

The Pensions Regulator	<b>Compulsory Review</b>  <b>FINAL NOTICE</b> <b>under Section 99(4) of the</b> <b>Pensions Act 2004 (the “Act”)</b>  <b>CBW Pension Forensics Limited</b> <b>and</b> <b>CBW Trustees Limited</b>	The Pensions Regulator case ref:  TM6882
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1. The Determinations Panel (the “Panel”), on behalf of the Pensions Regulator (the “Regulator”), met on 28 March 2011 to review (pursuant to Section 99 of the Act, the “Compulsory Review”) the Determination made on 28 October 2010 when the Special Procedure was used pursuant to Section 97 of the Act in relation to the following 13 Schemes (the “Schemes”):
  - i. The Sapcote Group PLC Pension and Life Assurance Scheme (**Sapcote Scheme**);
  - ii. The F&EV Linford Staff Pension and Assurance Scheme (**Linford Scheme**);
  - iii. The Grose Limited Retirement Benefits Plan (**Grose Scheme**);
  - iv. The Bolton Brass Pension Scheme (**Brass Scheme**);
  - v. The Bolton Power Pension Scheme (**Power Scheme**);
  - vi. The DT ATT UK Pension Scheme (**DT Scheme**);
  - vii. The Etchells Machinery Limited Retirement Benefits Plan (1972) (**Etchells Scheme**);
  - viii. The Ionic Surface Treatment Limited Pension Scheme (**Ionic Scheme**);
  - ix. The Montague L Meyer Pension Fund (**Montague Scheme**);
  - x. The William T Eden plc Retirement Benefits Scheme (**Eden Scheme**);
  - xi. The Pension and Life Assurance Scheme of Sumitomo Corporation Europe PLC (**Sumitomo Scheme**);
  - xii. The Reydel Limited Works Pension Scheme (**Reydel Scheme**);
  - xiii. The BBP Engineering Group Ltd Pension and Life Assurance Scheme (**BBP Scheme**);

and a trustee was appointed under Section 7 of the Pensions Act 1995 and a vesting order was issued under Section 9 of the Pensions Act 1995.

In summary, at the Compulsory Review the Panel determined that the earlier Determination made on 28 October 2010 to appoint a trustee and

issue a vesting order in relation to the Schemes should be upheld. This Determination was made for the reasons set out in section 7 “Reasons for Decision” points A.- F. below.

## **2. Matter to be determined**

### **A. Appointment of independent trustee**

At its meeting on 28 October 2010 the Panel granted the application for an order to be issued under Section 7 of the Pensions Act 1995. The Panel determined that an order be issued in the following terms in respect of the Schemes listed above:

1. Pitmans Trustees Limited of 47 Castle Street, Reading RG1 7SR is hereby appointed as trustee of the Schemes listed above (the “Schemes”) with effect on and from 28 October 2010.
2. This order is made because the Pensions Regulator is satisfied that it is reasonable to do so, pursuant to the relevant provisions of the Pensions Act 1995 as set out below, in order:
  - i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme pursuant to Section 7(3)(a);
  - ii. to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c);
  - iii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).
3. The powers and duties exercisable by Pitmans Trustees Limited shall be to the exclusion of all other trustees of the Scheme pursuant to Section 8(4)(b) of the Pensions Act 1995.
4. Pitmans Trustees Limited’s fees and expenses shall be paid out of the resources of the Scheme pursuant to Section 8(1)(b) of the Pensions Act 1995 and an amount equal to the amount paid out of the resources of the Scheme by virtue of Subsection (1)(b) is to be treated for all purposes as a debt due from the employer to the trustees of the Scheme pursuant to Section 8(2) of the Pensions Act 1995 as amended by Section 35 of the Pensions Act 2004.
5. This order:
  - i. will take immediate effect on the date of this order;
  - ii. may be terminated, or the appointed trustee replaced, at the expiration of 28 days notice from the Pensions Regulator to the appointed trustee, pursuant to Section 7(5)(c) of the Pensions Act 1995.

## **B. Vesting order**

At its meeting on 28 October 2010 the Panel granted the application for an order to be issued under Section 9 of the Pensions Act 1995. The Panel determined that an order be issued in the following terms in respect of the Schemes listed above:

1. The Pensions Regulator hereby orders the vesting in, and the assignation and transfer to, Pitmans Trustees Limited of 47 Castle Street, Reading RG1 7SR as trustee of the Schemes listed above, appointed pursuant to Section 7 of The Pensions Act 1995 by The Pensions Regulator, of all property and assets of the above Scheme, heritable, moveable, real and personal, of every description and wherever situated.
2. This Order is made by The Pensions Regulator pursuant to Section 9 of The Pensions Act 1995, as amended.
3. This Order will take immediate effect as at the date of this Order.

