



Neutral Citation Number: [2023] EWHC 1978 (Ch)

Case No: PE-2023-000002

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**  
**PENSIONS**

7 Rolls Building  
Fetter Lane, London,  
EC4A 1NL

Date: 31 July 2023

**Before:**

**THE HONOURABLE MR JUSTICE RICHARD SMITH**

**Between:**

**BRASS TRUSTEES LTD**

**Claimant**

**- and -**

**HAYLEY GOLDSTONE**

**First Defendant**

**THE BOARD OF THE PENSION PROTECTION FUND** **Second Defendant**

**Fenner Moeran KC** (instructed by **CMS Cameron McKenna Nabarro  
Olswang LLP**) for the **Claimant**

**Nicolas Stallworthy KC** and **Nicholas Hill** (instructed by **Pinsent Masons LLP**) for the **First  
Defendant**

**Michael Tennet KC** (instructed by **Hogan Lovells International LLP**) for the **Second  
Defendant**

Hearing date: 4 July 2023  
Draft judgment circulated: 12 July 2023

## **Approved Judgment**

This judgment was handed down remotely at 10.30am on 31 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

**Mr Justice Richard Smith:**

**Introduction**

1. On 4 July 2023, I heard a Part 8 claim brought by the Claimant, BRASS Trustees Ltd (**Trustee**). The Trustee is the sole corporate trustee of an occupational pension scheme, the Biwater Retirement and Security Scheme (**Scheme**). The Trustee sought the Court's approval for its decision to issue petitions to wind up the Scheme's sponsoring employers, Biwater Holdings Ltd (**BHL**) and Biwater International Ltd (**BIL**) (together **Biwater**), as requested in paragraph 1 of the amended Claim Form dated 15 March 2023 (**Decision**).
2. The Trustee had also proposed the appointment of the first Defendant, Ms Hayley Goldstone, a pensions solicitor and partner in Pinsent Masons LLP, to represent all members and beneficiaries of the Scheme in whose interests it is that the Decision not be approved (**Rep Ben**). At the hearing, I appointed her in that capacity pursuant to CPR, Part 19.9(2) for the reasons given then.
3. The second Defendant is the Board of the Pension Protection Fund (**PPF**).
4. Biwater was also invited to participate in these proceedings (but declined to do so), as was (and did) the Pensions Regulator.
5. The claim was supported by two witness statements from Mr Nicholas Chadha, a designated member of the LLP corporate director of the Trustee, dated 28 February and 19 May 2023 respectively. In addition, Ms Goldstone submitted a witness statement dated 21 April 2023. Mr Malcolm Weir, Director of Restructuring and Insolvency at the PPF, also filed a witness statement dated 20 April 2023, accompanied by an expert's report dated 21 April 2023 prepared by Mr Bob Scott, a Fellow of the Institute and Faculty of Actuaries, on behalf of the PPF.
6. The hearing was held in private. Although the general position is that hearings should take place in public (CPR, Part 39.2(1)), for the reasons I gave then, I was satisfied that publicity would defeat the object of the hearing and that it was necessary to sit in private to secure the proper administration of justice (CPR, Part 39.3(a)).
7. The Trustee sought at paragraph 2 of the amended Claim Form (in the alternative to a declaration approving the Decision) guidance as to the basis on which the Trustee should determine whether to make the Decision. Given the facts of this case, said to provide overwhelming support for the primary relief sought, and the Rep Ben's conclusion, reached after close and extensive examination of the underlying position, that there is no credible basis to challenge the Decision, that alternative relief was not pursued.
8. At the conclusion of the hearing, I granted the primary relief sought in paragraph 1 of the amended Claim Form, with my reasons to follow. These are those reasons.

