2 Interesting that it’s Mr Simpson who’s here this morning on behalf of
3 Worthington. And we can see this pretence of proper corporate governance continued
4 at page 473. At the top of the page, ‘The board’s remuneration committee, which
5 currently comprises David Simpson and Doug Ware, makes recommendations to the
6 board within agreed terms of reference in determining specific remuneration packages
7 for each of the directors, including pension rights.’

8 Now, it’s necessary just to unpack that. The remuneration consists of Mr
9 Simpson and Mr Ware. The board consists of Mr Simpson and Mr Ware. They’re
10 making recommendations to themselves as to what they should be paid. And they are
11 being paid, because we can see that, from page 474 – ‘Directors service agreements.’
12 Mr Ware has a letter of appointment for remuneration at the rate of £50,000 per
13 annum. And Mr Simpson has a letter of appointment with a remuneration of £24,000
14 per annum. And that’s in addition to, as we also know, a Mr Taylor having been
15 retained as a property consultant in relation to the Keighley site, which is effectively
16 the company’s only asset that needs any administration.

17 And we can also see, if we turn on to page 480, that the Keighley property of
18 course continues to appear in the company’s balance sheet, the statement of financial
19 position for the year ended 31st of March 2012. But you’ll notice that it’s moved from
20 being a non-current asset in 2011 to being a current asset in 2012. And it’s moved to
21 being a current asset because the intention is to sell it, and to use the proceeds for
22 acquisitions – to speculate at the expense of the scheme.

23 Now, this is a scheme that has already suffered sufficiently as a result of the
24 somewhat unorthodox use of its resources. And by that I intend to refer to what we’ve
25 called the ‘Loan to Rangers’ – the loan of £2.925 million that was advanced or
26 proposed to be advanced to the company that owns Glasgow Rangers Football Club.
27 Now I’m not going to take this transaction in any detail, because we set it out in our
28 skeleton argument, but in short what happened is that that sum – 2.9 million-odd –
29 was paid to the targets – Glasgow Rangers’ solicitors – subject to an undertaking, but
30 following the target, Glasgow Rangers going into administration, that 2.9 million was
31 released by the solicitors to the target’s administrators.

32 It’s now the subject of a claim by the scheme to recover the 2.9 million that

1 may or may not be successful, that remains to be seen. But at present that's over 30%
2 of scheme assets that have gone out of the scheme and being held now by insolvency
3 practitioners who are asserting that it constitutes an asset of Glasgow Rangers
4 Football Club, and that the scheme is simply an unsecured creditor. Those
5 proceedings were originally due to be heard, but by way of an expedited hearing that
6 was going to be in October of this year. And Mr Simpson and Mr Ware initially
7 opposed the appointment of an Independent Trustee because of the imminence of
8 those proceedings.

9 That order for expedition was subsequently revoked, and the proceedings are
10 now not expected to be heard until late 2013 or 2014. And so Mr Simpson Mr Ware
11 subsequently opposed the application for the appointment of an Independent Trustee
12 on the ground that there was no urgency because the hearing was such a long way
13 away, so it was truly a case of trying to have one's cake and eat it. The Panel is aware
14 that this is the second warning notice in the current calendar year that has been served
15 in relation to this scheme. The first warning notice is to be found at tab 82, at page
16 812. I'm not going to go through the detail of it, but I would ask you, please, if you
17 would briefly turn to page 819.

18 At paragraph 12.1 – and you will there see in the original warning notice the
19 eight bullet points that summarised the Regulator's case on the first warning notice,
20 the directly affected parties to which were Worthington, as employer, Mr Cook and
21 Mr Townsend, who were at that stage the only directors of Worthington, the only
22 Trustees of the scheme. And those are the points that were picked up at the first of the
23 two bullet points, at paragraph 12.1. And one can then see at page 794, at paragraph
24 three – and it's paragraphs (a) to (g) – the response of the then-Trustees, Mr Cook and
25 Mr Townsend, to the first warning notice.

26 And it's just instructive to see, you know, one or two points in that warning
27 notice – sorry, in that response – which were settled by my learned friend Mr Grant,
28 whose signature appears at page 811. And so one sees, for example at 3(c), a denial
29 that Mr Cook and Mr Townsend – dual capacities of directors and Trustees – that
30 they'd failed to identify and manage conflicts of interest. And one sees at (f) that if
31 the Panel were minded to appoint a Trustee that it was asked that that appointment
32 should take effect after the resolution of the High Court proceedings concerning

1 Rangers Football Club in administration, and [inaudible].

2 Well that was how matters stood in relation to the first warning notice, with a
3 hearing fixed for – I think it was 6 July of this year – until 6 June, and if we could
4 please go back in the bundle to page 514, and, picking it up about three-quarters of the
5 way down the page, an email from Ms Petula Kantanka at the Regulator giving details
6 of who would be attending the oral hearing on 6 July on behalf of the Regulator.

7 And at this stage, nobody knew that Mr Simpson and Mr Ware had become
8 directors of the principal employer and have become Trustees of the scheme, because
9 Mr Simpson and Mr Ware hadn't bothered to tell anybody. And the person who told
10 the Regulator what had happened wasn't Mr Simpson, wasn't Mr Ware, it was one of
11 the outgoing Trustees – Mr Townsend – in his email on 6 June, which is at the top of
12 page 514.

13 And we can then see, turning back to page 505 onwards – that's the deed of
14 removal and appointment, which removed Mr Cook and Mr Townsend and which
15 appointed Mr Simpson and Mr Ware. And I think all we need to look at is page 510,
16 which is the execution page, where we see Mr Simpson and Mr Ware as directors,
17 appointing themselves to be the scheme's only Trustees. And 511 is the
18 announcement of the change in the identity – or the composition of Worthington's
19 board. And we can look at the second paragraph, 'Mr Cook, the outgoing non-
20 executive chairman, was pleased to acknowledge the plans that the incoming directors
21 have for the future of the company. These include the immediate placing of ordinary
22 shares in the company to the value of at least £155,000 at the par value of 10p, and
23 further details to be announced when the arrangements have been made.' That has
24 never happened.

25 And then the penultimate paragraph. As regards Jerome Pension Fund,
26 'having examined the original proposals for the proposed loan to Rangers I confirm
27 the terms of the loan appear to offer an attractive opportunity to JPF. It seemed also
28 to be in the best interests of both WRN' – that's Worthington and JPF, that's the
29 pension scheme – 'Mr David Simpson, as a barrister, is aware of the circumstances
30 surrounding the proposed loan and the current legal proceedings, and is very well
31 placed to help with a successful outcome.'

32 And I'll just – I'll come back to that in just a moment, but perhaps I could

1 please turn to page 513, which is a record of the minutes of the first Trustee meeting
2 on 1 June, following Mr Simpson and Mr Ware being appointed. And it's the second
3 paragraph to which I draw your attention, 'it was agreed that DS' – Mr Simpson –
4 'would inform the Pensions Regulator of the change in Trustees and arrange a meeting
5 with the legal team as soon as possible in order to get a detailed update as to the
6 precise legal arguments used in the position of the proceedings.' That was never done.
7 The notification came not from Mr Simpson, but from Mr Townsend on 6 June.

8 I picked up at the bottom of paragraph 511 the comment in the announcement
9 about Mr Simpson being very well placed to secure a successful outcome of the
10 litigation concerning the money that was being held by the administrators of Rangers
11 Football Club. And it was certainly the case that Mr Simpson had plenty of
12 knowledge about the transaction relating – which led to that money being released to
13 the administrators, because he advised in relation to it on numerous occasions.

14 And if I may just give the dates and the references, without taking you to the
15 detail, he advised first on 27 May 2011 – the opinion begins at page 314 – secondly
16 on 6 June 2011 – the opinion begins at page 337 – thirdly, on 24 June 2011 – the
17 opinion begins at page 351 – and fourthly, on 27 September 2011 – the opinion
18 beginning at 431. Now, what Mr Simpson has said in relation to the advice that he
19 gave is really two things. Firstly he said that on the first three occasions he wasn't
20 advising the Trustees, he was advising another party. And we're grateful to him for
21 that clarification, but it's a striking feature of those first three opinions that none of
22 them identify the client to whom the advice is being addressed.

23 On the fourth occasion he was undoubtedly and explicitly advising the
24 Trustees in relation to the proposed loan to Rangers. And you will have seen from the
25 warning notice which is before you today that one of the major concerns on the part of
26 the Regulator was Mr Simpson's conflict of interest, not only as a director of an
27 insolvent principal employer, but also as a formal professional advisor to the Trustees
28 in respect of whom the scheme may very well have a claim against Mr Simpson in
29 respect of the advice he gave to the then Trustees in relation to the loan to rangers. So
30 he faced not only a conflict of interest as a director on the one hand and Trustee on the
31 other, but also a conflict of interest as Trustee on the other hand, as a professional
32 advisor against whom the Trustees of the scheme may have a claim.

1 It matters not for present purposes whether it's a good claim or not – Mr
2 Simpson will doubtless say it's not. On behalf of the Regulator I have to say that we
3 take the view that there's a strong prima facie claim against Mr Simpson in respect of
4 the advice that he gave. But the fact is that first that the conflict was there, but
5 secondly, Mr Simpson was completely unable to recognise the possibility of that
6 conflict.

7 CHAIR: Can I just – I want you to pause there, Mr Rowley. I mean, I understand the last
8 point that you made, but I was just going to ask you to what extent you think the Panel
9 need to take into account the events concerning Mr Simpson and his relationship with
10 the Trust, bearing in mind that he has now resigned and apparently the issue of the
11 need for an Independent Trustee accepted – I'm anxious that you use your time to
12 make sure that you deal with the situation and the issue of the new Trustees.

13 MR ROWLEY QC: I'm certainly aware that it might be thought that what I'm looking at is
14 background –

15 CHAIR: Very well.

16 MR ROWLEY QC: – but it's essential background, because it explains some of the serious
17 concerns that have caused the Regulator to proceed this morning, because these are
18 two individuals – Mr Hodgetts and Mr Adeniran – who've been chosen by Mr
19 Simpson. And if the Panel is going to conclude that the affairs of this scheme are
20 satisfactorily to be left in the hands of Mr Hodgetts and Mr Adeniran, that involves
21 accepting that Mr Simpson has made the right choice in selecting these two people as
22 Trustees of the scheme. So that, in turn, involves understanding the role that Mr
23 Simpson has played generally in relation to the scheme, and specifically in relation to
24 the selection of these two individuals. So they're not as divorced as might at first
25 sight appear.

26 Mr Ware, of course, faced the same conflict as Mr Simpson, as director and
27 Trustee, but we've seen also that he's seen Worthington as a vehicle through which
28 speculative acquisitions could be made. And much was made of his supposed
29 pensions experience at a company called FII, where he was chief executive officer.
30 But all we know about that venture is that he failed to rescue the company, so it's not
31 of itself a very helpful precedent.

32 I'm going to look then, if I may, very briefly at some Trustee minutes that

1 immediately followed the appointment of Mr Simpson and Mr Ware as Trustees –
2 pick it up at the meeting on 12 June, we find at – we’ll begin at 518. And it’s just one
3 paragraph, at page 520. ‘Legal team had also informed Mr Simpson’ – this is the
4 Regulator’s legal team – ‘had also informed Mr Simpson the Regulators were
5 concerned that Worthington directors and Trustees were one and the same, the
6 situation had not changed. They wanted to appoint an Independent Trustee with full
7 powers. DW’ – that’s Mr Ware – ‘pointed out it would be expedient for the current
8 Trustees to accept their appointments, the situation was not ideal. However, he
9 pointed out that it was in the interests of the Trust that the directors are in the employ
10 of the Trustees, and anything done to the detriment of the employer could adversely
11 affect the employer’s ability to continue its contributions to the Trust. For example,
12 the appointment of an Independent Trustee by the Regulator might at first sight appear
13 to be a benign event, in fact it would look very bad, would have to be publicised,
14 likely adversely to affect the employer’s value. This could have serious implications
15 for the employer to meet its financial obligation.’ And then I’d ask you to note the
16 final sentence: ‘wholly Independent Trustees might not realise the impact of their
17 actions upon the health of the employer.’

18 And then I’d like you to turn, please, to an email at page 535, where this point
19 is taken up by Mr Simpson. It’s at the bottom of the page – 20 June – timed at 18.39,
20 and just the first three sentences: ‘In relation to the appointment of an Independent
21 Trustee, while we are wholeheartedly opposed to the imposition of such by the
22 Pensions Regulator, for reasons recorded in the Trustees’ minutes of 12 June, we are
23 very much in favour of the appointment of an Independent Trustee.’

24 And then, then I think, probably, I can move on to take you to the – what I’m
25 going to call the run in to this hearing, and if I may I’ll take the warning notice as
26 read, but there are just one or two passages, please, in the response that I’d like you to
27 see. We have the response of Mr Ware and Mr Simpson, dated 19 October 2012.

28 DAME ELIZABETH NEVILLE: Sorry, what page are you on now?

29 MR ROWLEY QC: Well it’s not in the core bundle I’m afraid, so I hope that the Panel has it
30 as a loose document. It’s the response to the current warning notice, dated – the
31 response is dated the 19th –

32 CHAIR: I think it’s in our bundle now, actually.

1 MR ROWLEY QC: Oh, well I –

2 CHAIR: At 794.

3 MR ROWLEY: – I’m very much obliged for that.

4 MR SIMPSON: No it’s the previous one.

5 CHAIR: Is it the previous one? Oh, sorry.

6 MR ROWLEY QC: I think it – does the Panel have it as a loose document, rather than a core
7 bundle document?

8 [Crosstalk]

9 CHAIR: What was the date of it?

10 MR ROWLEY QC: 19 October, sir.

11 [Crosstalk]

12 MR GRANT: May I just check that the Panel has seen this before? As it’s certainly a not
13 unimportant document.

14 CHAIR: Yes. Yes, I have seen it before.

15 MR ROWLEY QC: Just a few passages, if I may, please, in the response of Mr Simpson and
16 Mr Ware. Document page number nine, paragraph 22, this is a response from Mr
17 Simpson and Mr Ware – it’s referring to the apparent difficulty of finding a Member-
18 Nominated Trustee, ‘Especially given this lack of interest by the membership the
19 current Trustees have sought to make good their commitment to appoint an
20 Independent Trustee to act in common with them.’ This is the vital part: ‘However,
21 the current Trustees’ – this is Mr Simpson and Mr Ware – ‘will obviously have to
22 obtain the Regulator’s approval of any such appointment to avoid the appointment
23 being usurped by the Determination Panel approving the Regulator’s application and
24 the Regulator appointing an Independent Trustee with exclusive powers.’