## **C. Compulsory Review**

Pursuant to Section 99 of the Act the Panel met on 28 March 2011 to conduct a Compulsory Review of its earlier Determination (made under Section 97(3) of the Act on 28 October 2010) in the light of representations received from Directly Affected Parties and the Pensions Regulator.

The Regulator's powers on a Compulsory Review under Section 99 of the Act include power to:

- i. confirm, vary or revoke the determination;
- ii. confirm, vary or revoke any order, notice or direction made, issued or given as a result of the determination;
- iii. substitute a different determination, order, notice or direction;
- iv. deal with the matters arising on the review as if they had arisen on the original determination, and
- v. make savings and transitional provision.

The Panel was mindful that to confirm an order under Section 7(3)(a), (c) and/or (d) of the Pensions Act 1995 to appoint a trustee to each of the Schemes it must be satisfied that it is reasonable to do so in order:

- i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Schemes pursuant to Section 7(3)(a); or

- ii. to secure the proper use or application of the assets of the Schemes pursuant to Section 7(3)(c); or
- iii. otherwise to protect the interests of the generality of the members of the Schemes pursuant to Section 7(3)(d);

and in addition if the Panel determines to appoint a trustee to the Schemes it must consider afresh whether the following provisions should be included in those orders:

- iv. for the powers or duties of a trustee so appointed to be to the exclusion of other trustees pursuant to Section 8(4)(b) of the Pensions Act 1995;
- v. for any fees and expenses of a trustee so appointed to be paid out of the resources of the relevant Scheme pursuant to 8(1)(b) of the Pensions Act 1995;
- vi. that an amount equal to the amount paid out of the resources of the relevant Scheme by virtue of Section 8(1)(b) is to be treated as a debt due from the employer to the trustees of that Scheme pursuant to Section 8(2) of the Pensions Act 1995;

and if an independent trustee is to be appointed to each Scheme whether:

- vii. a vesting order should be confirmed in relation to each Scheme under Section 9 of the Pensions Act 1995.

### 3. **Directly affected parties**

The following are the parties considered as being directly affected by the regulatory action taken on 28 October 2010 as set out in paragraph 2 above.

- (i) CBW Pension Forensics Limited (**CBW Forensics**)
- (ii) CBW Trustees Limited (**CBW Trustees**)
- (iii) The Pension Protection Fund (**the PPF**)
- (iv) Pitmans Trustees Limited – the appointed independent trustee
- (v) The sponsoring employers of the Schemes as follows:
  - (a) William Sapcote & Son Limited (Sapcote Scheme)
  - (b) Cramb & Dean (London) Limited (Sapcote Scheme)
  - (c) F&EV Linford Limited (Linford Scheme)
  - (d) Linford-Bridgeman Limited (Linford Scheme)
  - (e) Linford Building Limited (Linford Scheme)
  - (f) Linford Group Limited (Linford Scheme)
  - (g) S&J Whitehead Limited (Linford Scheme)
  - (h) W Grose Limited (Grose Scheme)
  - (i) W Grose Northampton Limited (Grose Scheme)
  - (j) McKechnie Brass Limited (Brass Scheme)
  - (k) Thomas Bolton Limited (Power Scheme)
  - (l) BLH Realisations Limited (Power Scheme)

- (m) DT Assembly & Test – Europe Limited (DT Scheme)
- (n) Moore Stephens Booth White (Ionic Scheme) - Liquidator
- (o) MLM Distribution Limited (Montague Scheme)
- (p) Montague L Meyer Limited (Montague Scheme)
- (q) MLM Distribution Limited (Eden Scheme)
- (r) Montague L Meyer Limited (Eden Scheme)
- (s) Sumitomo Corporation Europe Limited (Sumitomo Scheme)
- (t) Visteon European Corporate Office (Reydel Scheme)