### The Scheme - overview

9. The Scheme is a final salary occupational pension scheme, albeit also including a money purchase section. It is currently governed by a sixth definitive deed and rules dated 27 October 2016 (**Trust Deed and Rules**). BHL is the Principal Employer of the Scheme. BIL is a participating employer.
10. Under clause 10.2.1 of the Trust Deed, the Scheme can only be “*terminated*” upon:-
  - (a) the Principal Employer giving notice under clause 10.1;
  - (b) the Trustees determining to terminate it “*at any time during the Insolvency of the Principal Employer*”; or
  - (c) by reason of statute or an order of the Pensions Regulator.
11. Upon termination, the Trustee has the power to defer winding up or wind up the Scheme (clause 10.2.3).
12. “*Insolvency*” is defined in Schedule 1 to the Trust Deed as “*in relation to an Employer or the Principal Employer, its liquidation, provisional liquidation, administration, receivership, administrative receivership or its entering into a voluntary arrangement*”.
13. The Trustee can, therefore, only wind up the Scheme, without the Principal Employer’s agreement, on the Principal Employer’s insolvency.
14. The assets of the Scheme are significantly less than its liabilities. The Scheme’s actuary, of XPS, has provided a best estimate of the Scheme’s assets and liabilities as at 31 December 2022. This shows:-
  - (a) an asset value of £41.6m;
  - (b) total liabilities of £69.9m; and
  - (c) therefore, a Scheme deficit of some £28.3m.

### Biwater’s debts to the Scheme

15. As at 19 May 2023, Biwater owed the Scheme over £39.74m, £8,516,231 of which was due by way of outstanding contributions for deficit recovery, expenses, insurance and exceptional contributions.
16. There are three primary sources of payment obligations from Biwater to the Scheme, namely under:-
  - (a) the Trust Deed and a Schedule of Contributions (**SoC**) dated 4 August 2020;
  - (b) an agreement dated 14 January 2020 (**2020 Pensions Agreement**); and
  - (c) a series of agreements creating the Cascad Share Payment Obligation (**CSPO**).

### SoC & 2020 Pensions Agreement obligations

17. Under clause 8 of the Trust Deed and section 227 of the Pensions Act 2004, there is an obligation to put in place a schedule of contributions, identifying the amount to be contributed by the employers to the Scheme and when. In addition to the obligation to pay under the Trust Deed (clause 8.2), section 228 of the Pensions Act 2004 makes any unpaid sum due under the SoC a debt due from the relevant employer.
18. Mr Chadha explains, including by reference to a helpful spreadsheet, these elements of the amounts due to the Scheme and for how long they have been outstanding. This shows that Biwater has failed to meet its obligations to the Scheme from March 2020 onwards. Although the earliest obligations (deficit recovery contributions from March to May 2020) were deferred until 2021, and contributions were paid in June to November 2020, the outstanding debt has steadily increased from then onwards.
19. Mr Chadha also explains how Biwater agreed to make ‘exceptional contributions’ of £40,000 per month from June 2020 onwards under the 2020 Pensions Agreement.
20. Biwater has outstanding sums due under the current SoC and the 2020 Pensions Agreement of **£8,516,231** as at 19 May 2023 (not including interest), comprising:-
  - (a) £6,389,121 in unpaid deficit recovery contributions from March 2020;
  - (b) £919,153 in expense allowance contributions from August 2021, including £479,153 of PPF levy contributions, from December 2020;
  - (c) Approximately £87,649 in death in service insurance contributions, from August 2021; and
  - (d) £1.12m exceptional contributions, from February 2021.
21. I should add that, based on the most recent updating information provided by the Trustee to the court, the Scheme did receive £170,000 towards deficit recovery reductions on 29 June 2023, albeit this was less than the amount due for June 2023.

### The CSPO

22. Under agreements entered into between 2006 and 2009, Biwater was granted a reduction in ongoing funding contributions to enable it to buy out the Cascal B.V. joint venture. In return, Biwater agreed to pay the Scheme additional funds, originally intended to come from the proceeds of sale of Cascal. That sale did not generate the proceeds expected and the debt is still owed. There were various agreements to postpone the debt but the last moratorium under the 2020 Pensions Agreement ended on 27 January 2023. Taking into account the £7.4m paid down since 2010, this debt currently stands at **£31.23m**.

### Biwater’s financial problems and Scheme treatment

23. The Trustee has set out in its evidence Biwater’s financial position as it understands it to be based on its communications and discussions with Biwater management and other available information. This presents a bleak picture, not least for the Scheme’s ability to recover the debt due from Biwater. Although this information is necessarily

‘second hand’, I am satisfied that the Trustee has been assiduous in its efforts to understand Biwater’s financial position and prospects and ability to pay the debts due to the Scheme. Moreover, given Biwater’s generally unforthcoming approach, its ‘drip-feeding’ of information to the Trustee and its efforts to project positively its prospects, albeit ultimately not borne out, I am also satisfied that, if anything, the Trustee’s evidence likely understates the full extent of Biwater’s financial problems.