25 That was not done. We can then see, at paragraph 33, Mr Simpson holds
26 himself out as having advised on trusts during his practice as a barrister, saying he has
27 a good working knowledge of the law relating to occupational pension schemes. I
28 won’t take you to it, I’d simply ask you to note from his curriculum vitae at pages four
29 to eight in the bundle, he does not profess any expertise in either trust law or the law
30 relating to occupational pension schemes. That’s paragraph 4 to 8 in the core bundle.

31

32 MR GRANT: Pages – sorry?

1 MR ROWLEY QC: 4 to 8 in the core bundle.

2 MR GRANT: You said paragraphs.

3 MR ROWLEY QC: No, I meant pages. Sorry, pages 4 to 8 in the core bundle. Then at
4 paragraph 37, under the heading, 'common interests', we find the first of many
5 examples in which Mr Simpson seeks to downplay the conflict of interest that faced
6 both him and Mr Ware, where in the response reference is simply made to 'an
7 inherent possibility of conflict,'. And there's more of the same at paragraph 68, on
8 page 22: 'the current Trustees accept there is an inherent possibility of conflict of
9 interest in being both directors and Trustees.'

10 Then, at page 27, at sub-paragraph iv, that there is an attempt to address the
11 point that I made earlier about the particular conflict that Mr Simpson faces as a result
12 of his having been a professional advisor. And sub-paragraph iv simply talks about
13 minor conflicts that could arise as a result of David Simpson's involvement in the
14 litigation. So what one sees is that the authors of this response, Mr Simpson and Mr
15 Ware, plainly do not understand what is meant by a conflict of interest. And the fact
16 that they do not understand what is meant by a conflict of interest in my submission
17 informed the decision that they took when they chose to appoint Mr Hodgetts and Mr
18 Adeniran as Trustees on 22 November 2002.

19 And we can now see the circumstances in which those two gentlemen were
20 appointed by looking at some emails and some minutes of September, October and
21 November. And these are of particular importance, because they show the selection
22 criteria that were applied when Mr Hodgetts and Mr Adeniran were chosen by Mr
23 Simpson and Mr Ware. And back in the main bundle, and I was going to pick it up if
24 I may please, at page 671.

25 And this is an email dated 5 October 2012, from Alison Sanderson, who works
26 for the JLT group, they're a well-known firm of actuarial advisors and consultants in
27 this area, and they act as advisors to the scheme. And this is in connection with a
28 proposal by Mr Simpson and Mr Ware to seek to arrange for a Member-Nominated
29 Trustee to be elected. And the first two paragraphs address that process, and it's the
30 third paragraph then that's the important one: 'Please be aware that an MNT is very
31 different to an Independent Trustee which you refer to in your letter.' And then the
32 next sentence is vitally important, because this is advice Mr Simpson and Mr Ware

1 are getting from experienced actuarial advisors: 'An Independent Trustee is a
2 professional Trustee who has significant experience in pensions, and they are paid for
3 their services. In previous exchanges the Pensions Regulator felt the Trustee board
4 would benefit from employing an Independent Trustee. We work closely with a
5 number of Independent Trustees, and I would be happy to make a couple of
6 recommendations to you if that would help.'

7 And that's exactly what Ms Sanderson did. And she did it at page 673, in an
8 email four days later – 9 October 2012 – to Mr Ware, copied to Mr Simpson: 'Thank
9 you for your email. I agree it would seem sensible to appoint an Independent Trustee.

10 We work closely with a number of Independent Trustees, and I've provided details of
11 three organisations below. In view of the current litigation it would be sensible if you
12 were to contact them directly. They will be able to discuss your requirements with
13 you and let you know who would be interested in taking the scheme on.'

14 And the first name she suggests: 'We work with Best Trustees in a number of
15 clients.' And details are given. Next paragraph: 'We also work closely with
16 Eversheds Independent Trustee Company on a number of clients.' Contact details are
17 given. Next paragraph: 'Steve Southern has worked with a number of our clients.
18 Until recently Steve worked for Trustee Corporation Limited, which is Hammond's
19 Independent Trustee Company' – Hammond's, they're now part of a global firm
20 called Squire Sanders, but Hammond's were a well-known firm of solicitors
21 specialising in pensions law.

22 And then the next paragraph: 'please note that the fees for these services can
23 vary considerably, and it depends on the scheme and what issues arise. As a rough
24 guide, the typical fee would be around £3,000 per meeting, but you will need to liaise
25 directly with the individual Trustees regarding their fee structure.' So Mr Simpson and
26 Mr Ware had the benefit of some very clear advice from Ms Sanderson as to what was
27 meant by an Independent Trustee – that's a professional Trustee with significant
28 experience in pensions. And they were given the contact details of three well-known
29 Independent Trustees.

30 And we can see how Mr Simpson and Mr Ware responded to this if one looks
31 at the minutes of the next meeting of Trustees, which was on 29 October 2012. And I
32 first ask you to notice, three-quarters of the way down the page, on 758, 'Update on

1 litigation, correspondence with TPR' and the second paragraph –

2 CHAIR: Let's just find that, if we may.

3 MR ROWLEY QC: I beg your pardon.

4 DAME ELIZABETH NEVILLE: 758?

5 MR ROWLEY QC: 758. 'Minutes of a meeting of 29 October 2012.' It's heading numbered
6 section 3, 'Update on litigation and correspondence with TPR.' 'Litigation was
7 discussed, Mr Ware remains confident monies will be returned to the plan in full.
8 Trustees are in the process of appointing legal advisors. A City firm is putting
9 together a fee proposal. Trustees are hoping to negotiate a partial contingency fee
10 agreement, but are resigned to an up-front payment of circa £50,000. Mr Ware
11 confirmed that as there are no funds available to the company, the Trustees will be
12 requesting that the plan meet the legal costs.'

13 And then continuing, at the top of the next page, 'Correspondence with the
14 Pensions Regulator is ongoing, and Mr Ware noted he had been criticised for
15 involvement in litigation. It is likely he may have to come off the Trustee Board in
16 the future and be replaced by an Independent Trustee. The Trustees have proposed
17 that they select an Independent Trustee from the TPR panel, rather than having one
18 imposed, and they await TPR approval to this.' Now, as far as the Regulator is
19 concerned, that is complete fiction. There are no documents in the bundle that
20 support the proposition that the Trustees have put before the Regulator Independent
21 Trustees and were awaiting regulator approval.

22 And the same is true of the comment – or the text, over the page, at 760, under
23 the heading 'Trustee board', where it's said that 'The Trustees are trying to appoint an
24 Independent Trustee, and Mrs Sanderson has sent details of individuals and the
25 Regulator's recommended panel.' Well, Mrs Sanderson has certainly given three
26 recommendations, because we've seen them. 'The Trustees have written to the
27 Regulator and await their response.' And, again, as far as the Regulator is concerned
28 that is fiction.

29 The next minutes – and it's at this point that Mr Hodgetts and Mr Adeniran
30 appear on the scene. The next minutes are to be found by turning back in the bundle
31 to page 754. And the first substantive part of the minutes deals with the finances of
32 the employer, Worthington. 'Mr Ware had presented a document dated 19 November

1 2012’ – the briefing note – ‘setting out his concerns about the state of the company’s
2 finances, and identifying an irreconcilable conflict of interest between the Trustees’
3 roles as directors of the sponsoring employer, Trustees of the Jerome Group scheme.’

4 The content of the briefing note’s set out in detail – ‘Mr Ware’s analysis of the
5 company finances and its content was noted. It’s concluded the company could not
6 afford to sponsor the scheme indefinitely. It was merely a matter of time before the
7 company became insolvent, as the company’s pension contributions and costs were
8 greater than its income. The company was only propped up by shareholder funds and
9 borrowings.’ And I’m just going to stop there. A copy of the briefing note has been
10 requested – well, not requested, Mr Simpson and Mr Ware were required to produce a
11 copy of that briefing note by a notice served under Section 72 of the Pensions Act
12 2004. And they have refused to do so. We do not have that briefing note.

13 But what we do know is that there was a conclusion expressed in the briefing
14 note. This is under the heading, ‘conflict of interest’ – ‘the briefing note had
15 concluded that the directors should approach the Pensions Regulator and PPF and that
16 in such case the directors would have a conflict of interest if they continued to act as
17 Trustees of the scheme. This is because the company’s interests and those of the
18 scheme would be very different.’ Well, I’ll stop there. The directors did not approach
19 the Regulator. As of the end of last week, they had not approached the PPF either.

20 And then the next paragraph, and that’s ‘Mr Ware and Mr Simpson were of
21 the view that the conflict arose as soon as they seriously decided to discuss an
22 approach to the Pensions Regulator and PPF, even if an approach was not actually
23 made, as their mindset could influence all else that they do.’ And then, moving over to
24 the next page, the second paragraph there, ‘as discussions regarding the Pensions
25 Regulator and the PPF could not be delayed they believe they must resign as Trustees
26 as soon as possible without leaving the scheme in the lurch.’

27 And then, under the heading ‘potential Independent Trustees,’ it’s said that
28 ‘Mr Ware and Mr Simpson have inquiries of their various contacts for suggestions of
29 suitable persons they could approach to act as Independent Trustees.’ And I’d ask the
30 Panel to remember, Mr Ware and Mr Simpson knew very well from the advice they’d
31 had from JLT what is meant by an Independent Trustee – a professional Trustee with
32 experience of the administration of a pension scheme. It’s then said that ‘Mr Simpson

1 had approached a former member of the panel. She was too busy to act, but provided
2 names for Mr Simpson to contact. After contacting the recommended people and
3 being further referred to others Mr Simpson had received a response from somebody
4 who has expressed an interest to act, but Mr Simpson was yet to arrange a meeting
5 with him, and was concerned that professional Trustees would charge a fortune for
6 their services to the detriment to the scheme.

7 'Mr Ware had also continued to make inquiries amongst FSA-authorized firms
8 for recommendations, and had provided Mr Simpson with CVs of two potential
9 Trustees – Robert Hodgetts and Shola Adeniran.' And neither of them are authorized
10 by the FSA, who were willing to act for a reasonable fee, subject to being satisfied as
11 to all the issues relating to the scheme. 'Mr Simpson felt that the directors' current
12 Trustees had a duty to satisfy themselves as to the suitability of potential Trustees, and
13 wanted to interview them.'

14 And then we see what's here said about each of them. 'Mr Hodgetts, an
15 accountant with a CIMA qualification with experience as a pension fund Trustee,
16 CIMA is a reputable regulator with high standards of training and ethics, which was
17 comforting.' How it was necessary to explore RH's experience and knowledge of
18 pension funds, then 'SA – much commercial experience, well qualified and
19 mathematical, which could help understand investment strategy, but no apparent
20 experience of pension funds. It was necessary to explore the extent of his knowledge
21 of Trustee obligations.'

22 I'm going to come back to their CVs shortly, because I'd like to go to the
23 minutes of what is not a Trustee meeting but a board meeting of Worthington which
24 was held two days later – 22 November 2011 – and those minutes are at 773-774.
25 And of course the significance of this is that the power to remove and appoint
26 Trustees is vested in the principal employer – so it needed Worthington's board to
27 decide what it was going to do, and Worthington's board consists of Mr Simpson and
28 Mr Ware.

29 Halfway down on 773, under the heading 'potential Independent Trustees' –
30 and it's a board meeting by telephone – so Mr Hodgetts and Mr Adeniran are actually
31 listening into this call, as we're told 'DS was with the potential new Trustees, Robert
32 Hodgetts and Shola Adeniran. He had interviewed them and was extremely impressed

1 and keen that they be appointed. RH and SA were also keen. DS believed that DS
2 DW should strike while the iron was hot, so as not to miss the opportunity. RH had
3 his own accountancy firm, a member of CIMA, had two-three years working closely
4 with New Bridge Street Associates in relation to the Big Bus Pension Fund. RH not a
5 Trustee but did the leg work, again much hands on experience, he dealt with transfer
6 values, which could be an involved process, but spoke with pension fund jargon and
7 was aware of Trustees' obligations.' And so forth.

8 And then, 'Mr Adeniran, well qualified, very mathematical, BSc in Computer
9 Science, MSc in Corporate Real Estate Finance and Strategy. Very impressive,
10 having asked the most searching, astute questions about the scheme. Also very
11 knowledgeable about investment vehicles – gilts, bonds etc. Did not have experience
12 as a Trustee, but was well aware of Trustee duties. Neither RH nor SA had previous
13 knowledge of each other prior to DW's recent contact. DS gave RH and SA a full
14 explanation about' – and note the third bullet point, please – 'the Pensions Regulator
15 proceedings with an explanation of the content of the warning notice and the response
16 thereto.'

17 And then if you turn over the page, please, to – it's the third paragraph
18 beginning, 'DS stated that he was conscious'. And Mr Hodgetts and Mr Adeniran are
19 parties to all of this. 'DS stated he was conscious that the PR's oral hearing was only
20 a matter of weeks away, but felt that the appointment of replacement Trustees could
21 not wait. He was also mindful of JLT's advice that inclusion in the PR's panel of
22 Trustees is no guarantee of quality, there being no entry requirements, even though
23 panel Trustees are monitored.