#### 4. The Application

1. The application by the Regulator was made as a result of an investigation undertaken by the Regulator into two corporate trustees, namely CBW Forensics and CBW Trustees arising out of a breach of law report submitted to the Regulator in July 2010 under Section 70 of the Act. Enquiries made by the Regulator subsequent to this report failed to alleviate concerns as to the issues raised.
2. An unannounced inspection by the Regulator took place at the joint premises of the two corporate trustees on 6 October 2010 to ascertain whether certain requirements contained in pension legislation had been complied with (the Inspection). In view of the limited time and resource constraints the Inspection focussed on five schemes: the Sapcote, Linford, Grose, Brass and Power Schemes. These five schemes, together with the DT Scheme, are referred to by the Regulator in its application as the “Primary Schemes”.
3. CBW Forensics was incorporated on 12 June 2001 and was formerly known as Conway Belway Williams (Forensic Consultancy) Limited but changed to the current name on 30 October 2007. The original directors were XXX XXX and XXX XXX who is believed to be XXX XXX. XXX XXX resigned as a director on 30 September 2008.
4. XXX XXX was appointed as a director of CBW Forensics on 7 May 2008 and remained as such until 10 July 2009 which was shortly before he became a director of CBW Trustees. This left XXX XXX as the sole director of CBW Forensics.
5. CBW Forensics was appointed as trustee to a number of occupational pension schemes following its incorporation and remained in post, in most cases, until 6 July 2010. It was generally the sole trustee of those schemes. It is understood that CBW Forensics remains as trustee of the Etchells and Ionic Schemes.
6. During the period of appointment CBW Forensics exercised its power of investment (and disinvestment) as trustee in relation to the assets of the Primary Schemes. The Regulator’s application

included evidence which showed that a substantial proportion of the assets of the Primary Schemes had been invested in high risk, relatively illiquid assets (as acknowledged in the investment advice obtained).

7. The exercise of these investment functions generally followed advice provided by a financial advisor, G&G Financial Services Limited (G&G) which is authorised to provide advice under the Financial Services and Markets Act 2000. There appeared to be connections between CBW Forensics and G&G.
8. The evidence showed that G&G had received significant commissions as a result of the investments made following their advice. The documents demonstrated that XXX XXX, XXX XXX and XXX XXX all appear to have received distributions from G&G, apparently in their personal capacities, representing a partial share of the commissions.
9. On 15 July 2009 CBW Trustees was incorporated. XXX XXX was and remains the sole director. On 6 July 2010 CBW Trustees replaced CBW Forensics as trustee on a number of schemes. CBW Trustees has exercised its investment power, since its appointment, in a similar manner to CBW Forensics.
10. Since July 2010 CBW Trustees have also been appointed to three further schemes, the Montague, Eden and Sumitomo Schemes. The Regulator is also aware that CBW Trustees has either been appointed, or is imminently to be appointed, to the Reydel Scheme.
11. In light of the above, and in order to secure the proper use of the Schemes' assets in the future and to protect members' benefits, the Regulator requested that the Determinations Panel appoint an independent trustee to the 13 schemes detailed in 1 above.

## **5. Representations**

In addition to material it had before it at the original hearing the Panel had received representations from a number of the Schemes affected, the Regulator, Pitmans Trustees Ltd and Herbert Smith on behalf of CBW Trustees and CBW Pensions Forensics. The Pitmans representations contained an 'Initial Overview of Investments' by XXX XXX XXX XXX XXX XXX which is referred to below as the "XX Report". These were all considered carefully.

## **6. Decision**

The Panel dealt with the matters arising on the Compulsory Review as if they had arisen on the original Determination. The Panel decided to confirm the original Determination made on the 28 October 2010 and to confirm the orders issued as a result of that Determination.



need to sit down and work out where best to take the money across all funds to enable investment”. XXX XXX replied: “XXX, you advise us where to take the 8mil if you are not up to the job I will appoint someone who can”

6. Eventually the £8m was drawn from the DT, Power, Brass and Sapcote Schemes and invested in April 2010.
7. During the time when both XXX XXX and XXX XXX were directors of CBW Forensics investments were made by CBW Forensics on behalf of all the Primary Schemes in Meteor Structured Products. In the period from July 2009 onwards investments were made on behalf of DT, Sapcote, Power and Brass in the Sapphire Romanian Property Fund and on behalf of Power, Brass, Sapcote and Grose in the Quadris Environmental Fund.
8. The products and funds mentioned were all according to their own documentation high risk and illiquid and in some cases fell under foreign jurisdiction with limited or no regulatory controls. This should have caused CBW Forensics to question seriously the suitability of these products and funds for investment by a pension scheme.
9. In his report to CBW Pensions Forensics re: the Linford Scheme dated 27 January 2010 XXX XXX noted that disinvesting from Scottish Widows would incur surrender penalties of 1.27%. He pointed out that by switching to a property fund within the Scottish Widows Fund Range no penalties would be incurred and went on to detail the alternative property fund investment. The Panel has seen no evidence which confirms that his advice was considered.
10. It appeared that in respect of some of the investments XXX XXX specified the amount to be invested in particular products, regardless of advice from G&G. He appeared to do this without reference to the suitability of that product as an investment for a pension scheme, or for the scheme in question.
11. Taking all these factors into account the Panel found that there had been many and persistent failures to observe the provisions of Section 36 of the Pensions Act 1995 mentioned in paragraph A.1. above.