24. Biwater’s statutory accounts for the year ended 30 September 2021 have not been filed and are now overdue by almost nine months. The last available statutory accounts are therefore long out of date. Despite this, it is clear that Biwater has no prospect of meeting its financial obligations to the Scheme. Indeed, in recent months, the directors of Biwater have apparently been worried about their position given Biwater’s situation. Other creditors are becoming more aggressive. As Mr Chadha records:-

*“On 12 April 2023, I had a call with Justin Jones and Paul Stevens [directors of BHL] who told me that the directors were worried about their position from a director duties perspective, as it was becoming harder to justify continuing to operate. They noted that in recent discussions, GemCorp (an investment firm) had recommended that they engage with a restructuring adviser, and had suggested Latham and Watkins. I was told on that call that Latham and Watkins had agreed to do some work pro bono on restructuring the business and both they and Douglas Hawthorne, insolvency partner at Osbourne Clarke [sic] had attended a directors’ meeting on 11 April 2023. It was also made clear to me on that call that the Scheme is not the only creditor with significant concerns about Biwater; HMRC has been being more aggressive, Santander have indicated that they will call on their overdraft on 5 September 2023 if the CBILS loan they provided remains unpaid on that date, and other creditors are “shouting for payment”.”*

25. Biwater’s core business is the delivery of water supply and treatment projects across the world. Its business since 2020 can be summarised as follows:-
- (a) Its primary project, a contract for the delivery of water supply infrastructure in Tamale, Ghana, which was awarded to Biwater by the Ghanaian Government in 2019.
  - (b) It has received some relatively small payments from other existing projects and asset sales during 2022 but considerably less than required to fund its working capital requirements.
  - (c) Biwater has not succeeded in realising any other potential projects, including:-
    - (i) a contract in Iraq-Basrah, supposed to start in May 2020 but not yet signed;
    - (ii) a contract in Cameroon, supposed to start in May 2021 but not yet started;

- (iii) a contract in Kurdistan, supposed to start obtaining receipts in September 2021 but not yet started; and
  - (iv) a claim for an abandoned project in Libya, involving litigation in 2020, albeit with the litigating party wound up in 2022.
- (d) According to Mr Chadha, in the absence of any profitable contracts, Biwater “*has survived the last couple of years almost entirely by taking on new debt*”.

### **The Ghana Project**

26. The Ghana Project has always been the primary hope for Biwater. This was awarded (at least in principle) in 2019 and is divided into two stages:-
- (a) the development phase worth US\$8m, understood to have been delivered; and
  - (b) the construction phase worth US\$264m, not yet commenced.
27. The construction phase was supposed to have reached financial close since late 2019, with Biwater expecting then to receive a significant advance payment of approximately £31.5m, of which £16.2m would be used for bonding, collateral and fees. Mr Chadha explains how “*Biwater have regularly indicated to the Trustee that the monies received would be used to pay down various creditors (at least in part) including the Pension Arrears due to the Scheme (although the amount that might be available towards the Pension Arrears has reduced over time as debt in Biwater has increased)*”. Despite repeated assurances from Biwater to the contrary, this has failed to materialise. Given the increased debt burden assumed by Biwater, even if the Ghana Project advance payment were now to be made, it appears this would be insufficient to pay the Scheme in full as well as its other creditors. The Trustee noted the following in particular in relation to the Ghana Project:-
- (a) From December 2021 to October 2022, Biwater worked to obtain approval from HM Treasury and support from UK Export Finance (UKEF), the UK’s export credit agency which helps exporters access finance and insurance. UKEF approval was granted in September 2022 and HM Treasury approval in October 2022.
  - (b) Although these approvals appeared promising, a condition precedent to the Ghana Project advance payment being made, and a condition of UKEF’s support, was the recapitalisation of Biwater, with the latest version appearing to be:-
    - (i) £30m of ringfenced funds not available for working capital or debt servicing; and
    - (ii) up to £50m working capital investment potentially available for the pension arrears.
  - (c) From summer 2022, Biwater negotiated with the Trustee on a proposed “Standstill Agreement” by which the Trustee would agree to Biwater using the Ghana Project advance payment to pay other creditors in return for certain immediate and ongoing payments and a share of the sums raised on recapitalisation provided it did not wind up BHL and BIL in the meantime. Biwater did not advance this agreement after November 2022. The Trustee believes this was due to Biwater’s failure to advance the recapitalisation investment.