24 I'll stop there. First, there is no evidence that JLT ever gave that advice. And,
25 secondly, it's wrong, and just by reference to some regulations that have been in force
26 since 2005 I will demonstrate to the Panel that it's wrong. And sorry, we're handing
27 these up rather late, but it's just one set of regulations at tab 13 of the bundle. They're
28 the Occupational Pension Schemes Independent Trustee Regulations 2005, at tab 13.
29 And if you please turn to –

30 MR GRANT: Sorry, which tab I this?

31 MR ROWLEY QC: Tab 13. I'm sorry, 14 – beg your pardon – tab 14. I can't count. Tab
32 14. And regulation three of these regulations deals with the criteria that need to be

1 satisfied in order for a Trustee to be registered as an Independent Trustee for the
2 purposes of the 1995 Act. So it's entirely wrong to say that there are no entry
3 requirements, because there are conditions for registration, which are set out at
4 regulation three. And the material – well, the material sub-paragraphs are (a) and (b).

5 And they're what are known – at (a) – as being the factual conditions, that is to say
6 it's readily answerable whether the applicant does or does not satisfy the factual
7 conditions – for example, is the applicant subject to a prohibition order or a
8 suspension order or disqualified?

9 But then at sub-paragraph (b) are what are known as the judgement-based
10 conditions. And an Independent Trustee will only be admitted to the Regulator's
11 panel if the Regulator is satisfied of each of the four matters set out as sub-paragraph
12 (b). First, that the applicant has sufficient relevant experience of occupational pension
13 schemes, secondly that the applicant is a fit and proper person to act as a Trustee of an
14 occupational pension scheme, thirdly that the applicant operates sound administrative
15 and accounting procedures, and fourthly that the applicant has adequate indemnity
16 insurance cover.

17 And if the Regulator is not satisfied in relation to each of those matters the
18 Independent Trustee will not be included on the Regulator's panel. And I'm going to
19 ask you to have those criteria in mind, please, when considering the curriculum vitae
20 of Mr Hodgetts and Mr Adeniran, because it will be my submission they satisfy none
21 of them.

22 And I think, probably, I can now focus on Mr Hodgetts and Mr Adeniran. And
23 as the Panel will have seen from the minutes of 22 November 2012 board meeting, Mr
24 Hodgetts and Mr Adeniran were interviewed by Mr Simpson alone. There's no
25 evidence that Mr Ware has ever met either of them. Mr Simpson's credentials for
26 deciding whether Mr Hodgetts and Mr Adeniran are appropriate persons to act as
27 Trustees of this scheme are unclear. But they are certainly not borne out by Mr
28 Simpson's own performance as a Trustee of this scheme since 1 June 2012.

29 The Panel will remember the JLT email of 9 October 2012 offering the name
30 of three reputable Independent Trustees. There is not the slightest shred of evidence
31 that any of those three Independent Trustees was ever approached by either Mr
32 Simpson or Mr Ware. There is no evidence that anyone was interviewed apart from

1 Mr Hodgetts and Mr Adeniran. This is nothing more than a desperate attempt by Mr
2 Simpson and Mr Ware to fend off this hearing just as they fended off the hearing that
3 was fixed for 6 July. And they had a keen interest in fending off the hearing, because
4 of their interest in the principal employer. And I make no bones about it, their
5 conduct can only be described as underhand. There's no other word that could be
6 used – well, in fact, there are probably stronger terms that could be used, but I'll
7 content myself with that one.

8 What I would invite you to do, please, again in the core bundle, is now to look
9 first at Mr Hodgetts' CV, which is at page 715, and to have open at the same time
10 page 773, which are the minutes of the board meeting on 27 November 2012, and to
11 compare Mr Hodgetts' CV with the content of the board minutes. Now if one just
12 looks at Mr Hodgetts' CV on page 715, Mr Hodgetts may be the man that you would
13 want to engage if you were venturing into the bus and coach passenger service market,
14 but his CV discloses nil experience.

15 I'm sorry – I have the arcs in your bundle – thank you sir, I'm looking at page
16 715 and 773 together. His CV at 715 discloses nil experience of occupational pension
17 schemes. His CV says nothing about the Big Bus Pension Fund that's mentioned in
18 the minutes at 773. There isn't even a mention in his CV about a company called Big
19 Bus. There is no mention in his CV of any experience at any level and of any form
20 relating to a pension scheme.

21 Mr Adeniran's CV is to be found at 713-714. And, again, I'm going to look at
22 it and compare it with the board minutes at 773.

23 DAME ELIZABETH NEVILLE: Sorry, what page is that?

24 MR ROWLEY QC: The CV is at 713-714 –

25 DAME ELIZABETH NEVILLE: Yes, yes.

26 MR ROWLEY QC: – and then the minutes are at 773-774. If one looks at Mr Anediron's
27 CV, he has no experience of occupational pension schemes in any capacity
28 whatsoever. From March 2006 until November in 2011 he was engaged in the media
29 industry. Between March 2006 and November 2007 at a company called Media
30 Planet. And then from November 2007 until October 2011 at a company called
31 Lyonsdown Media.

32 Thereafter, Mr Adeniran appears to have had a career change and has become

1 interested in oil, gas and gold in Africa. There's nothing in his CV that discloses the
2 basis on which Mr Simpson formed the view that Mr Adeniran was very
3 knowledgeable about investment vehicles – gilts and bonds, which is recorded in the
4 minutes. There's nothing in the CV that forms any basis for concluding that Mr
5 Adeniran is well aware of Trustee duties, let alone the duties of a Trustee of a pension
6 scheme, which differ significantly from the Trustees of other trusts.

7 We have summarised at paragraph 71 of our skeleton argument the grounds on
8 which we submit that Mr Hodgetts and Mr Adeniran are manifestly not suitable
9 persons in whose hands the administration of this scheme should reside for a moment
10 longer than absolutely necessary. And really, in the light of the material that I've
11 taken before you, I think they largely speak for themselves, but I'll just say a little bit
12 about each of them.

13 The first is manner and circumstances in which they each accepted
14 appointment as a Trustee of the scheme in November 2012. And that is important, in
15 my submission, because they knew exactly what the position was, because Mr
16 Simpson told them. Neither of them considered it appropriate to make any contact
17 with the Regulator prior to accepting appointment on 22 November 2012, despite
18 knowing these proceedings were scheduled for hearing three weeks later. So that's
19 the first point at paragraph 71. The second point is not only did they not consult the
20 Regulator before accepting their appointment, they didn't consult the Regulator
21 afterwards either. Neither of them has had any contact with the Regulator. It wasn't
22 until yesterday afternoon that we even knew they were going to be represented here.
23 They received a letter from the Panel – from you, sir – and they didn't respond to it.

24 Thirdly, from their CVs, it is absolutely apparent that each of them totally
25 lacks the skill, knowledge and experience required of the Trustee of a pension
26 scheme. And the suggestion made in my learned friend's note is that, oh, under the
27 knowledge and understanding regulations a Trustee is given six months to get up to
28 speed, so they should have six months to learn on the job. I mean, if the matter
29 weren't so serious then that would be laughable.

30 Fourthly, this is a scheme that is involved in bitterly contested litigation to
31 recover in excess of 30% of its assets. There is not the slightest suggestion in any of
32 the evidence that Mr Hodgetts and Mr Adeniran have any experience of the conduct of

1 litigation that would make them suitable as Trustees to have stewardship of a scheme
2 engaged in litigation of that character. And, fifthly, more generally, the financial
3 position of this scheme – its acute deficit, and the complexity of its affairs demands,
4 now, that its affairs should be in the hands of an experienced Trustee.

5 But our – I'm going to add a bit more, if I may, because more has come out
6 since we settled a skeleton argument, because we got a response to a Section 72 notice
7 that was received only after the skeleton had been settled and lodged. So we do have
8 a few additional points to add, if I may. And the first of which is one I've already
9 made earlier, which is neither of them is here today. Why? I'd ask the Panel, is the
10 explanation that's being offered on behalf of each of them for their non-attendance
11 today – is it convincing? The answer is no, because it's wholly vague.

12 What are their substantial engagements? Are they professional? Social?
13 Personal? There's been no attempt to explain their non-attendance today. That of
14 itself is suggestive of them not taking their duties as Trustees seriously. It's further
15 evidence of their lack of suitability. But what we also now know is that Mr Hodgetts
16 and Mr Adeniran didn't agree to act as Trustees for altruistic motives – they're being
17 paid. And they are being paid pro-rata £30,000 per annum each – 15,000 for the first
18 three months. £30,000 each, £60,000 per year, pro-rata.

19 JLT advised Mr Simpson and Mr Ware that the services of an Independent
20 Trustee would be about £3,000 per meeting. That might seem high, but for £60,000
21 you would get 20 meetings with an Independent Trustee. Which is better value? An
22 Independent Trustee at 20 meetings, or Mr Hodgetts and Mr Adeniran? Mr Hodgetts
23 and Mr Adeniran both have careers, they have jobs. There is no explanation of what
24 their duties are going to be, how many hours they will put in, and how they're going to
25 reconcile their functions as paid Trustees with their apparently other full-time
26 commitments.

27 And there's another area of concern which relates to the remuneration that Mr
28 Hodgetts and Mr Adeniran are being paid. Who is paying it? It is the employer, or is
29 it the scheme? We're not told. Because if it's the scheme it's a breach of trust,
30 because the basic rule is that a Trustee must act gratuitously unless there's a provision
31 in the Trust instrument that entitles him to be paid. There is no provision in this
32 scheme's documentation that would allow Mr Hodgetts and Mr Adeniran to be

1 remunerated for what they are doing as Trustees.

2 And I have to say an added concern is how my learned friend's appearance
3 today is being funded – is that being paid for by the scheme? We don't know. There
4 is no evidence that Mr Hodgetts and Mr Adeniran have any professional indemnity
5 insurance. So if, as Trustees, they do something that results in loss to the scheme,
6 absent insurance, that's a loss that the scheme and its members will have to bear.

7 And, and this is a point we make in the skeleton, Mr Hodgetts and Mr
8 Adeniran remain in office as Trustees at the gift of Mr Simpson and Mr Ware. If you,
9 the Panel, decided not to appoint an Independent Trustee to this scheme, Mr Simpson
10 and Mr Ware could tomorrow remove Mr Hodgetts and Mr Adeniran and put in others
11 in their place.

12 They will also find themselves in the position of having to investigate the
13 possibility of the scheme having a professional negligence claim against Mr Simpson
14 in respect of the advice that he, Mr Simpson, gave. And yet it was Mr Simpson who
15 interviewed and recommended them. It was Mr Simpson who negotiated the terms of
16 their appointment. All of these factors, in my submission, lead to the overwhelming
17 conclusion that Mr Hodgetts and Mr Adeniran are manifestly not suitable persons to
18 have the stewardship of this scheme, and this is a scheme that cries out for the
19 appointment of an Independent Trustee.

20 And the Panel, I'm sure, will have very much in mind the criteria in section
21 seven of the 1995 Act, but just for completeness in the authorities bundle that we've
22 handed up section seven is to be found at tab 1. And I said at the start of my
23 submissions that the Regulator relies on sub-paragraphs, (a), (c) and € of sub-section
24 3. And – each, you know, the box can readily be ticked. And I only need to tick one,
25 but, first, to secure that the Trustees as a whole have or exercise the necessary
26 knowledge and skill for the proper administration of the scheme. Neither Mr
27 Hodgetts or Mr Adeniran has any knowledge or skill relating to occupational pension
28 schemes.

29 (c) – to secure the proper use or application of the assets of the scheme.
30 Again, these assets need to be under the stewardship of a properly experienced
31 Independent Trustee. And we can see from the history of the scheme why that is the
32 case, because of the £2.9 million that's now in the Glasgow Rangers Football Club

1 administrator's account that is trying to be recovered in complicated High Court
2 litigation.

3 If you have people as Trustees who do not have the necessary knowledge and
4 skill then that is going to lead to risk to scheme assets, as has already occurred. And
5 at (d) – otherwise to protect the generality of members, that members' interests need
6 protection really from two things – from the total lack in skill and experience of Mr
7 Hodgetts and Mr Adeniran, and they need protection from the underhand conduct of
8 Mr Simpson and Mr Ware, who continue to be able to exercise control by virtue of
9 their directorship of Worthington.

10 And if the Panel is minded to make an order under Section 7.3, then we ask for
11 – well, I think one of the conventional ancillary orders for payment of the Independent
12 Trustee's fees and expenses out of the resources of the scheme, that those sums should
13 be treated as a due from the employer – that's section 8.1.b, and section 8.2. An order
14 that the Independent Trustee should have exclusive powers, under 8.4.b, and then a
15 vesting order under section nine. And I think I've come in at just about an hour and a
16 quarter, so I'm – sorry, I took up my full –

17 CHAIR: Thank you very much.

18 MR ROWLEY QC: Thank you.

19 CHAIR: Now, Mr Grant, if we start now we'll need a break. I'll leave it with your
20 preference. Would you rather start and take a break, or would you rather we had a
21 break now and had lunch?

22 MR GRANT: I'd rather take a break now, intent to come within 45 minutes, which I think I
23 will do if I start fresh.

24 CHAIR: That's very reasonable, and we agree that. I think three quarters of an hour should
25 be enough for lunch. If we make it half an hour, which I'm tempted to try to do, it
26 won't work. So we'll go for three quarters of an hour – half past one we'll resume.

27 MR ROWLEY QC: Thank you.

28
29 **(The hearing adjourned from 12.48 p.m. to 1.30 p.m.)**

30
31 CHAIR: I do propose to suggest that at the end of first submissions, if counsel want to take
32 it, I give them the opportunity for a brief reply, I would suggest a quarter of an hour, if

1 you need it. It would be in accordance with our normal approach, and – pro rata time
2 for yourself, Mr Simpson.

3 MR GRANT: Yes, sir, to be clear, is that following my submissions Mr Rowley then replies,
4 or Mr Simpson speaks, or after Mr Simpson speaks?