## **B. Statements of Investment Principles**

1. Section 36 of the Pensions Act 1995 on Choosing Investments requires that trustees of a trustee scheme must exercise their powers of investment such that:



[3] ... before investing in any manner (....) the trustees must obtain and consider proper advice on the question whether the investment is satisfactory ...having regard to the requirements .. relating to the ... statement [of investment principles] under section 35

[5] .... the trustee.... must exercise their powers of investment with a view to giving effect to the principles contained in the statement under section 35, so far as reasonably practicable.

### PPF Schemes

2. An email from XXX XXX to XXX XXX of G&G on 11 March 2010 says with respect to the DT Scheme, Sapcote Scheme and Power Scheme:

“DT ATT is now in PPF assessment and the PPF have now issued their own Statement of Investment Principles which overrides ours. All scheme investments must now (a) conform to this and (b) be run past and sanctioned by their in house investment team before being transacted.”

“Sapcote will either be fixed on the PLC or it will end up in the PPF. If after all of the current legal wrangling the scheme does go into PPF assessment then the assessment period will be deemed to have started as at the date of the qualifying insolvency event. In this case Oct 2007, and however unreasonable this may seem, all decisions taken will be referenced to this date! So effectively the scheme is in assessment even though it’s not, until such time as a Judge says its not!”

“Power is now split into two bits. One third equates to Butterley which is now in PPF assessment and therefore the same rules apply to this portion of the fund as to DT ATT and Sapcote. That leaves the remaining two thirds (approx £6mn) of which £3mn is invested in either Meteor or Quadris.”
3. Notwithstanding XXX XXX’s concerns, the DT, Power, Brass and Sapcote Schemes together invested £8m in the Meteor Property Fund in April 2010. There is no evidence to suggest that the investments were in accordance with the PPF’s Statement of Investment Principles (SIP) or were sanctioned by the PPF.
4. It follows that there was a clear contravention of Section 36 in respect of the DT and Power Schemes and a possible contravention in respect of the Sapcote Scheme where the Schemes own SIP may still have applied.

## Sapcote Scheme

5. The SIP for the Sapcote Scheme dated 6 April 2008, included amongst other things statements that (Paragraph 5 on Portfolio Construction):
  - (1) At the total plan level and within individual manager appointments investments should be broadly diversified to ensure there is not a concentration of investment with any one user ....
  - (2) Investment in illiquid investments such as property or pooled property funds may be held as long as the total amount of the plan's assets invested in such asset classes is not excessive.
  - (3) Investments in derivatives is permitted within pooled funds as long as they contribute to a reduction in risk or facilitate efficient portfolio management.
  - (4) Investments may be made in securities that are not traded on regulated markets. Recognising the risks (particularly liquidity and counterparty exposure) such investments will normally only be made with the purpose of reducing the plan's mismatch risk relative to its liabilities or to facilitate efficient portfolio management. In any event, the Trustees will ensure that the assets of the plan are predominantly invested on regulated markets.
6. CBW Forensics invested a total of 41% of Sapcote's assets in highly illiquid investments (22% in Meteor Property Fund, 12% in Sapphire, 7% in Quadris) in contravention of the Sapcote Scheme's Statement of Investment Principles and therefore Section 36.
7. Taking account of these examples the Panel found that there had been a number of failures to observe the provisions of Section 36 of the Pensions Act 1995 mentioned in paragraph B.(i) above.

### **C. Security, Quality, Liquidity, Profitability**

1. Regulation 4 of the Occupational Pension Schemes (Investment) Regulations 2005 (the 'Investment Regulations') was applicable to all the Primary Schemes as they were Schemes with 100 or more members.
2. The Investment Regulations require, inter alia, that the trustees of a trust scheme must exercise their powers of investment so that:

[3] ... the powers of investment, or the discretion, must be exercised in a manner calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole; ....