(d) Finally, on 20 December 2022, Ghana announced it had suspended payment on most of its external debt and was seeking its restructuring. The Ghanaian Government was unable to confirm that the Ghana Project would be able to continue despite the debt restructuring. Although the IMF has now approved a US\$3bn loan to Ghana, it is unclear if the terms allow for the Ghana Project and it appears that only about US\$600m of the loan might be immediately available, with long creditor negotiations anticipated to release the remainder. As for the Ghana Project, with the construction phase valued by Biwater at approximately US\$264m, the Trustee says it is difficult to see how Ghana could confirm that this remains affordable. As a result of the delay, the UKEF approvals may also need refreshing. Since Biwater has hitherto not been able clearly to explain all the steps required to achieve Ghana Project commencement and receipt of the Ghana Project advance payment, the Trustee remains concerned that there may be yet further obstacles.

### **Recapitalisation**

28. Despite repeated assurances from Biwater, its recapitalisation has not occurred and does not now appear to have any realistic prospects. In summary:-
- (a) Since March 2021, Biwater has been promising imminent funds from potential investors;
  - (b) In total, Biwater has identified 11 different potential investors, none yet coming good;
  - (c) The last serious investment prospect for the ringfenced funds of £30m was the International Investment Bank (**IIB**), in discussions since at least October 2022 and which Biwater described in February 2023 as “*ready to go*” (in relation to some investment at least). However, IIB is now apparently unable to invest due to US sanctions following the Russian invasion of Ukraine; and
  - (d) The last potential investor (announced by Biwater in December 2022) was Zayat Global Energy whose key individual was Mr Ahmed Zayat, a former bankrupt.
29. Mr Chadha says that Biwater’s recapitalisation now seems unlikely, at least one that might assist the Scheme. As noted, the Standstill Agreement discussions did not advance beyond November 2022.

### **SGM and the sale of Binc**

30. As part of the 2020 Pensions Agreement, the Trustee consented to Biwater entering into an agreement with Sustainable Growth Fund, SCSp, SICAV-SIF (**SGM**), a Luxembourg investment fund. SGM lent money to Biwater by way of loan notes, totalling £24.435m as at November 2022, estimated to have increased to approximately £25.355m by February 2023. That loan was secured by members of the Biwater Group, including by means of security over a Biwater subsidiary, Biwater Inc (**Binc**). SGM is currently investigating selling Binc. That sale is unlikely to pay off SGM in full but the Trustee considers this shows the level of Biwater’s financial distress.
31. The Trustee has two priority rights granted by SGM, namely:-

- (a) a *pari passu* right such that, if (i) SGM's security is enforced (including the realisation of secured assets in an insolvency of BIL or BHL) (ii) SGM's loan notes are repaid, and (iii) the Scheme is owed at least £1.25m, the Scheme's liabilities will be paid back *pari passu* up to a sum of £1.25m; and
  - (b) a 'super priority' right triggered if SGM realises its interest in Binc (including by way of an agreed sale of the shares by Biwater), giving the Scheme the first £2.5m of the proceeds.
32. The possible sale of Binc has not yet happened and it may be that either Biwater sells Binc itself (without SGM enforcing its security) or there is a sale of Binc assets rather than Binc shares. In a consensual sale, the Scheme's *pari passu* right is not triggered and, on an asset sale, neither of the Scheme's *pari passu* or super priority rights is triggered. As such, it may be in the Scheme's financial interests to trigger insolvency, thereby potentially protecting its interests in any Binc sale proceeds.