5 CHAIR: I am suggesting after you have spoken, Mr Simpson speaks and then Mr Rowley,
6 yourself and, if necessary, Mr Simpson. So, when you are ready, Mr Grant.

7 MR GRANT: I am ready and I will begin. I will try to follow Mr Rowley, if nothing else, in
8 accuracy of time estimate and I hope to conclude within 45 minutes. I asked over the
9 lunch break Mr Simpson to ask for the copies of a first witness statement which he
10 made on 16 November. I am told that he was told that there were already copies of
11 that so it was an unnecessary task. Your colleague to your right is nodding, apparently
12 in agreement.

13 PANEL ADVISER: They were forwarded to the panel but I have made copies and given
14 them to the panel.

15 CHAIR: I am just going to have to interrupt you, I am afraid. I have left some papers in the
16 retiring room.

17 MR GRANT: It's three pages in total – one page witness statement, an exhibit –

18 *[Pause to obtain document]*

19 CHAIR: I'm sorry. Mr Grant, please.

20 MR GRANT: Not at all, Chair. I had rather assumed that Mr Rowley had seen it before. It
21 would appear not. It's brief. I will come to that, if I may, in due course. In my
22 submission, the primary issue is, not so much the background and how we got here,
23 but where we are now and what are the allegations against the new Trustees Messers
24 Hodgetts and Adeniran. It is against that background that I wish to address my
25 submissions. First of all I wish to explain, to reduce any avoidance of doubt, why my
26 clients are not here. I have already said this in part this morning; they were, until
27 yesterday, unaware of the case against them and the grounds for their removal,
28 allegedly on the basis that they have insufficient knowledge and understanding. They
29 proceeded, in my submission reasonably, upon the basis of the letter, sir, which you
30 summarised this morning, 28 November, saying that the panel would expect to hear
31 submissions about, or proof of deed of appointment or removal, and the security of
32 assets, on that basis. They were not to attend given their substantial work-related, I

1 stress, engagements. Had they known what the nature of today's hearing was going to
2 be, and the Regulator's case, as I said before, was summarised only in a skeleton
3 argument, things may have been different.

4 You have also heard, without re-treading ground, that the skeleton argument,
5 was delivered to Mr Simpson's chambers at ten past six on Monday evening. He has
6 made enquiries and I will let him speak as to what that has revealed. So that is the
7 explanation as to why the new Trustees are not here. It is not out of disrespect; it is
8 not out of an absolution of their responsibilities, or an ostrich-like approach, to use my
9 learned friend's words.

10 Following on from that leads to the question of representation, the point that
11 Mr Rowley has raised, querying the basis on which my services are paid for today.
12 Clearly, my clients have entitlement to be represented, and clearly it follows that they
13 are entitled to pay for that. On that point, may I remind the Panel that there is
14 insurance for this scheme, and at page 507 of the bundle, this was the deed of removal
15 and appointment of the Trustees. This was the deed by which Mr Ware and Mr
16 Simpson became Trustees on 1 June. It begins at page 505. At page 507, second
17 punch-hole, one sees an amendment to the Trust deed. Clause 8.6 was amended by
18 adding a sub-clause (c), as follows – I'll read it out if I may: 'The principal employer
19 should maintain uninterrupted insurance cover in relation to its liability pertaining to
20 sub-clause (a) of this clause 8.6 to indemnify Trustees and former Trustees to
21 maintain such insurance at such level as the Trustees deem appropriate from time to
22 time to a level of not less than £3 million.' I will come back to that in due course.

23 DAME ELIZABETH NEVILLE: I am sorry, I think I heard you to say, in relation to the cost
24 of today, that they are entitled to pay for that, but what do you mean by that?

25 MR GRANT: Well, the suggestion by Mr Rowley was a query as to the basis on which the
26 new Trustees were paying for today. I am just saying that they are entitled to be
27 represented. That was my point.

28 DAME ELIZABETH NEVILLE: I thought I heard you say, 'And they are entitled to pay for
29 it.' I may have misheard.

30 MR GRANT: I used the opportunity then to refer to the question of insurance. It seemed the
31 appropriate time to mention that in order to correct something that Mr Rowley said
32 before.

1 DAME ELIZABETH NEVILLE: You said that they were entitled to be represented and then
2 you referred to the insurance?

3 MR GRANT: Yes.

4 MR ROWLEY QC: Are the costs of today incurred by the new Trustees being paid out of the
5 scheme assets?

6 MR GRANT: I understand so, yes.

7 MR STERN: The question I was going to ask simply relates to this insurance. Is it an
8 external insurance, so a third party?

9 MR GRANT: I understand it is with Chubb. I know no more than that and it may be if you
10 have question, Mr Simpson – you may wish to ask him about that.

11 Turning to the allegations made against the new Trustees, they are brief, and
12 contained, really, in my learned friend's skeleton argument at paragraph 8.2 saying
13 they acted inappropriately in taking the appointments. Neither has the requisite
14 knowledge or the skill or the experience. In the very short time – underline that –
15 since 22 November 2012, both have not demonstrated a willingness to cooperate with
16 or assist TPR. In other words, neither has demonstrated a willingness to cooperate
17 with or assist TPR.

18 Those points are then fleshed out, albeit briefly, at paragraph 71. The
19 Regulator relies upon the manner and circumstances in which they accepted the
20 appointment, their failure promptly to inform the Regulator of their appointment, their
21 lack of skill, knowledge and experience, their unsuitability to add conduct to the
22 litigation relating to the loan, the present financial position of the scheme and the
23 complexity of its affairs demands the appointment of an Independent Trustee. It is
24 instructive in my submission to compare those allegations with the ones levelled
25 against Messers Cook and Townsend in the first warning notice and even in the
26 existing extent warning notice against Mr Simpson and Mr Ware.

27 If we turn in the bundle to page 812, you can see the first warning notice. I
28 simply wish to take you to the bullet points to which my learned friend took you
29 previously, on page 819, under the heading 'Conclusions'. You will see nine bullet
30 points I think there are there – eight, in fact. The first points are related to conflict,
31 and that the directors were also the Trustees, and of course that no longer is the case.
32 That entertains the first, second, third, fourth bullet points. The fifth point there is the

1 'Loan to Rangers', so this warning notice then to be laid at the door of the then
2 Trustees, who were responsible for it. Again, not a point that can now be levelled.
3 Next point: 'Failure to comply with responsibility to notify their regulator of certain
4 events, the failure to report the potential £3 million investment loss.' The same point
5 can be made. They say: 'All the above concerns are also relevant to the grounds in
6 section 7 of the Pensions Act. 'The Regulator is the appropriate body.' So, in
7 summary, the points are: conflict, both in relation to the identity of directors as
8 Trustees; and involvement with the proposed loan, and I use those words advisedly, to
9 Rangers.

10 If you look at the existing warning notice – it is not in the bundle, madam.
11 Again, if I may deal with this as briefly as I can. Paragraph 107. I am afraid I do not
12 know where in that bundle it appears. So again, the focus there is that the Trustees
13 remain in a position of conflict, because of the identity as directors of Worthington
14 and Trustees. You will see at 107.1.4 that there is reference there made to clause 8.6
15 of the deed, to which I referred you a few minutes ago. So 107.1 is all about conflict,
16 and then 107.2, no advice. 107.3, 'Systematic failure to adequately identify
17 monitoring conflicts.' Over the page, it again goes back to the proposed loan, and
18 refers to Mr Simpson's involvement in that. They say at 107.5: 'His position is
19 untenable given his previous legal advice.' Of course, none of which points apply to
20 the new Trustees. So the question of conflict has gone, and as one has seen from the
21 skeleton argument, which was amplified today, the focus is on knowledge and
22 understanding. What Mr Rowley did seek to do was to say, 'Let us look at the
23 background of matters, and the circumstances in which the new Trustees were
24 appointed by the outgoing Trustees, Mr Simpson and Mr Ware, and to see if any
25 conflict or unsuitability could be identified that way.' But at this point I say that the
26 allegations against the new Trustees are very focused and markedly differ from before.
27 As I said in my note for today, the real mischief, namely the identity of the directors
28 as Trustees, has been cured. I think we can move away from the warning notice, at
29 least for the time being.

30 Standing back, in my submission, the Panel should have regard to the
31 problems facing the scheme. In my submission they are four-fold. First, there is a
32 substantial deficit – clearly, that is not unique to this scheme and function – a number

1 of well known factors. Secondly, the problems of Worthington. It is not suggested by
2 the Regulator that any Independent Trustee would have a magic wand in relation to
3 Worthington's position. Third issue is the question of the Keighley site. Again, on
4 the one hand, criticism is made of attempts, or apparent ambitions, to develop or
5 speculate in relation to that site. Fourthly, the litigation involving the proposed loan
6 to Rangers. Now, in the warning notice there is criticism that Messers Simpson and
7 Ware focussed on that litigation to the exclusion of the Keighley site. That is denied
8 in the response, which, again, I am going to take as read. The important thing: as I
9 have said before, the success of that litigation is perhaps the most important short-
10 term factor in the survival and recovery of the scheme's assets. I will go briefly into
11 the litigation details, if I may, in due course.

12 What was said this morning, in the opening exchanges about whether this
13 hearing should continue today if at all, was that the scheme had been rudderless for at
14 least six months and potentially longer. As Mr Rowley correctly identified this
15 morning, the real interest is not the Regulator's; it is the interest of the membership.
16 Against the background of the problems facing the scheme one should consider what
17 an Independent Trustee would do to right the difficulties. In my submission, that is
18 answered in paragraph 11.d of Mr Simpson and Mr Ware's response. Again, that is
19 not in the core bundle and I am afraid I cannot tell you exactly where it is in your blue
20 bundle.

21 I would ask you to turn to page 6 of the response, paragraph 11.d – but it just
22 appears in that page as (d). The then Trustees, Mr Simpson and Mr Ware, their belief
23 was that an Independent Trustee would, in order to satisfy the fiduciary duties of the
24 scheme, would pursue the litigation, seek to protect Worthington's assets for the
25 benefit of the scheme, seek to appoint a Trustee from the scheme membership, leave
26 the investment management in the hands of industry professionals but monitor
27 investors' performances. In relation to what Messers Simpson and Ware did since
28 their appointment as directors, and most pertinently as Trustees, I wish to detail and
29 make the following submissions. Sir, for the avoidance of doubt, I do so speaking for
30 the new Trustees as part of the background to which they were appointed. These
31 points are all in the response to the warning notice, but they can be summarised as
32 follows. First of all, Messers Simpson and Ware approached the City firm Lester

1 Aldridge, proposed appointment to conduct the litigation. The individual there, Tony
2 Sampson, is the head of Recovery and Insolvency, an experienced solicitor and
3 registered solvency practitioner. Also considered the question of Member-Nominated
4 Trustees in paragraph 21 of the response. But I am not going to ask you to turn to
5 that, because you have already seen the source document today with the advice from
6 JLT that attempts were made as recently as February 2011 to find a Member-
7 Nominated Trustee but without success.

8 Attempts had also been made in relation to the Keighley site. I ask you to turn
9 to paragraph 70 of the response. That summarises the position and you have heard
10 much of the detail before. The essence is, as a site, plans have been for mixed
11 development. It appears that the council awarded the planning application to someone
12 else. So the valuation of the site has had to be adjusted and recalculated in the sum of
13 £4 million. The crucial thing is, given the difficulties that are facing commercial
14 property across the country, not unique to this scheme, there were genuine attempts, in
15 my submission, by the directors to make something of that asset – the primary asset of
16 the directors. What criticisms can be levelled at the former Trustees, and what can be
17 said about the new ones, that they do not have the skill and ability to deal with that
18 asset, bearing in mind, of course, it is an asset of the company and not the Trustee?
19 Finally, this is the document that I referred to at the beginning of this afternoon's
20 session, the fact that Mr Simpson has undertaken The Trustee Toolkit and has been
21 given the certificate, of which you have copies there. He has taken the time to pass the
22 Regulator's own process. I would say that is a significant factor.

23 Furthermore, accusation has been made that Messers Simpson and Ware's
24 conduct is underhand. That was the word used. If I could refer briefly to a few
25 documents in the bundle in support of the submission that, in fact, Messers Simpson
26 and Ware were cooperative with the Regulator. For instance at page 514, we have
27 looked at this before; that is the email from Mr Townsend informing the Regulator of
28 the appointment of the new Trustees. We need not linger over that. Moving over to
29 page 523, this is an email from Ms Kantanka of the Regulator – it also appears
30 elsewhere in the bundle but it is convenient to look at this here. This is in response to
31 an email from Mr Simpson. It says, 'We appreciate your and Mr Ware's cooperation
32 since your appointment as Trustees', but then highlights their dual role as Trustees in

1 the scheme and directors of the principal employer. In my submission, there was
2 cooperation by Mr Simpson and Mr Ware with the Regulator from shortly after their
3 appointment. They have answered the section 71 requests, the first one within the
4 time period allotted; the others, admittedly not. The only information they have not
5 answered is the provision of the briefing note, the reason being that they say it
6 contains sensitive information. The essence of the briefing note is apparent from the
7 minutes that were disclosed. In my submission there is no prejudice to the Regulator
8 in that regard.

9 Let me move on to consider very briefly the interest of Mr Simpson and Mr
10 Ware. In their answer to the Section 72 notice at page 716, they clarify their interest,
11 or rather lack thereof.

12 DAME ELIZABETH NEVILLE: Page...?

13 MR GRANT: Page 716, madam, in the main bundle. This is in response to the first Section
14 72 notice. Highlight in particular little (b) and (c); neither has or had any
15 shareholding or options of entitlements with the employer. Neither has any control,
16 involvement or shareholding, any current or former corporate shareholding with the
17 employer. So their interest in the employer is limited to their remuneration as
18 directors.