[5] ... the assets of the scheme must consist predominantly of investments admitted to trading on regulated markets;

[6] .... investment in assets which are not admitted to trading on such markets must in any event be kept to a prudent level; ....

#### Security / Risk

3. G&G's report in relation to the Power Scheme in April 2010, having noted that the Moore Park Investment for the Meteor Property Fund had been suggested by CBW Forensics went on to say:

"Having carefully considered the Moor Park Property Fund I consider this a high risk investment and would therefore only be comfortable with this being a satellite investment. Furthermore I would recommend that you first consider other available property funds. I would be happy to provide a comparison if you feel this would help."

4. CBW Forensics and CBW Trustees were appointed as the sole Trustee the Primary Schemes. On behalf of several of them it invested significant sums in the Sapphire Romanian Property Fund, the Quadris Environmental Fund and the Meteor Structured Products. XXX confirm in their report that all these products were high risk.

#### Quality / Liquidity

5. XXX write that in relation to the Meteor Property Fund, there is a redemption fee of up to 10% of net proceeds if withdrawal occurs within 5 years of investment, with the precise fee being at the discretion of the protected cell company. In addition the managers reserve the right to defer redemptions in the event that they cannot be met. It seems that redemptions are not currently being permitted.

6. An email from XXX XXX to XXX XXX of G&G on 11 March 2010 in relation to a possible investment in the Meteor Property Fund says with respect to the Brass Scheme:

"Brass has just made a substantial investment with Lombard and needs all of the remaining liquid assets to meet amongst other things the £200k per month payroll. On top of this Brass has just been sold and we may well lose control of the scheme to another trustee who will I am sure, scrutinise all transactions very closely (we would). So here I would counsel extreme caution."

7. Notwithstanding these concerns CBW Forensics invested £3m of Brass assets into the Meteor Property Fund in April 2010. The

three other investors in the Meteor Property Fund are DT, Power and Sapcote all of which are likely to enter the PPF. XXX writes that “exit over the next year or so seems unlikely particularly given that the four Primary Schemes are the only investors in the Fund.”

8. Regarding the Sapphire Romanian Property Fund XXX writes that “liquidity is a significant concern given the Fund’s private-equity type nature. Any exit prior to the two year anticipated investment term is unlikely”.
9. In relation to the Quadris Environmental Fund XXX states that the Fixed Rate share class (in which Power, Brass, Sapcote and Grose have £4.5m invested) is currently not permitting redemptions. The Schemes have £1.7m invested in the Charitable Trust share scheme class which is permitting redemptions without penalty.
10. Finally, the CBW FTSE Autocall Plan states clearly that: “you should only invest in the plan if at the outset you believe that you will not need to access your capital for the full five year term. Should you need your money back prior to the maturity date, this can be obtained but it is unlikely that you will receive back the full amount you originally invested.”

#### Profitability / Return

11. At 6.3.1 of its representations Herbert Smith assert that: “Interim reports prepared in connection with the Sapphire Romanian Opportunity Fund LP show that the Fund has already achieved its stated return and that capital invested will be returned together with the quoted 30% return upon expiry of the investment term.”
12. The Panel does not agree. The interim report makes it clear that the ultimate return on the investment will only be known at the end of the two year period and that ‘the return of the 30% offered by the Fund is held as a priority return at the Romanian SPV level and will be released from cash flows upon development of the projects’ (page 6) and that ‘the Fund requires 125 units to be delivered and sold to the market in order to return the capital and 30%’ (page 8) and that the bulk of sales are planned for 2011(page 8).
13. As with all high risk illiquid investments the profitability / return of the investment will only be known when cash is realised on exit from the investment, typically in the medium to long term. Therefore profitability over the normal investment period cannot be assessed now. The Panel considers that if the Schemes, for liquidity reasons are forced early sellers, then these investments are likely to underperform and may well not return the capital invested.

## Portfolio Exposure

14. Security, Quality. Liquidity and Profitability risks were highest in relation to the Meteor Property Fund, the Sapphire Romanian Property Fund and the Quadris Environmental Fund and c 40%, 40%, 30% and 20% respectively of the Sapcote, Power, DT and Brass Schemes' assets were invested across these products.
15. The Panel concluded that the pattern of investments both by CBW Forensics and CBW Trustees were in breach of regulation 4(3), 4(5) and 4(6) of the Investment Regulations.