**Biwater's conduct towards the Scheme:**

33. Setting aside Biwater's failure to come good on its various assurances of funding and as to its business prospects, the Trustee is also concerned by two particular aspects of Biwater's conduct. First, Biwater has repeatedly failed to provide the Trustee (or the Pensions Regulator or the PPF) with information, whether requested by the Trustee or even promised by Biwater, to such an extent that EY (the Trustee's advisers) at one point maintained a tracker of questions asked and unanswered. As Mr Chadha explains:-

*"The overall impression of the Trustee is that Biwater only ever tells it 'good news'. Although Biwater regularly tells the Trustee about what is about to happen, or investors who might agree to invest, it fails to inform us of breaches of negative pledges, of potential investors declining to invest, of failures of other projects to advance. In light of this information deficit the Trustee has repeatedly and throughout at least 2022 requested regular updates, but despite assurances that updates will be forthcoming, either they are not, or many questions asked are simply left unanswered."*

34. Second, the Trustee says that Biwater has breached a negative pledge obligation under the 2020 Pensions Agreement, preventing it from issuing further loan notes, repaying shareholder loans early or granting additional security without Trustee consent (clauses 4 and 12). The Trustee says that, despite this, Biwater:-
- (a) repaid a loan to Sir Adrian White, a major shareholder in and director of BHL, in January 2022; and
  - (b) repaid a loan from Napier Park by way of an issue of further loan notes in December 2022.
35. The Trustee says that Biwater was aware of its obligations when it took these steps, having previously sought permission in March 2021 for the issue of loan notes. Although these further unauthorised actions left the total amount of debt the same, such steps have resulted in other creditors being preferred over the Scheme.



### **The ongoing position of the Scheme and the Decision**

36. The Trustee says that it is now in a difficult and unenviable position. Biwater has failed to pay the Scheme what it owes and all the signs are that it will not do so, or be able to do so, in the future. Biwater's conduct towards the Scheme and the lack of complete and/ or meaningful information reinforce that view. The particular problem that this has created is that the Scheme now suffers, and will continue to suffer, from what is known as 'Scheme Drift' and 'PPF Drift'.

### **Scheme Drift**

37. Scheme Drift is helpfully explained in Mr Chadha's first witness statement and the expert report of Mr Scott as part of the PPF's evidence. However, in summary terms, this occurs where the assets of a pension scheme do not meet its liabilities such that it is in deficit and the proportionate level of funding worsens with the passage of time. This can occur, for example, because:-
- (a) As benefits are paid out of available funds, the proportion of assets to liabilities decreases, ultimately resulting in no assets but remaining liabilities; and/ or
  - (b) The payment of ongoing administration expenses of the Scheme again causes the funding level to decrease.
38. As the evidence explains, the Scheme is suffering Scheme Drift on account of both the payment of benefits and administration expenses. Scheme Drift can be countered by fresh injections of funds, albeit as noted, that is not happening in this case, and/ or where returns on investments held by the Scheme perform better than expected. However, as Mr Chadha explains, the Scheme has had to take a conservative approach to investment in light of Biwater's financial position and conduct.
39. The consequence of Scheme Drift, unless a scheme's deficit is repaired, is that members who receive benefits now are being paid at the expense of those whose benefits will be received later such that the latter are not being treated fairly or equitably.

### **The PPF and PPF Drift**

40. The PPF is a statutory fund that provides compensation for beneficiaries of qualifying occupational pension schemes for which the employer has become insolvent and the scheme is in deficit. Mr Weir explains the role and function of the PPF. However, in summary:-
- (a) In certain circumstances, the PPF must assume responsibility for an occupational pension scheme. This occurs where the scheme is a qualifying scheme and its assets are insufficient to meet defined PPF benefit levels.
  - (b) Determining whether a scheme is to 'enter' the PPF can be complex but is determined by reference to an 'assessment period' commencing on the 'assessment date', usually the date of the qualifying insolvency event.
  - (c) Assuming that the Board of the PPF assumes responsibility for the scheme:

- (i) all scheme assets are transferred to the PPF;
  - (ii) the trustees are discharged from their responsibilities; and
  - (iii) the PPF assumes responsibility to make payments to the members at the prescribed PPF compensation levels.
- (d) PPF compensation levels are set out in schedule 7 to the Pensions Act 2004. Given their complexity, I do not attempt to summarise the framework here save to note that one important variable in the level of compensation payable is whether the member has reached the relevant scheme's normal pension age as at the assessment date. Moreover, the compensation payable by the PPF will differ from (and usually be less than) the benefits payable under the relevant scheme as a result, for example, of the rules concerning increases to pensions in deferment and pensions in payment and the payment of survivors' benefits.
41. As Mr Weir also explains, by reason of the operation of these rules, the longer it takes for an employer to suffer a qualifying insolvency event, the greater the PPF benefits will generally be, even if there is no further accrual of pension benefits. This is because, for example, more members will reach their normal pension age and, as a result, enjoy in the PPF a higher percentage of their scheme benefits, their scheme benefits will have increased to a higher level than they would have done had they entered the PPF earlier and more members will have died, triggering full survivors' benefits rather than the reduced level in the PPF had the member in question died after the assessment date. That increase in PPF compensation is known as 'PPF Drift'.
42. In addition to PPF Drift, if a scheme's assets reduce through the passage of time, for example, through the payment of ongoing scheme expenses, there will be fewer assets to meet the PPF compensation when the PPF assumes responsibility for the scheme and the PPF will bear the increased shortfall. This is in the context of the PPF being funded by a mixture of:-
- (a) transfers of assets from the schemes for which it accepts responsibility;
  - (b) a levy imposed on all qualifying schemes; and
  - (c) investment returns.
43. Accordingly, the longer a scheme takes to enter the PPF assessment period, the greater the shortfall of assets to PPF liabilities there is likely to be. As Mr Chadha explains, in the case of the Scheme here, the latest report by the Scheme Actuary shows estimated:-
- (a) Scheme Drift of over £200,000 every month from June 2023 to June 2024; and
  - (b) PPF Drift over the same period ranging from £182,000 in August 2023 to £688,888 in January 2024.

## The Decision

44. In light the above matters, the Trustee board of directors met on 19 January 2023 to consider whether or not to issue petitions to wind-up both BHL and BIL. They unanimously decided to do so. As Mr Chadha explains in his first statement:-

*“20.1 On 19 January 2023, there was a meeting of the board of the Trustee which was attended by CMS, EY, the Scheme Actuary and Fenner Moeran KC [NC1/B/41/951-957]. The Trustee considered the facts known to it (including an update provided by Biwater during the course of the meeting), the legal advice of CMS and Fenner Moeran KC, and the analysis provided by EY [including insolvency outcome advice] and the Scheme Actuary [including Scheme Drift advice]. It also considered its duties to administer the Scheme in accordance with the Trust Deed, to call in and protect the Scheme’s assets and to maintain and protect the interests of the members. **Taking all this into account the directors of the Trustee unanimously decided that, subject to the approval of the Court and no material change to the factual position, the Trustee would issue the winding up petitions in relation to BHL and BIL (the “Decision”).***

*“20.2 The Trustee also considered at that meeting the issue from the point of view of whether the PPF was or was not a factor which the Trustee could and/or should take into account - and decided that it would make this decision to take such action irrespective of the PPF, and even if and to the extent that it could take the PPF’s existence into account.”*  
(emphasis in bold)

45. The Trustee sought relief by way of the Court’s approval for the Decision.

## The law - trustee decisions

46. When exercising a fiduciary power, trustees are required to inform themselves of the relevant facts and take into account relevant factors and ignore irrelevant ones (Harris v Shuttleworth [1994] ICR 991 at [999G-H]; Pitt v Holt [2013] 2 AC 108; Lewin on Trusts (20<sup>th</sup> edition) at [29-023]-[29-025] and [29-041]-[29-044]). As Lewin points out, although a number of authorities talk of taking into account “*all relevant matters*”, the range of circumstances required to be taken into account will depend on context. For example, time, urgency, quantum and cost may play a part. Lewin considers that the duty to take into consideration relevant matters is best regarded as an element of the duty to act responsibly. Trustees must have a rational basis for a decision but will be in breach only if a given matter is so significant that a failure to take it into account would be irrational. As to what is a relevant matter to take into account, the authorities, such as they are, indicate that this too depends on context, including the nature of the trust and power under consideration (Pitt v Holt [2011] EWCA Civ 197 at [114]).

47. Trustees should also act rationally (sometimes expressed as not acting capriciously) and reasonably. The distinction between rationality and reasonableness was explained (in a different context) in Hayes v Willoughby [2013] 1 WLR 935 at [14] in the following terms:-

“Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person’s thoughts or intentions. ... A test of rationality, by comparison, applies a minimum objective standard to the relevant person’s mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.”