19 Much play has been made of the fact that the power of appointment of the
20 Trustees is in the hands of the principal employer. Although not invariably the case,
21 that is normally the case in pension schemes. It is best in my submission to construe
22 such a power as a fiduciary power, namely that one must be exercised in the interests
23 of the members. What Mr Rowley has said on a number of occasions is that the
24 possibility of abuse remains in the hands of Mr Ware and Mr Simpson to remove
25 Trustees willy nilly, unless there has been an independent appointment by this Panel.
26 First thing to note is that on both occasions in June and in November it was the
27 Trustees themselves who resigned. In June, the then directors of the company
28 resigned and also resigned their trusteeships. So the Trustees left of their own
29 volition. I would not say voluntarily because they felt forced out.

30 Three weeks ago, the directors resigned as Trustees but remained in their
31 position as directors. There has been no history to date of directors removing Trustees
32 against their will and it is quite clear from case law that one would have to analyse the

1 circumstances of any appointment to make sure that the fiduciary power is complied
2 with. So the risk of that is, in my submission, overstated.

3 I now move on to the litigation. Mr Rowley says that it is fiercely contested,
4 and he is right. The advice which the Trustees, and I use that term compendiously
5 throughout, has been good prospects of recovery of the 2.95 million, whether in what
6 are defined as the fund proceedings, namely the claim under the money, which was, at
7 least until recently, in the client account of Taylor Wessing; but given that Rangers
8 has now gone into liquidation, as I understand Taylor Wessing are no longer acting, I
9 cannot tell the Panel where that money currently is. It must be in another solicitor's
10 account, if indeed it has moved. Some £3.9 million is there, claimed over by
11 effectively four parties: Jerome, to the sum of £2.925 million; a venture capital
12 company called Merchant Turnaround to the sum of £2.1 million; Rangers, if I may
13 use that term for simplicity if not accuracy; and HMRC, although it is clear that
14 HMRC's claim is contingent on Rangers' claim.

15 The response refers to the advice which the Trustees received throughout. The
16 simple position is, while terms were agreed, there were a number of preconditions for
17 the loan to become effective. The money was paid into Rangers' then solicitor's
18 account, was held under unequivocal and express written undertaking. It is clear, and
19 Collyer Bristow have pleaded the same, that the money must remain on trust for
20 Jerome for the Trustees unless they gave directions to the contrary. Their position is
21 that they never did. While considerable sums have been spent on the litigation – as I
22 understand, it may be £5 million on behalf of the administrators and £7 million on
23 behalf of Collyer Bristow – while that litigation is not due to come to trial until late
24 2013 or early 2014, and the transcript of the hearing in which the expedited trial that
25 was revoked, to use Mr Rowley's word, is in the bundle, nonetheless the Trustees'
26 position remains a confident one.

27 CHAIR: Mr Grant, do we know why the money was transferred to the solicitors before the
28 various conditions had been resolved? Wouldn't it have been better for the money to
29 have been held until the conditions had been dealt with?

30 MR GRANT: Well, hindsight is a wonderful thing. The commercial rationale for it was that
31 the then Trustees were going to be paid, what was described as interest, for having
32 done so – and substantial interest. We are talking sums of £75,000 a quarter, in

1 recollection. I may be incorrect as to precise amounts. That was why it was done.
2 They were asked to do so on the basis that it would show good faith. Clearly, doing
3 that alone would have been extremely foolish, but it was done subject to the
4 undertaking, which in my submission was itself sufficient protection, and in
5 consideration of the sizeable payments of interest as was described. Commitment fees
6 is another way of using them. So that's why it was done. It is difficult to see how the
7 Trustees could have received £75,000 from other means at the time. So the
8 commercial rationale was there. Looking again, whether they would have done the
9 same remains to be seen, but that is, in summary, why the money was paid before the
10 terms were agreed, which was in August 2011. Shortly I will come on to the precise
11 chronology in relation to Mr Simpson's opinions as to why it was done before terms
12 were agreed.

13 The bottom line is that the Trustees say that a whole number of preconditions
14 were not satisfied. Rangers were in breach of various guarantees and warranties.
15 There are a whole number of defences, or arguments available to the Trustees in
16 recovery of that money. Even if the money isn't recovered under the fund there, the
17 parallel proceedings for the breach of fiduciary duty trust are undertaking, which
18 effectively would have the same result.

19 CHAIR: Was it ever revealed why the money has been paid into the other party's solicitors
20 rather than just paid into their own solicitors?

21 MR GRANT: No it wasn't; at least I am not aware of ever having seen any documentation or
22 explanation to that effect. It was also complicated, although this doesn't particularly
23 answer your question sir, at the time the loan was proposed to Rangers' parent, at the
24 time the money was initially paid, thereafter the structure of the loan changed; it was
25 actually to Rangers with the parent acting as guarantee. But given that Collyer
26 Bristow were solicitors both for Rangers and the parent company, one of their
27 members, who is referred to as a partner, Gary Withey, was secretary of both, it didn't
28 really make much difference.

29 Now this is all background, but Mr Rowley has made no little emphasis on Mr
30 Simpson's involvement in the build-up to the litigation and the proposed loan. He has
31 given you the references to the four opinions which Mr Simpson gave. Of course, Mr
32 Rowley's point is that there is at the very least the prospect of a professional

1 negligence claim against Mr Simpson, which colours his entire involvement and by
2 extension is relevant to the matter before you now: his involvement in the
3 appointment of the new Trustees. What is important to bear in mind, in my
4 submission is that, as has been made clear, only one of the four opinions was to the
5 Trustees. That is the one on page 431 of the bundle. That is 27 September 2011.
6 That was after the terms of the loan had been agreed and after two other counsel, both
7 junior counsel, Professor Watson-Gandy and leading counsel Richard Price QC, had
8 given their opinions. If I could simply refer you to paragraph 62 of the response, that
9 sets out the chronology of opinions. Clearly the Trustees could only have any
10 complaint in relation to Mr Simpson's opinion, the very last of the opinions, after the
11 contracts had been exchanged, and this leads to immediate doubts as to the success of
12 the professional negligence claim and against the background of two other counsel,
13 one of whom is leading counsel, having previously advised on related matters. I will
14 let Mr Simpson speak more to those if he wishes. The relevance, in my submission –
15 the question the Panel has to consider is whether Mr Simpson's involvement in
16 identifying the new Trustees is a reason for the Panel to appoint an Independent
17 Trustee.

18 In fact, we can now move on to the circumstances under which the new
19 Trustees were appointed. I said this morning, but I will repeat, undoubtedly the
20 circumstances and the timing were unfortunate. While Mr Rowley referred, this
21 morning, to the issue of having one's cake and eating it, the Regulator's position has
22 been throughout that Mr Ware and Mr Simpson are in a position of conflict. Their
23 position, in my submission as evidenced by the minutes, is that they acknowledged the
24 possibility of conflict once a real conflict arose in relation to the possibility of entering
25 the PPF – an actual, unavoidable conflict arose which necessitated their resignation as
26 Trustees. In my submission, even if the Panel are of the view that the conflict was
27 unavoidable from day one, it is better to recognise it late than not at all. Second, in
28 my submission, Mr Simpson and Mr Ware were quite clear; it was minuted, this
29 decision; they had the benefit of a briefing note; they sought advice informally from
30 JLT before on the question of Independent Trustees; they had considered Member-
31 Nominated Trustees and we have seen that Mr Simpson had undertaken the Toolkit
32 process. They were committed to, in my submission, acting for the benefit of the

1 scheme. Conflict arose and they took steps. They informed the Regulator on the
2 Tuesday after the decision – tail end of the week before – to resign. In due course,
3 albeit not immediately, they provided the Regulator with the deed of appointment and
4 removal.

5 It is necessary to consider in some detail the process by which the new
6 Trustees, Mr Hodgetts and Mr Adeniran, were identified. The first point is that
7 conflict was identified and we can look at the minutes of the meeting of the Board of
8 Trustees on pages 754 and 755. You have been taken to this already by Mr Rowley so
9 I will be as brief as I can. On page 755 under the heading ‘Potential Independent
10 Trustees’, Mr Simpson approached a former member of the Determinations Panel and
11 she provided the names for Mr Simpson to contact. He contacted the recommended
12 people and was referred to others. He received a response by someone who expressed
13 an interest and has yet to arrange a meeting with them. He was concerned that
14 professional Trustees would charge a fortune – and I will come back to cost in due
15 course. Mr Ware had continued to make enquiries amongst FSA authorised firms,
16 recommendations, and provided Mr Simpson with CVs for two potential Trustees:
17 Robert Hodgetts and Shola Adeniran who were willing to act for a reasonable fee,
18 subject to being satisfied as to all the issues relating to the fund.

19 I will now pick up one small point Mr Rowley made. It doesn’t say there, or
20 imply in my submission, on a fair reading of the minute, that Mr Hodgetts or Mr
21 Adeniran were FSA authorised themselves, or approved persons, or anything similar.
22 Simply that was the process by which they had been identified. Crucially, it’s Mr
23 Ware – and if you recall the terms of the warning notice, the concern of the Regulator
24 was that it was Mr Ware was who in the pocket of Mr Simpson and would be unduly
25 influenced by him. It was Mr Ware who identified these individuals in the first place.

26 Mr Simpson expressed the view he should meet them; in my submission, that’s a
27 wholly appropriate thing to have done. The minutes from the meeting state that
28 neither Mr Hodgetts nor Mr Adeniran was known to the other. The bottom line is, the
29 new Trustees are two individuals, unknown to one another, identified through a
30 sequence of enquiries in the first place by Mr Ware. Their proposed approval was
31 then effectively ratified or consented to by Mr Simpson.

32 MR STERN: Do you know a source of the CVs – the source of the recommendations?

1 MR GRANT: Sir, I am conscious that I am only supposed to be giving submissions; I can
2 only go on what the documents say but page 755 says that – I am repeating myself –
3 Mr Ware continued to make enquiries amongst them and the names were put forward
4 and he provided Mr Simpson with the CVs of two potential Trustees, Mr Hodgetts
5 and Mr Adeniran. I was only assume that they had been identified by whoever the
6 intermediary was and they provided their own CVs. I may be misunderstanding your
7 question.

8 MR STERN: The answer to the question is no, thank you.

9 MR GRANT: I was seeking to ensure that I understood the question. Then we turn to their
10 CVs. Those are at pages 713 and 715. The starting point, in my submission, is that
11 there is no requirement of law that a pension Trustee has to have acted as a pension
12 Trustee before; that would be circular for obvious reasons. We will deal with Mr
13 Hodgett's position first, page 715. You have been taken through this by Mr Rowley
14 but I am just going to direct you to various other sections of it. He was a finance
15 director, joint managing director, chairman of Greenline Travel. He worked closely
16 with New Bridge Street Associates in relation of the British Bus Pension Fund. He
17 was also Trustee of the London Country Bus South West Employees' Welfare Fund –
18 I suspect effectively a friendly association. Clearly not a Trustee and clearly there are
19 differences in Trustee requirements; that goes without saying. Nonetheless, in my
20 submission, relevant experience. Thereafter, following that position, left and joined
21 East Lancashire Coachbuilders, then set up an accountancy practice. Became CEO of
22 the Bus Employees Friendly Society, serving [inaudible] tax exempt savings. Again,
23 certainly not a Trustee of a pension scheme, but, in my submission, relevant
24 experience with transferable skills and considerations. The role encompasses the
25 compliance and corporate governance requirements of the FSA by whom it is
26 regulated. So familiar and conversant with the notion and concept of regulation. A
27 friendly society have recently taken over management and resources of the former
28 welfare fund. In 2002 when he was finance director, he helped reorganise and then
29 float the fledgling London Bus Tender[?], which had grown rapidly from a large
30 Surrey-based operator. In addition to the above he has been a Trustee of the Relate
31 North and West Sussex charity since the turn of the century, originally as Treasurer
32 for five years.

1 Now, in terms of what the Regulator says this scheme requires – someone of
2 considerable experience in positions of responsibility: CEO, financial director,
3 managing director, chartered accountant, MBA, ACMA, familiarity and experience
4 with concepts comparable to pension funds. No apparent experience of litigation, but
5 in my submission that is what lawyers are paid for. Undoubtedly experience making
6 difficult decisions with sizeable financial consequences.

7 In relation to Mr Adeniran, I recognise that he has no direct experience, even
8 in something like the friendly association or the like, but in my submission he has
9 extensive experience in the business sector. Mr Rowley traced briefly his background,
10 having worked at Lyonsdown Media until 2011 and then appeared to have undergone
11 a change in career. It is apparent, if one looks at the bottom of page 713, the summary
12 of his roles as senior project manager at Lyonsdown Media, that he was focusing
13 primarily on the natural resource industry, which involved market research, broad
14 analysis, budgeting, lifestyle managing, cross marketing and financing the
15 supplement. He secured as clients some of the top names in the oil and gas industry
16 and that is doubtless where his contacts for his current occupation arose. He fostered
17 Lyonsdown into new partnership with *The Times* and *The Scotsman*. He developed
18 and implemented several new supplement ideas and practices at Lyonsdown. Notable
19 projects include oil and gas regeneration, agriculture, business turnaround and
20 restructuring. Peter Mandelson, UK Secretary of State and John Bogle, founder,
21 Vanguard Group. Of course, restructuring and turnaround are issues that are key to
22 the survival of the company and that is primarily a matter for the directors. By the
23 standards which the Regulator seems to expect someone to act on behalf as a Trustee
24 of the scheme, in my submission, this is relevant experience.

25 DAME ELIZABETH NEVILLE: Can I ask, was this not producing supplements for the
26 newspapers and magazines and these were the topics on which the supplements were
27 produced?