### **D. Diversification**

1. The Investment Regulations require, inter alia, that the trustees of a trust scheme must exercise their powers of investment so that:  
  
4 [7] ... The assets of the scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group must not expose the scheme to excessive risk concentration;
2. The investments in the Meteor Property Fund in particular lead to an excessive reliance on that asset in relation to a number of the Primary Schemes. Approximately 24%, 22% and 19% of the overall portfolio of the Power, Sapcote and DT Schemes respectively were invested in the Meteor Property Fund.
3. The Panel concluded that the pattern of investments both by CBW Forensics and CBW Trustees was in breach of regulation 4(7) of the Investment Regulations.

### **E. Conflicts of Interest**

1. The Investment Regulations require, inter alia, that the trustees of a trust scheme must exercise their powers of investment so that:  
  
[2(b)] ....the assets must be invested in the case of a potential conflict of interest, in the sole interests of members and beneficiaries; ....
2. Professional trustee companies are expected to understand and abide fully by the Regulator's guidance on conflicts of interest<sup>1</sup>.

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<sup>1</sup> A copy of which is available at:<http://www.thepensionsregulator.gov.uk/guidance/guidance-conflicts-of-interest.aspx>

### Payments from G&G

3. During the relevant period very significant payments were made to XXX XXX and XXX XXX in respect of commission sharing as a result of transactions entered into by G&G on behalf of Schemes following decisions to make those investments by the CBW companies as sole trustees of relevant Schemes.
4. For example in April 2010 a series of investments were made across the majority of the Primary Schemes which led to most of those Primary Schemes' assets being reinvested. Evidence included in the application showed that G&G received total commissions of £921,000 of which £438,000 was distributed to XXX XXX and £35,000 to XXX XXX. This evidence was not challenged.
5. It was clear that the directors of CBW Forensics, and after 10 July 2009, the directors and representatives of G&G, had an interest in the choice of investments made with the scheme assets. It was in their personal financial interest to select investments which paid a large commission and to churn investments in order to obtain further commissions.

### Commission Arrangements

6. The Panel noted the comments on the suitability of commission arrangements provided in the XXX Report to Pitman Trustees Limited dated 18 February 2011. XXX considered that "commission arrangements are not typical arrangements for the provision of investment advice for most defined benefit schemes where fees are more typically paid directly by the scheme or employer." However, XXX acknowledged that for very small schemes (less than £10mn in assets) it was not uncommon for IFAs to provide advice and for commission arrangements to be in place. While this was not unacceptable XXX considered that such arrangements could give rise to concerns in relation to proportionality, transparency and conflicts of interest.
7. In relation to the commission sharing arrangements in place for the Schemes where CBW Forensics / CBW Trustees were sole trustees XXX reported that there 'appear to be valid concerns in all of these areas' and went on to say:
  - the commissions paid in respect of most of the advice do not seem to be at a reasonable level for providing advice on pooled pension fund products ...
  - the lack of transparency of commission arrangements will be highlighted by the fact that the audited pension scheme

accounts are unlikely to have picked up the significant cashflows out of the scheme in respect of the commission payments ...

- we do not know if the sponsoring employers of the CBW schemes would have been aware of the levels of commission payable ...
- many of the investments made were sufficiently large to enable access to institutional funds, with lower management charges (and less risk). The commission sharing arrangements ... create a clear potential conflict as to whether the advisers or trustees would wish to look at such funds ....
- likewise the commission arrangements also creates a conflict in that a high turnover of investments creates more initial commissions and therefore an incentive to keep 'churning' portfolios.

### Summary of Investments

8. The Panel reviewed XXX's Summary of Investment Transactions for the six Primary Schemes and for each Scheme noted the number of times the portfolio had been turned over for the period in question; the total commissions paid as a percentage of the Scheme's assets and the total redemption fees / initial charges paid as a percentage of the Scheme's assets.
9. The total investments of Brass, Power, DT, Linford, Sapcote and Grose Schemes had been turned over 3.4x, 2.9x, 3.5x, 3.7x, 3.3x and 3.8x respectively.
10. The total commission paid during the period for the Brass, Power, DT, Linford, Sapcote and Grose Schemes amounted to 5%, 4%, 6%, 3%, 5% and 4% respectively.
11. The total redemption fees / initial charges paid during the period for the Brass, Power, DT, Linford, Sapcote and Grose Schemes amounted to 3%, 2%, 2.8%, 2%, 3% and 2% respectively.
12. Given that the period in question ranged from June 2007 at the earliest to February 2011 at the latest, and that the investments in many cases were designed to be illiquid medium to long term investments, the Panel considered that there was clear evidence of the portfolios having been churned and consequent high commission charges, redemption fees and initial charges paid out to the detriment of the Schemes.