48. The test of reasonableness is often described as Wednesbury reasonableness (based on Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 K.B. 223). This requires the trustee not to act as no reasonable trustee would. In Edge v Pensions Ombudsman [1998] Ch 512, this was put in terms of not taking a decision that “*that no reasonable body of trustees properly directing themselves could have reached*” (Edge at 534, affirmed by the Court of Appeal in [2000] Ch. 602).

### **The law - trustee applications for direction**

49. The court has a general jurisdiction (exercised under CPR, Part 64) to give guidance to trustees in the exercise of their powers. In particular, trustees can seek the approval of the court for a proposed exercise of their powers, rather than seeking to surrender their powers to the court. The classic description of these types of application is found in the case of Public Trustee v Cooper [2001] WLTR 901 in which Hart J quoted from the unreported decision of Robert Walker J in Re Egerton Trust Retirement Benefit Scheme. The Decision falls within the second category identified by Robert Walker J:-

“The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of

special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.”

50. The role of the court in a ‘blessing’ application such as this is limited, namely to see that the proposed exercise of the trustees’ powers is lawful and within the power, and that it does not infringe the trustees’ duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors. In doing this, it requires to be satisfied only that:-

- (a) The trustees have in fact formed the opinion that they should act in the way for which they seek approval;
- (b) The opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at – including taking into account relevant considerations and ignoring irrelevant considerations; and
- (c) The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.

51. As Lewin puts it (at [39-095]):-

*“In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed.”*

52. In this context, I have also had regard to Merchant Navy Ratings Pension Fund Trustees Ltd -v- Stena Line Ltd [2015] Pens. L.R. 239 (at [16]) and the other authorities cited there by Asplin J (as she then was).

### **PPF considerations**

53. The Trustee also explained that an issue arises as to a potentially (ir)relevant consideration, namely to what extent (if at all) the Trustee should take into account the existence of the PPF and, in particular, whether the Trustee should take into account:-

- (a) the existence of PPF compensation; and
- (b) the interests of the PPF.

54. The Trustee says that the reality of this case is that the financial considerations are such that the Trustee concluded it would have taken the Decision irrespective of the PPF such that the court may consider it unnecessary to address this issue in any detail. However, the Trustee also says it is clear that it should not take either issue into account, at least in respect of the Decision, for essentially two reasons:-

- (a) As the relevant authorities show, pension scheme trustees should not ‘game’ the PPF in the sense of altering their actions on the basis of the ‘insurance’ provided by the PPF. Rather, in considering whether to take the Decision, the Trustee in

the present case was required, in accordance with Independent Trustee Services Ltd v Hope [2009] EWHC 2810 (Ch) (ITS) to disregard the existence of PPF compensation, and proceed on the basis that any increase in the deficit would impact on members' benefits. The Trustee complied with that requirement; and

- (b) The authorities show that the PPF is not a contingent beneficiary of the Scheme. As such, when exercising a fiduciary power, the PPF's interests are not a relevant consideration. In fact, the PPF could be characterised as a stranger to the trust, and taking into account its interests could be said to be a 'fraud on the power' by reason of it being to benefit a foreigner to the trust (see, for example, Thomas on Powers (2<sup>nd</sup> edition) at [9.26]-[9.28]; Topham v Duke of Portland (1863) 1 De GJ & Sm 517 at [568]).

55. In ITS, the court concluded that trustees could not use the existence of the PPF to justify using the vast bulk of the scheme's assets to pay for full benefits for some of its members whilst the PPF would provide the benefits of the remainder. Although the court did not conclude that the trustees could never take the existence of the PPF into account, it did conclude that abusing its existence in this manner was outside the proper exercise of their powers. As to the former, Henderson J (as he then was) held:-

"106. ... Mr Giffin submitted, and I would agree, that there is no single all-purpose answer to the question whether the PPF is a relevant consideration for trustees to take into account. It all depends on the context and purpose of the particular power which the trustees are proposing to exercise, and the particular way in which they wish to take the PPF into account."