28 MR GRANT: Madam, I can only go on the bullet points and that is the first bullet point –
29 supplements.

30 DAME ELIZABETH NEVILLE: That is my reading of what the company did and what his
31 role was: new supplement ideas, notable projects, presumably on supplements.
32 Anyway, if you cannot answer the question –

1 MR GRANT: No, I see your point madam; I can do no more than the interpretation I brought
2 to bear to it. More recently, the consultant and shareholder of Savannah Mining Ltd,
3 acted as a fund-raiser for the third round of funding and invested personally in helping
4 to reorganise the company towards being able to approach external finance partners,
5 introduced the company to the fund-raising partner Liberum Capital, succeeded in
6 raising 2.5 million equity capital for the purpose of conducted drilling on highly
7 prospective gold mineralisations and obtaining their licences, helping to position
8 Savannah towards another round of fund-raising. From October 2011 onwards
9 produced the company's business plan and led its corporate development by setting up
10 the corporate structure, etc. Successfully presented and introduced the company to
11 specialist corporate finance boutiques, successfully led perforce in its mineral asset
12 licenses acquisition programme, acquired enterprise investment scheme tax status
13 from HMRC to de-risk the company from a retail investor's perspective and increase
14 potential value. So those are substantial, in my submission, relevant experience and
15 skills. Bearing in mind, in terms of the litigation, entitled to instruct – you have heard
16 about the steps previously taken to instruct specialised solicitors for that task. In
17 terms of dealing with the Keighley site, that is primarily an issue for the directors. In
18 my submission, you have two robust individuals with experience to fight the corner on
19 behalf of the scheme.

20 MR STERN: When you say fight the corner on behalf of the scheme, what did you have in
21 mind?

22 MR GRANT: Well, one of the points said in the past was that there was an inherent conflict
23 with the directors acting as Trustees. Issues were taken as the proposed division of
24 profits in relation to the Keighley site. As I said before, that is an asset of the
25 company but the Trustees must come to the company with proposals for improving
26 the financial position of the scheme. They are entitled, and one would expect them, to
27 come up with various proposals. If they are not expected to do things like that then
28 reference to the Keighley site is a complete red herring, in my submission, to the
29 terms of the application for the Panel.

30 MR STERN: I think maybe I should address my question to Mr Simpson when he has the
31 opportunity to speak.

32 MR GRANT: I propose to turn finally to the question of cost before summing up the

1 Trustees' position. Mr Rowley has said that the pro rata cost is £60,000. That is
2 certainly one way of putting it, but the way that the Section 72 notice read was that the
3 initial cost was £15,000 for three months to get the two new Trustees up to speed.
4 Given the complexity of issues upon which the Regulator relies –

5 DAME ELIZABETH NEVILLE: Can I ask, is that £15,000 each?

6 MR GRANT: £15,000 each. That was the first three months. Inevitably, the point that I was
7 just making was that the Regulator – relying upon the complexity of the situation
8 facing the fund, it will take time to get up to speed with the issues; it always does
9 whenever any Independent Trustee comes on board, let alone the situation with the
10 litigation and the like, which is complex, as you have heard. So this was an initial
11 attempt to fix the fee for the time period for doing the reading in, getting up to speed.
12 Thereafter the position was to be reviewed. To say it was £60,000 pro rata is, in my
13 submission, a misnomer. There was an attempt to fix the fee until the point where the
14 cost would inevitably be front-loaded in working out and understanding the
15 difficulties facing and the circumstances of the scheme.

16 CHAIR: But to get it up to £60,000, the two would have to be paid another £30,000 over
17 nine months. That does not seem exorbitant does it?

18 MR GRANT: Well, in my submission it is not.

19 CHAIR: So £60,000 is not unreasonable.

20 MR GRANT: No. Mr Rowley says, from the information we have from JLT in the bundle,
21 says that it was approximately £3,000 per meeting but it could well be in excess of
22 that.

23 CHAIR: Mr Rowley, as I understand it, was saying that £60,000 seemed a reasonable
24 projection of what these two Trustees would get for a year's work. You seem to be
25 saying the same thing.

26 MR GRANT: I think understood Mr Rowley as saying that £60,000 seems a lot and you get
27 much more out of Independent Trustees at £3,000 per meeting. My point is that the
28 initial thing of fixing the cost going forward, in my submission, it is a frontloading. It
29 is unlikely to be that over the span of a year. £3,000 might be okay for a run-of-the-
30 mill meeting, but the initial meeting will require considerable reading in on behalf of
31 an Independent Trustee as to the issues facing the scheme on the different fronts – the
32 litigation and generally. Even the litigation itself, I can speak with experience, will

1 take thousands, or tens of thousands of pounds I suspect, for Independent Trustees to
2 read into. So cost is a relevant consideration and one that does not weigh in the
3 favour of an appointment of an Independent Trustee. It is unfortunate that the
4 projections of what the cost thereafter would be are not before the Panel. In my
5 submission, to fix it for the short-term interest is a sensible approach and the overall
6 sums, as you said sir, are not unreasonable. So what I am proposing now, conscious
7 of the time and my estimate – I have gone over my estimate by five minutes – is to
8 sum up on the new Trustees' position.

9 CHAIR: I do not hold you to your own estimate. You can take a bit more time.

10 DAME ELIZABETH NEVILLE: I have asked a lot of questions. I would just like to ask a
11 question about the cost of the new Trustees. Where will that come from; their
12 remuneration?

13 MR SIMPSON: I will explain that in my submission.

14 MR GRANT: If I can leave that to Mr Simpson. So in summary, unless you have any
15 further questions, madam, in summary today, the new Trustees' position is that one
16 has to look at where we now are, where we have got to, and the route by which we got
17 here is a question of background. The mischief which, understandably, exercised the
18 Regulator for a large part of this year has gone. There is a distinction between the
19 directors and the Trustees. Much has been done over the last six months; the scheme
20 has not been rudderless. They are on the verge of proceeding with the litigation,
21 hopefully to a settlement. That is a prospect. With the new Trustees involved, in my
22 submission, things for the first time in some time are looking good.

23 The new Trustees' primary position is to resist the appointment of any
24 Independent Trustee but in the alternative, if the Panel were minded to appoint one, to
25 be appointed with non-exclusive powers; i.e. with the new Trustees remaining in
26 position and the Independent Trustee as well. Sir, unless I can be of any further
27 assistance, that is the position of the new Trustees.

28 CHAIR: I will ask my colleagues if they have any further questions.

29 Thank you, Mr Grant.

30 MR GRANT: Thank you.

31 CHAIR: Mr Simpson.

32 MR SIMPSON: Thank you sir. I will try to be brief. Mr Grant has covered a lot of the

1 ground. If there is any overlap it is for a purpose. First of all, let me apologise to the
2 Panel for the late submission of the deed appointing the Trustees. I haven't been into
3 the office for a week or two due to ill health, and the deed was in the office. I did
4 submit it as soon as I could.

5 After listening to Mr Rowley's submission I am almost convinced that I
6 should go and see the priest or turn myself in to a police station, his character
7 assassination has been very masterful. However, there is some supposition stated as
8 fact and I need to address that. When we came to office in June of this year, we
9 inherited a company and a trust, both of which were in very bad shape. As soon as I
10 was appointed as Trustee, I telephoned the Pensions Regulator to try and establish a
11 dialogue. I don't know if you have seen my CV. Although it does not refer to trust
12 experience, I included that CV just to show the Regulator who I am. I monitor can
13 who had been visiting my website and I noticed that the Pension Regulator had visited
14 several times. I suspended my website because that is the conduit through which I get
15 work and I do not want any more. The CV shows that I have been in regulation on
16 your side of the fence for 10 years, so naturally I thought the best thing was to pick up
17 the phone and start a dialogue, which I did, on day one. I was told that the Pension
18 Regulator could not talk to me because we had to be represented by a solicitor. So
19 they could only talk to a solicitor. So that was really why I thought we could deal
20 with things; that was the end of it.

21 There has been criticism of me as a non-executive director in supporting the
22 company trading and making acquisitions. But, if I was a non-executive director of
23 Sainsbury's, I would not be criticised for supporting food retail. There is absolutely
24 nothing wrong with supporting acquisitions. We came to the company and to a trust
25 as Trustee that was in deficit and in litigation. The interest – although we have
26 admitted to an inherent conflict between directors and Trustees being the one and the
27 same people, having considered it, we considered that the interests of the company
28 and the Trustee in recovering the loan to Rangers and dealing with the deficit were
29 equal, or aligned. So although there was an inherent conflict, there wasn't an actual
30 conflict. We have been monitoring conflict ever since. It then came to November
31 when we actually decided that because of the precarious state of the company that an
32 approach to PPF may be possible. Then that was an irreconcilable conflict and so we

1 had to resign and do something about that.

2 There has been comment about the financial state of the company and the
3 value of the Keighley site of £4 million. When we came to our office we only had the
4 2011 Report, which the directors had. That valued the site at £4 million. We liaised
5 with those directors; we had nothing else to go on at that time. We had to produce a
6 report very quickly. The directors assured us that it was worth £4 million, so we put
7 that.

8 CHAIR: Who gave you that valuation?

9 MR SIMPSON: The previous directors.

10 CHAIR: What were their qualifications to do that?

11 MR SIMPSON: They had advice previously. They had contacted what they said was an
12 expert and relayed that back to us. We valued at £4 million, but subject to change.
13 Since then, we have instructed Muzzlehoff[?] to value all of the assets of the
14 company, so that valuation may well change.

15 CHAIR: You have not had that yet

16 MR SIMPSON: No, it has been commissioned but things take time. We have said we would
17 approach a PPF but we cannot do that until we have the valuation with which to make
18 an approach, if indeed we do now make an approach. There has been criticism of the
19 remuneration of myself, Doug Ware and John Taylor. As Mr Grant said, my
20 remuneration is £24,000, Doug Ware's remuneration is £50,000 and John Taylor's is
21 £12,000. John Taylor is an extremely useful individual. He has been involved in
22 property for a long time. He lives in Yorkshire and he liaises with the planning
23 department.

24 CHAIR: Is he a chartered surveyor?

25 MR SIMPSON: He is a former director who can seek advice from chartered surveyors but he
26 has had dealings and he has had personal relations with the planning department. Just
27 on that site, it may be of interest to the Panel that the development of the Keighley site
28 is not imminent. Planning is not imminent. There are certain problems with planning
29 at the moment. As Mr Grant said, there was originally planning for mixed use, and
30 then the council withdrew that. They then said that it would be ideal for residential
31 use but they have demanded £1 million to go towards local amenities and they want
32 social housing involved. But this government is changing that to make development

1 easier. In addition to that, the other part of the plan that the council want us to buy in
2 order to get planning and the council own that land – on one plot of land there are
3 tenants at the moment. Now of course we don't want planning to boost the price. We
4 do not know how much the council are going to charge us for the land. On another
5 piece of land they want us to build a factory. So it is all quite up in the air.

6 CHAIR: Are you saying you can't develop the site without acquiring another site from the
7 local authority?

8 MR SIMPSON: That is what the local authority are talking about.

9 CHAIR: So you are in an utterly contingent situation, aren't you, in that sense?

10 MR SIMPSON: The council are very keen, so I believe. Now this is Doug Ware's area as he
11 tends to look after that side, so I cannot give that much detail about it. We have the
12 site, we are in contact with the planning authorities and they seem to be keen to get it,
13 but we do not wish to push the price up by getting planning permission for the people.

14 CHAIR: Have you got an agreement in principle from the council to sell you the land?

15 MR SIMPSON: Yes, we are in talks with them.

16 CHAIR: Talks with them? They have not agreed?

17 MR SIMPSON: Well, in principle. Yes, they want us to buy the land from them.

18 CHAIR: The question I am asking is whether you have an agreement in principle. It seems
19 to me a pretty important step towards being able to realise a development plan, to
20 actually own the site.

21 MR SIMPSON: Yes, sir.

22 CHAIR: But you have not got it.

23 MR SIMPSON: My understanding is that we have an agreement in principle subject to price,
24 which we do not know yet. Mr Rowley stated as fact that we are going to encumber
25 the land in order to acquire other companies. That is just supposition. As far as the
26 directors of Worthington are concerned, the land is ring-fenced. We have spoken to
27 several acquisition targets over the last few months and the method of acquiring – for
28 example in one, we were offered an option to buy the whole company in exchange for
29 shares in Worthington. I do not know why one would particularly want shares in
30 Worthington but that was the offer. Once we had that offer we were going to
31 publicise it and test the reaction on the market, for example; however, that did not
32 come to fruition. We have proposed other acquisitions but always relating to the

1 shares issued by Worthington and nothing has come in at the moment so we do not
2 have an acquisition in the pipeline.

3 In terms of fund-raising, we have raised some funds by the placing of shares.
4 We are proposing at the moment, or we have it in train, to raise £400,000 by again the
5 placing of shares. Now, this money has got to be used usefully. We cannot keep
6 going to selling shares in order to fund the pension fund, for example, so we need
7 some sort of co-operation with the pension fund in terms of how we go forward.

8 The other issue is the litigation. Apart from us, all the other parties have large
9 City firms and they seem to be making hay while the sun shines. We are showered
10 with letters. There has been a stay at the moment, which is just coming to an end so it
11 has all been started again. We have been showered with letters and requests for
12 information. It has been not quite a full time job for me, so rather than being
13 underhanded and unhelpful I have been working extremely hard with the litigation.
14 When we came to the company and the Trusteeship, we were facing an application by
15 another party, by Duff & Phelps, the administrators, to strike out our claim on the
16 basis that we have not disclosed documents. The solicitor, at the time, was poorly and
17 unable to cope, I think, so even if there is some sort of conflict the fund has benefited
18 from me being there because I worked extremely hard to provide disclosure to the
19 other side and so prevent our case being struck out.

20 DAME ELIZABETH NEVILLE: Am I right in thinking that the solicitor, originally, was
21 actually a solicitor who normally dealt with matrimonial matters and was retained
22 solely as a vehicle to gain access to counsel?

23 MR SIMPSON: Originally. That was my knowledge at the start, and I was quite surprised
24 that she had been retained to deal with this litigation. She was not retained by us but
25 when it came to the previous Trustees, obviously some people think a solicitor is a
26 solicitor is a solicitor rather than thinking in terms of horses for courses. So, 'She is a
27 qualified solicitor, she must know everything about law' – that sort of attitude. When
28 I came along I was told there was a hearing and it was nothing to worry about, a storm
29 in a teacup. I did not go along with that because of my experience and I actually had
30 to go to court to find out what it was all about, and was quite shocked to find out that
31 it was an application to strike us out.