### Relationship with Staverton

13. XXX XXX was a director of Staverton Wealth Management Ltd (Staverton) from 12 May 1999 to 14 October 2008. The managing director of Staverton is XXX XXX who is believed to XXX XXX XXX XXX. Staverton shares the same address as CBW Forensics and CBW Trustees. XXX XXX chaired a meeting of the directors of Staverton.

14. On the signing page of the Professional Introducers Agreement referred to below in para 16 the words 'to include Staverton Wealth Management' were written suggesting that the agreement was also intended to cover Staverton Wealth. Payments were indeed made to Staverton which appeared to be shares of the commission earned by G&G on investments made on behalf of some of the Schemes.
15. In August 2010 Staverton was purporting to provide independent advice to CBW Trustees. It is not clear what commission arrangements applied and what if any benefits XXX XXX XXX XXX XXX XXX XXX XXX XXX.

#### Herbert Smith's Representations

16. In paragraph 8.1.1 of their submissions Herbert Smith admitted that both XXX XXX and XXX XXX had entered into 'Professional Introducer Agreements' with G&G. Under the agreements the company was obliged to share with XXX XXX and XXX XXX part of the commission earned by G&G on business introduced by XXX XXX and XXX XXX to G&G. This company had been appointed as the investment adviser to the Primary Schemes.
17. In paragraph 8.1.2 of their submissions Herbert Smith noted that the payments were to XXX XXX and to XXX XXX in their personal capacities and that the CBW entities did not receive any payments. Furthermore in paragraph 8.1.3 Herbert Smith noted that the agreements were entered into before the CBW companies became trustees of any of the Primary Schemes. Herbert Smith submitted that decisions made by the CBW companies were not motivated by the payment of commissions.
18. The Panel noted that the Professional Introducer Agreements with XXX XXX and XXX XXX continued after the CBW companies became trustees of the relevant Scheme. The Panel has no doubt that XXX XXX and XXX XXX directly, and in the case of XXX XXX also by virtue of his involvement with Staverton, were conflicted in relation to both appointing and then considering advice received from G&G (and later Staverton).
19. In paragraph 8.2.1 and 8.2.2 of their submissions Herbert Smith contend that, at least in the case of the Sapcote and Grose Schemes, the payments were authorised because of the inclusion in the scheme of charging clauses which allowed the Trustee and, by way of example, in the Sapcote Scheme Trust Deed and Rules "an officer of a corporate trustee" to be paid or to retain commission. The submissions did not include similar provisions for



all the Schemes but the Panel worked on the basis that it is likely that they did.

20. The reasons for the inclusion of this sort of clause in trust deeds is well known; it is to ensure that trustees who are professionals receive, as the Sapcote Scheme says, “all usual professional or proper charges and commissions”. The Grose Scheme requires the “fees or remuneration for [the trustee’s] services” to be “at a rate to be agreed between such trustee and the Principal Employer”.
21. The Panel does not consider that the arrangements under the Professional Introducers Agreement could in any way be said to be ‘usual or proper charges and commissions’ and no evidence was submitted or submission made that the receipt of a share of commission had been agreed with any of the Principal Employers.
22. The payments were certainly not made to the Trustee. Furthermore, the payments made to XXX XXX and XXX XXX were not made for services provided by them in their capacity as officers of the CBW Trustee company in question. Thus the Panel found that the payments were not covered by the clause and rejected the submission made by Herbert Smith. In any event Staverton, a company in which XXX XXX was interested, was neither the trustee nor an officer of the trustee and the submissions do not touch on those payments.
23. The relevant CBW trustee company was in a fiduciary position to each of the schemes of which it was a trustee. It is settled law that a company director is in a fiduciary position towards his company. As in this case either XXX XXX or XXX XXX was for most of the material times the sole director of the relevant CBW company each had a fiduciary obligation to that company in respect of its business, namely in this context to ensure that the company acted at all times in the best interests of the schemes of which it was a trustee.
24. One such obligation would be to exercise its powers in a way which, put at a minimum, ensured that the level of commission paid to independent financial advisers was competitive. Thus an arrangement where the director could (and in this case did) personally benefit from commission sharing was clearly in conflict with his and the company’s fiduciary duties.
25. Furthermore, it is undisputed that trustees are not entitled to put themselves into a position in which their personal interests conflict with their duties as a trustee. This is known as the no-conflict rule (see Lewin on Trustees; 18th edition 20-01).