32 I do not wish to criticise her; she was not really up to the task and she had

1 health issues at the same time. In terms of the litigation, a lot has been made about
2 this conflict that I have. Mr Grant has pointed out that all of my advice was to a third
3 party in relation to this loan; there was only a single piece of advice that I gave to the
4 Trustees after exchange of contract. The basis of that advice was the difference
5 between two drafts of the contract – draft 25 and draft 35. Now, the actual difference
6 was very small, because each draft got a higher number; it was a tweaking of that.
7 The Trustees had received advice from Professor Mark Watson-Gandy, the junior
8 counsel and leading counsel also, Richard Price. I was very careful in that advice, not
9 to tread on their toes and not to cover the same areas, because I didn't want to
10 compromise any indemnity cover the Trustees were seeking. There is an email – I just
11 can't find it at the moment – on page 115 of this bundle, 13 September, bearing in
12 mind the exchange of contracts was in August – 13 September. This is to Pete
13 Townsend, who was then Trustee and director. 'I have avoided advising you on this
14 for months. I'm sorry but I'm not going to stop now.' So I have been very careful not
15 to advise the Trust all along in that. I have also been working to find City solicitors to
16 represent the fund also. I have had a lot of consultations with various firms and
17 latterly I have had a lot of consultation with Lester Aldridge solicitors. They are keen
18 to act on a contingency basis. First of all they offered us a 50% reduction in fee,
19 which I think maybe an imposed Independent Trustee might go along with, but going
20 that extra mile I want a cap, I want certainty on the cost. I have been negotiating for a
21 contingency fee with a cap so that the cost would not go above a certain amount of
22 money. Any costs of course we will get back if the litigation is successful.

23 A few months ago, I had a meeting with Duff & Phelps, the administrators,
24 and I went to see if we could settle this out of court by them just returning the pension
25 fund's money. They tantamount admitted to not having a very good case, were very
26 interested, but the meeting was just before their application to strike us out. Although
27 we had an interesting chat and we are going to talk more, we did not reach agreement
28 on that occasion because of course they wanted to see whether we would be struck out
29 or not. They got caught up in a lot of other things and I have not been able to talk to
30 them since but now that there has been a change of carriage to BDO, who are
31 liquidators, I have been in touch with them and told them that we have been in talks
32 with Duff & Phelps previously and they have made an offer to the previous Trustees

1 to return a large amount – £2.7 million. I said that we were about to instruct City
2 solicitors on a contingency fee, so shouldn't we talk about you giving our money back
3 anyway, at the moment? They are keen to talk, although without admitting that they
4 do not have a good case they are keen to talk to us and create a dialogue with a view
5 to returning the funds with a lack of litigation. But of course, I am happy to sit on my
6 hands because of the new appointments etc.

7 When I had the meeting with... I want to move onto my interview with the
8 Trustees.

9 DAME ELIZABETH NEVILLE: Sorry, before you move on, can I just ask? Now that you
10 are no longer a Trustee, in what way do you continue to be involved in the litigation?

11 MR SIMPSON: That is the thing; I am sitting on my hands. I have been explaining to the
12 Trustees where we are with the litigation. I have not introduced them to Lester
13 Aldridge yet. I have established contact with BDO and I cannot do anything with
14 them at the moment. So I want to work with the Trustees to actually... A lot of
15 contact with BDO depends on my own knowledge in my dealings with Duff & Phelps.
16 I need to put that in writing but I need the sanction of the Trustees as the moment.
17 Because this whole thing is up in the air, if sanctioned by the Panel we can get on with
18 that and hand over the reins; keep them up to speed. I am not going to leave them in
19 the lurch at all. That is not my intention.

20 When I went to meet the Trustees, of course, their CVs were the basis of my
21 asking them questions. The minutes, as prepared for the Trustees are almost certainly
22 going to be different. Admittedly, as I said to Bob Hodgetts, his CV, in presentational
23 terms need to change. I did have a lot of under-linings and questions on my rough
24 copy when I went to interview them. My interview questions were based on The
25 Trustee Toolkit that I had just completed. So it wasn't anything to do with my own
26 prejudice, my own underhandedness, as it were. In my view they came up trumps.
27 They were very good. Insurance is in place with Chubb. It is £2 million per claim at
28 the moment. Chubb originally refused to talk to the Trustees directly because the
29 company is the client, but I have given them permission to give the Trustees all the
30 information they want. The Trustees have not been sitting on their hands; they have
31 been in constant contact with JLT to find out the financial positions, etc. They have
32 been talking to insurers and they have been getting everything in order in their own

1 minds.

2 When I was on the phone to Doug Ware on 22 November I was actually in a
3 different room to the Trustees. Another thing that was stated as fact: that they were
4 there. They weren't. They were in a different room and I could talk about them
5 freely.

6 In terms of my remuneration, as Mr Grant said, it was £15,000 for the first few
7 months, to be reviewed after that. I know, from dealing with particularly the
8 litigation, it has almost been a full time job and there will be a lot to do to get up to
9 speed on it. If someone is going to charge £3,000 for a meeting, to spend hours and
10 hours and hours and hours getting up to speed and talking to solicitors, which may
11 need 15 meetings within a very short time, then £60,000 pro rata, which was allegedly
12 going to be paid to the Trustees, would be dwarfed by the imposed Independent
13 Trustee.

14 From the company's point of view, we are very price-conscious about the
15 Trustees. We do not control the new Trustees. I respect them for their independence
16 of mind. I do not want to dismiss them if they make a claim. I am sure that if anyone
17 made a claim against me and they were dismissed then the follow-on Trustees would
18 continue the claim. I am sure they are not going to warn me about the claim
19 beforehand.

20 To avoid the fund going into PPF, the company must be able to fund the
21 scheme. To fund the scheme, the company must be healthy. We are creating funds at
22 the moment, we want to go forward and for that reason we set the £15,000 limit for
23 the Trustees. Our fear of a panel Trustee is they would not be minded to contain costs
24 but that the costs would be uncontrolled and we would not be able to predict what
25 those costs would be. A lot has been made of the fact that we said we would approach
26 the PPF and we have not yet. Of course, we need the valuation from Muzzlehoff
27 before we do that.

28 Sir, that was a little disjointed and I did not cover everything that Mr Rowley
29 alluded to in his case. It would probably be better to be cross-examined and then I
30 could have addressed each and every issue. If I could help on answering any
31 questions then I would be happy to.

32 CHAIR: Well, our process this afternoon does not allow for cross-examination.

1 MR SIMPSON: No, no.

2 CHAIR: We do have a few questions for you, though. I would just like to start, if I might, by
3 going back to the Keighley site and the reference we have seen on the papers to there
4 being an 80/20 split between the company and the Trust, not in respect of the
5 Keighley site specifically, but in respect of any profit, as I understand it, that the
6 company make. Now, how was that agreement brought about?

7 MR SIMPSON: That was brought about by the previous directors and previous Trustees, so I
8 am not privy to how that was brought about. Presumably those Trustees made that
9 agreement with themselves, so I think that is probably a conflict.

10 MR STERN: Is there any evidence of that agreement?

11 MR SIMPSON: Yes there is: the recovery plan. There is a paragraph in there stating that
12 there would be 20% of the profits. So that was agreed by the previous
13 directors/Trustees amongst themselves.

14 CHAIR: But it was not an arm's-length agreement by the sound of it. The parties were
15 probably conflicted.

16 MR SIMPSON: The lovely thing now is that we do have somebody to put the pension fund's
17 view and also to take account of any representations that the company may have.

18 CHAIR: You are no longer a Trustee, but as a director of the company, what would your
19 response be to the suggestion that it has changed that agreement; that it has varied in
20 favour of the pension fund?

21 MR SIMPSON: The directors can talk about anything, and we must be allowed to discuss
22 things and I can relate some of the conversations that we have had. We had been
23 talking a lot about how we make up the deficit. In the context of going to the PPF, we
24 talked about, shall we give the pension fund the Keighley site to try and help out.

25 We had both been Trustees for six months. We had both worked extremely
26 hard for the Trust and benefited the Trust in my submission. We gave a great deal of
27 sympathy for it but, if we were, for example, going to walk away from the Trust, we
28 need to do something to break free from it. If we did get a PPF the company probably
29 would not survive but we have been trying to look at ways to both get a PPF and the
30 company survive. As I say, one of those things would be to give the Keighley site.
31 One idea I've had – I don't want to go to the PPF. One idea I did suggest to Doug
32 Ware is that we establish a fund to develop the site. I believe that funds for residential

1 development are all the rage these days. Of course a fund is where you get outside
2 investors. It's only in discussion, bandying ideas about. I am just relating the kinds of
3 conversation we have had. The fund could have a share, external investors have a
4 share of any sale price. Of course, before we get to that stage we there has got to be a
5 lot of research and expert opinions about how to go about it, but we are discussing a
6 lot, and it always includes the funds deficit.

7 CHAIR: Just turning to that, before you get to the stage of a fund to develop it, you have to
8 get it to a develop-able condition, don't you? Forgive me for putting it bluntly, but do
9 you think that the company have done as much as they might have done to firstly
10 secure what I would call a proper valuation underscored by a proper, qualified chartered
11 surveyor; and secondly have you done enough to secure all the appropriate agreement
12 you need to put the site into development? It does seem that you have been looking at
13 this a long time and little progress has been made.

14 MR SIMPSON: I can't agree. We have been in office six months. There has been a great
15 deal to do. The litigation has occupied me every day up until this day recently.

16 CHAIR: The company has been looking at this for more than six months, haven't they?

17 MR SIMPSON: The company has – the previous directors. At least, we are seeking a proper
18 valuation now. In my submission we are doing things properly now.

19 CHAIR: I won't press the point. I'll see if my colleagues have any questions. Mr Stern?

20 MR STERN: No, you asked the question I was going to ask.

21 CHAIR: Thank you very much, Mr Simpson, thank you. Now, Mr Rowley?

22 MR ROWLEY QC: Yes sir, if it may please you sir, a few matters by way of reply. I am
23 going to begin with what, I'm sorry to say, is a slightly sensitive point, which is the
24 basis upon which my learned friend Mr Grant is here today and by whom his fees are
25 being paid. It finally emerged, as it had not been put clearly before even in answer to
26 a question by your colleague Dame Elizabeth Neville, that the new Trustees, although
27 they have not deigned themselves to come and explain their position, are using
28 scheme funds to pay for a barrister to do that on their behalf. I am afraid I cannot
29 remember the name of the Judge but there was an eminent Victorian Chancery Judge
30 who made the famous comment that 'The law is not that there should be no cakes and
31 ale; the law is that there should be no cakes and ale at the expense of the Trust.' What
32 he meant by that is that the assets of the Trust are to be used for the proper purposes of

1 the execution and proper administration of the Trust. What is happening today is that
2 scheme assets are being spend by two Trustees who have been in office for only three
3 weeks, who are tried to hold on to a paid appointment for their own benefit. If a new
4 Trustee is appointed as a result of today's hearing, I would suggest that an item that is
5 going to be very high up on his/her list is going to be the propriety of that expenditure
6 of scheme monies. These are new Trustees who are not prepared to spend their own
7 money to justify what they had done. They are here on expense of members and they
8 think that they are on a free ride. In my respectful submission, and the law is clear on
9 that, they are not.

10 I do again make the point that we still have had no explanation why they are
11 not here today. What business are they engaged on, where, and why was it so pressing
12 that neither of them could attend? Why did neither of them write to the Panel to
13 explain that they could not attend? They didn't do so. They didn't write to the
14 Regulator and explain why they could not attend. The first that we were aware of Mr
15 Grant's intended appearance today was when his note appeared unheralded yesterday
16 afternoon. That is, in my submission, entirely demonstrative of their entirely cavalier
17 approach to their duties.

18 I have to say, I heard with surprise what Mr Simpson said about the new
19 Trustees, that they were in meetings with JLT, that they were in meetings with other
20 people. They certainly had not contacted the Regulator. They certainly had not
21 contacted the Panel. There is no evidence before the Panel that they have done
22 anything at all since they were appointed on 22 November. All one has is that bold
23 assertion from Mr Simpson, which is not borne out by any documentation. You will
24 also remember that Mr Simpson said – and I think this was how he put it – that on day
25 one, as soon as he was in office, he contacted the Regulator. He said that the
26 Regulator would not speak to him because he was represented by solicitors. Well, my
27 instructions are that that is not something that the Regulator has any recall and Mr
28 Simpson was not represented by solicitors because he still is not represented by
29 solicitors. He has throughout acted on his own behalf, and the manifest incorrect-ness
30 of that statement can be seen from the document sat page 513-514 of the core bundle.

31
32 Page 513 is day one, 1 June 2012, when Mr Ware and Mr Simpson have their

1 first meeting following their appointment as Trustees. The first the Regulator is
2 informed of that is over the page, at page 514, from Mr Townsend; five days later,
3 from someone who is no longer in office. No attempt made by Mr Simpson to contact
4 the Regulator to explain what has happened. This is not, with respect, my seeking to
5 engage in any form of character assassination of Mr Simpson. The point of the
6 submission I made this morning about Mr Simpson's conduct is that his conduct from
7 1 June 2012 down to his submission to you this afternoon demonstrate, in my
8 submission, that the panel can have no confidence in the accuracy of anything that Mr
9 Simpson has said and the Panel can have no confidence in Mr Simpson's judgment.
10 And it is Mr Simpson who has been responsible for the selection of these new
11 Trustees. You are being asked to take the calibre of these new Trustees on trust on the
12 basis of an interview with Mr Simpson. On my submission, having heard him this
13 afternoon, it is manifest that that is something you should not do.

14 As regards Mr Simpson's point that he has done Trustee training with the
15 Regulator's toolkit, I note that the date on which he completed that module was 9
16 November 2012. Now, I don't know what the content of that module is, but what we
17 do know is that on 20 November 2012 Mr Simpson felt able to advise his fellow
18 Trustee that an Independent Trustee could be appointed to Regulator's Panel of
19 Independent Trustees without having to satisfy any entry requirements, as he put it. I
20 showed you the Independent Trustee regulations, which demonstrate that that was
21 completely wrong. So whatever Mr Simpson may or may not have learned during the
22 course of his training programme, he clearly was not equipped to make any decision
23 as to who would be the appropriate new Trustees for this scheme.

24 I would also please invite you to just remind yourselves again of the Trustee
25 meeting that was held on 29 October – so this was just over three weeks before the
26 new Trustees were appointed. It is pages 758 and 759 in the core bundle. It is the
27 first paragraph at the top of page 759. Of course, it is significant that at this meeting
28 there were two representatives of JLT, the scheme's actuarial consultants. It was JLT
29 who had advised as to the appointment of an Independent Trustee and three possible
30 appointees in that respect. In the presence of JLT on 29 October 2012, on the top of
31 page 759, we can see a proposal that the Trustees select an Independent Trustee from
32 the TPR panel. That is 29 October. 22 November, Messers Hodgetts and Adeniran

1 are appointed.

2 What changed between 29 October and 22 November to lead to Messers
3 Hodgetts and Adeniran as opposed to an Independent Trustee from the TPR panel
4 being the appropriate appointee? That is not a rhetorical question; it is a question that
5 demands an answer. The answer is that nothing changed. So why then were Messers
6 Hodgetts and Adeniran appointed? Answer: to try and frustrate this hearing.

7 So far as the suitability of the Independent Trustees are concerned, really there
8 is not much more that I wish to say in addition to what I have said this morning save
9 to say that the import of my learned friend Mr Grant's submission seems to be that
10 people who have business experience in other areas are appropriate persons to be
11 appointed pension scheme Trustees. Well the answer is that that may be so in relation
12 to some schemes in some circumstances but is it appropriate that two people with no
13 experience of the administration of an occupational pension scheme should be
14 appointed as its only Trustees and paid at a rate comparable to that at which a
15 professional Trustee would be paid? Is it appropriate that persons with no experience
16 of occupational pension schemes should be appointed to this scheme given the
17 particular circumstances in which it finds itself? It has not only the problem of a
18 severe deficit but also the litigation in which it is engaged, as to which the outcome
19 appears wholly uncertain, and yet the Trustees appear able to sign off statements and
20 accounts in respect to which the loan is treated as recoverable for full value, not even
21 a modest discount for litigation risk.

22 It was also the thrust of my learned friend Mr Grant's submission that there is
23 no longer any problem with conflict. I certainly do not accept that. There is a specific
24 problem of conflict as regards to Mr Simpson because of the prior advice which he
25 has provided to the Trustees and I have to confess I find it exceedingly difficult how it
26 can be said that there was no possibility of the Trustees having a claim against Mr
27 Simpson. If a deal had already closed then why were they seeking his advice? They
28 were seeking his advice because, if you look at his opinion, he was advising on a draft
29 facility agreement – a draft agreement that had not at that stage been entered into.
30 There was still time, therefore, for the transaction to be aborted. If the parties cannot
31 agree on the terms of the facility agreement then the transaction would not have gone
32 ahead. So there was the opportunity, in my submission, for Mr Simpson, having

1 properly appraised himself of the provisions of the investment regulations, to advise
2 the Trustees that this matter should not proceed. Yet these are the people about whom
3 it is said, by both Mr Grant and Mr Simpson, who should now have control of this
4 scheme, including the possibility of recovery proceedings against Mr Simpson; people
5 who have been interviewed by Mr Simpson, selected by Mr Simpson, whose
6 remuneration has been fixed by Mr Simpson and the suggestion is that they are in
7 some way wholly detached and removed and would be able to deal with him at arm's
8 length. Well, if those two individuals were here then you might be in a better position
9 to reach a view on that but just on the evidence that is before you there is no warrant
10 for reaching that conclusion, in my submission. It is simply not borne out by the
11 available material.

12 There is a certain amount of discussion about the cost of the two new Trustees
13 as against an independent but there is the document recording the terms on which the
14 two new Trustees were to be remunerated. How many hours are they to spend? What
15 are their duties? We have had some very vague suggestions made about how much
16 they might be paid after the expiry of the three months. It is simply not satisfactory to
17 come before the Panel without any degree of supporting documentation or without any
18 appropriate information about what the long-term arrangements are going to be with
19 these new Trustees. I would respectfully remind you that the test in Section 7.3 of the
20 1995 Act is that you have to be satisfied, is it reasonable to appoint a Trustee of this
21 scheme. When the 1995 Act was first enacted, the test was that OPRA as it then was
22 had to be satisfied that it was necessary. That is no longer the test. The test is, is it
23 reasonable. In my submission, that is a question that permits only one answer from
24 everything you have heard from Mr Simpson himself and from all the documents that
25 you have seen. That answer is that it plainly is reasonable to appoint a Trustee.

26 Then that only leaves the question raised very much in passing at the tail end
27 of my learned friend Mr Grant's submissions, where he suggested that the Trustees
28 should not have exclusive powers. It would be a pointless appointment in that case
29 because the new Trustees, Mr Hodgetts and Adeniran, would have majority rule. So
30 quite apart from their inherent unsuitability to be Trustees, to have an appointee
31 without exclusive powers would effectively leave the affairs of this scheme in the
32 control of those two individuals. So if you are minded to appoint a new Trustee, if

1 you are of the view that it would be reasonable to do so, that appointment can only
2 work if it is an appointment with exclusive powers.

3 Unless I can be of any further assistance, those are my submissions.

4 CHAIR: Thank you Mr Rowley.

5 MR GRANT: We will start with Section 7 and work backwards. The paragraphs we are
6 relying on are sub-paragraphs (a), (c) and (d). I will come to (a) in the end. Dealing
7 with (c) first: 'To secure the proper use or application of the assets of the scheme.' In
8 my submission, even at this point no evidence has been put forward as to why the new
9 Trustees have failed or even why it is anticipated that they will fail to secure the
10 proper use or application of the assets of the scheme. Turning to (a), 'The knowledge
11 and skill', I shall not repeat what I have said before. And (d) follows, in my
12 submission, from those points: 'To protect the interest and the generality of the
13 members of the scheme'. In my submission, with the catchall (d) there, it would be
14 improper, in my submission, for the Panel to find that only (d) was satisfied if neither
15 (a) nor (c) were made out. With respect for my learned friend, I did not say that
16 people with business experience are necessarily qualified to act as Trustees. I said
17 that these individuals, with their respective experience looked at as a whole, were
18 appropriate.

19 The comparability of costs, in my submission, is a big question. My learned
20 friend takes issue with the lack of evidence put forward on behalf of the new Trustees,
21 or even on behalf of the directors, as to what the cost might be, but the Regulator has
22 provided no such evidence. The £3,000 we have has come effectively by way of
23 documentation provided by the Trustees, or rather by their predecessors. To say that
24 there would be a cost saving from appointing an Independent Trustee, in my
25 submission, involves a very big leap of faith.

26 Turning briefly to the question of Mr Simpson's involvement, the chronology
27 is quite clear. Even with the admission that what my learned friend says is correct,
28 about the prospect of a claim against Mr Simpson, it must follow that that would be
29 equally true, or more so, of the other counsel who had advised before.

30 As to the non-attendance of my clients today, I have said the point before; I
31 won't repeat it, save to say this given the point that you made, sir, some 15 minutes
32 ago to Mr Simpson – the process does not permit a cross-examination – how would

1 the Panel be persuaded of their suitability by the simple fact that they attended today?

2 It cannot be the Regulator's case that attendance itself is enough to satisfy that they
3 are the appropriate people to be Trustees of the scheme. So my submission, looking
4 at the statutory test, looking at the difference in the situation of the new Trustees
5 compared with those before, absence of conflict – so the focus is on their knowledge
6 and understanding – given the circumstances in which they were appointed, which are
7 unfortunate, in my submission, but should not be laid at their door, it is not
8 appropriate to make the order sought. Or, at best, the order sought should be one for
9 an independent appointment. That is all I wish to say by way of reply.

10 CHAIR: Thank you Mr Grant. Finally, Mr Simpson.

11 MR SIMPSON: Thank you sir. Mr Rowley did call for me to answer a certain question,
12 which I propose to answer very shortly. In relation to my contacting the pension
13 regulator as soon as I was appointed, I cannot remember the name of the person I
14 telephoned but it was somebody in the legal department. We had a solicitor acting for
15 us at the time Sharan Hassett of Hazelwoods. She was the person who your colleague
16 did identify as the matrimonial solicitor who then had conduct of the case. Of course,
17 when Mr Townsend and Mr Cook resigned, she was left behind.

18 I was not satisfied with her performance but we couldn't dis-instruct her
19 straight away. We needed her. She is actually an important witness to the case so I
20 question whether I should have dis-instructed her anyway. But it was the right thing
21 to do. We got the litigation back on track. We are in a healthy condition in terms of
22 the litigation where we were on the brink of being struck out. However, she was in
23 office at the time. She was managing the litigation on behalf of the Trustees; we
24 became Trustees and she was then our solicitor for some time before we dis-instructed
25 her. So she was in place, she was also dealing with the Pension Regulator at the time,
26 also. Obviously, if I had known these allegations would come up I could have
27 produced – if I had my laptop with me I could have produced evidence to verify that.

28 In terms of what has changed, we were talking in terms of appointing an
29 Independent Trustee and we thought it was probably a good idea, apart from the cost
30 to the fund. It is provided for in (d) that although Worthington are liable to cover the
31 cost of Trustees, if Worthington do not come up with the money in a reasonable time
32 then they take that money from the fund. I have no doubt that an imposed,

1 Independent Trustee would do just that.

2 Sir, you have been given my statement which shows that I have completed the
3 Pension Regulator's own course on 9 November. I did that with a view to attending
4 today to answer all of the allegations against me in relation to lack of knowledge. It
5 was quite interesting in some respects. It did not add to my knowledge greatly. There
6 were one or two tips in there that I thought were quite good. I did it to show that by
7 the Regulator's own standards I had the requisite knowledge to be a Trustee.

8 Of course, what the Pension Regulator has sought to do is take a wrongheaded
9 approach to criticise my advice as legal advisor and then use that to show that I did
10 not have sufficient knowledge to be a Trustee, which of course is a completely
11 different standard. As of 9 November, I was gearing up to attend this hearing as a
12 Trustee. What changed was the conversation that I had with my fellow Trustee in
13 relation to a briefing note on 19 November, which although we have not disclosed we
14 have alluded to in the minutes. Douglas Ware brought to my attention the
15 predicament of the Worthington Group and the prospect that we need to approach the
16 Pension Protection Fund. We felt we couldn't wait. That's what changed. That was
17 approximately 19/20 November; that's what changed.

18 We had to act quickly, in my view; it was an irreconcilable conflict of interest,
19 and quite frankly Douglas Ware had come up with two individuals with whom I was
20 very impressed. I had done a lot of research, in contacting Independent Trustees
21 whose details I had been given. They were either not willing or referred me onto other
22 people. It was a very time consuming operation and I had not got to the end of it. As
23 I said I had one person who was interested in talking but that was as far as it got.

24 CHAIR: I don't understand why that stopped you going to the Pensions Regulator and seeing
25 if they could help you from their approved list. It would have been quicker.

26 MR SIMPSON: When we have spoken to the Pensions Regulator we have found them to be
27 very unhelpful. I take it that somebody somewhere has a nose out of joint because we
28 didn't consult them when we were appointed in the first place. We had the warning
29 notice and from then on I was under the impression that we wouldn't get much
30 cooperation. Examples were: we were given a warning notice which was very
31 difficult to follow, it was a bit all over the place, very badly drafted and we were given
32 two weeks to respond to it and when we asked for further time, the guillotine came

1 down and they said 'No'. I got the impression that they wanted to stop us getting a
2 response in. When I asked for clarification of the Determination Panel's request for
3 information about secure GO[?] assets, I was told that the letter was sufficient and
4 they did not need any further details about that. So the approaches I have had have
5 been fairly unhelpful apart from when I approached the Determinations Panel to ask
6 further time, it wasn't the Pensions Regulator that helped; it was the Determinations
7 Panel which granted extra time to submit our response to the warning notice.

8 CHAIR: Okay. Thank you.

9 DAME ELIZABETH NEVILLE: You said earlier on that you would explain where the
10 remuneration for the current Trustees was coming from. I don't think we have heard
11 anything specific on that.

12 MR SIMPSON: Oh sorry – well, Worthington has raised certain funds by share placement
13 already. Now, that's not a great deal of money but we are trying to raise £400,000
14 with share placement so that if we have the prospect of continuing then of course we
15 will go ahead with that. If there is no prospect of continuing then it is a waste of time.
16 It would be tantamount to not quite defrauding shareholders necessarily, but acting
17 against their interests.

18 DAME ELIZABETH NEVILLE: The £30,000 that is been committed to pay for the Trustees
19 for the next three months – where will that be paid from?

20 MR SIMPSON: From Worthington's accounts.

21 CHAIR: Thank you. Anything else? Thank you, Mr Simpson.

22 MR SIMPSON: Thank you.

23 CHAIR: Well, that concludes the hearing, which is the first part of the panel's deliberations.
24 We go on now to meet privately to consider what we have heard and to make our
25 decision on the requests and the warning notice. Thank you all for your attendance.
26 Thank you all for your cooperation. This closes the hearing.

27 MR GRANT: Sir, may I be so bold as to ask you if you have any idea by when the decision
28 will be made?

29 CHAIR: My expectation is that the decision will be made quickly in the next day or two.
30 Following practice that we have followed before, we may well issue the decision and
31 follow it with reasons. That is the most likely outcome.

32 MR GRANT: That's most helpful, thank you.

1 | CHAIR: Thank you very much.

2 | **(The hearing was concluded at 3.17pm)**