26. Herbert Smith's representations at 8.3 failed to acknowledge that the arrangements with G&G gave rise to an actual (or even potential) conflict of interest. The Panel found this most concerning. Professional trustees are expected to fully understand their fiduciary responsibilities and relevant law as it relates to conflicts of interests.

### Conclusion

27. The Panel concluded that the pattern of investments both by CBW Forensics and CBW Trustees was in breach of regulation 4(2)(b) of the Investment Regulations and the Trustee had not understood and observed the Regulator's Guidance on managing conflicts of interest.
28. While other elements of the Panel's decision are also important the Panel considers that taken on its own the failure of XXX XXX, XXX XXX, CBW Trustees and CBW Forensics to avoid the conflicts of interests described above would have been sufficient justification for the decision the Panel has made.

### **F. Relevant Schemes**

1. Herbert Smith represented that since the evidence that was presented by the Regulator relates essentially to the Primary Schemes there is no justification for appointing a trustee to the other schemes of which the two companies are trustees. The Panel does not agree.
2. The Panel accepts that the breaches of the Investment Regulations were breaches by the corporate trustees in relation to particular schemes and not all schemes. However, the Panel considers that the failings of the corporate trustees reflect the knowledge and skill of XXX XXX and XXX XXX. Since XXX XXX and XXX XXX are sole directors of the corporate trustees, their lack of knowledge and skill applies to the corporate trustees themselves. As such the concerns which the Panel has in relation to the Primary Schemes and the Panel's perception of the need to protect the Primary Schemes applies equally to the Secondary Schemes.
3. In view of the above the Panel considered that an independent trustee with exclusive powers should be appointed to each of the Schemes listed in 1. above and that a vesting order should also be issued in respect of each of the Schemes listed in 1 above. The Panel was satisfied that this was necessary to secure the proper use or application of the Schemes' assets and to protect the interests of the generality of the members of each of the Schemes involved.

**8. Important Notices**

This Determination Notice is given to you under Section 98(4) of the Act. The following statutory rights are important.

**9. Referral to the Upper Tribunal**

You have the right to refer the matter, to which this Determination Notice relates, to the Upper Tribunal ("The Tribunal") under Section 99(7) of the Act. Please see Appendix 2.

**Signed:** .....Olivia Dickson.....

**Chairman:** .....Olivia Dickson.....

**Dated:** 18 April 2011.....

**Section 5 of the Pensions Act 2004**  
**Regulator's objectives**

- (1) The main objectives of the Regulator in exercising its functions are –
- (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
  - (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
  - (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
  - (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.
- (2) For the purposes of subsection (1)(b) the members of personal pension schemes within this subsection are-
- (a) the members who are employees in respect of whom direct payment arrangements exist, and
  - (b) where the scheme is a stakeholder pension scheme, any other members.
- (3) In this section-
- “stakeholder pension scheme” means a personal pension scheme, which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c.30)(register of stakeholder schemes);
- “work-based pension scheme” means-
- (a) an occupational pension scheme,
  - (b) a personal pensions scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
  - (c) a stakeholder pension scheme.

**Section 100 of Pensions Act 2004**  
**Duty to have regard to the interests of members etc**

- (1) The Regulator must have regard to the matters mentioned in subsection (2) –
- (a) when determining whether to exercise a regulatory function –
    - (i) in a case where the requirements of the standard or special procedure apply, or
    - (i) on a review under section 99, and
  - (b) when exercising the regulatory function in question.

- (2) Those matters are –
- (a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
  - (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

**Referral to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)**

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under section 103 of the Pensions Act 2004 (“the Act”) you have 28 days from the date this Determination Notice is given to refer the matter to the Tribunal or such other period as specified in the Tribunal rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice. The Tribunal’s address is:

The Tax and Chancery Chamber of the Upper Tribunal  
45 Bedford Square  
London  
WC1B 3DN  
Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal Rules.

You should note that the Tribunal rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to The Pensions Regulator. Any copy reference notice should be sent to:

Determinations Support  
The Pensions Regulator,  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW.

Tel: 01273 811852