56. However, as to the latter - the trustees' ability to take into account the existence of PPF benefits when making decisions and 'gaming' the system:-

"115. In my judgment the proposal seeks to subvert this legislative policy in two principal ways. First, it aims to minimise, if not eliminate, the Scheme assets which will vest in the PPF, at a time when the Scheme is seriously underfunded and almost certainly unable to provide benefits at the PPF level, let alone the level provided for by the Rules. Secondly, it treats the availability of PPF compensation as though it were an advantage to be exploited for the Scheme's benefit, whereas Parliament clearly intended the PPF to be a funder of last resort which will step in if, and to the extent that, the Scheme is unable to fund PPF level benefits with its own assets.

116. I have no hesitation in holding that the proposal represents a blatant attempt to undermine or circumvent the policy of the PPF legislation. Furthermore, there is to my mind a clear and strong public interest involved, both in the operation and financial health of the PPF itself, and more generally in the responsible administration of occupational pension schemes, including the maintenance of proper funding levels.

119. Adopting that approach, I would hold, as a matter of law, that the prospective availability of compensation under the PPF, if and when the Scheme enters the PPF, is not a relevant factor for the Trustee to take into account in the exercise of the rule 12.3(b) power, or any power of a similar nature, because to take it into account would be contrary to the clear legislative policy of the Pensions Act 2004, and would thus be contrary to public policy. Further than that I would not, at present, go, bearing in mind that the existence of the PPF is in certain contexts a legitimate matter for trustees to take into account, and the dangers of invoking public policy in relation to a situation which is not before the court. I would, however, say that if my conclusion in the present case is soundly based, I would expect a similar approach to be adopted in any instance where trustees seek to take advantage of the existence of the PPF as a justification for acting in a way which would otherwise be improper.”

57. Henderson J also commented on the possibility of regarding the PPF as a contingent beneficiary of the pension scheme, coming down (at [139]) firmly against such an analysis.
58. In Granada UK Rental and Retail Ltd v Pensions Regulator [2019] EWCA Civ 1032, the Court of Appeal agreed with Henderson J in ITS “*that there is no single all-purpose answer to the question whether the PPF is a relevant consideration for trustees to take into account. It all depends on the context and purpose of the particular power which the trustees are proposing to exercise, and the particular way in which they wish to take the PPF into account*”. Re Axminster Carpet Group Retirement Benefits Plan [2021] EWHC 1652 (Ch) indicated the same fact-specific approach to the potential relevance of the PPF to the exercise of trustee discretion. In light of the state of the authorities, the Trustee submits that:-
- (a) The existence of the PPF could not justify not taking the Decision if the Trustee would otherwise have taken it. Put another way, the Trustee was entitled to ignore the benefit to members of PPF Drift and, so long as the Decision would have been taken but for the existence of the PPF, it could take it; and
  - (b) When determining whether or not to wind up the Scheme’s sponsoring employers, any interests of the PPF (such as in preventing PPF Drift and/ or minimising the deficit between the Scheme’s assets and PPF compensation) are not relevant considerations for the Trustee exercising its fiduciary powers, by reference to its beneficiaries.

### **The Rep Ben’s position**

59. Before considering the Trustee’s claim, it is only appropriate to consider the position of the Rep Ben. Given her professional credentials as a highly experienced pensions solicitor, I accepted that she is appropriately qualified for the role of Rep Ben, supported by her colleagues within her firm and by specialist pensions counsel. Moreover, given the sensitivity of this matter, involving as it does, a decision leading to the potential liquidation of Biwater, I also accepted that it was appropriate in this

case for a Rep Ben to be appointed who was neither a member nor beneficiary of the Scheme even though the need for confidentiality meant she had no contact with those she represents.

60. I am also satisfied that, in undertaking her role, the Rep Ben has taken extensive steps to ensure that she represented the beneficiaries' interests as fully as possible, including through her analysis of the information provided to her by the Trustee, the Scheme deficit and the implications for members, Biwater's financial position and business prospects and the stance of the Pensions Regulator, her examination of issues potentially implicating the merits of the Decision and her multiple (unsatisfied) requests of Biwater for information.
61. Having taken these steps, the Rep Ben has concluded that there is no evidence that the Trustee has failed to take account of relevant factors or has taken account of irrelevant factors in making the Decision. She has also acknowledged that the Decision was one that a reasonable body of trustees, properly directing themselves, could have reached. Although she (quite properly) does not positively agree that the Decision is in the best interests of the beneficiaries she represents, she has found nothing that can realistically be said against the Decision and has indicated that she does not oppose the court's approval of the same.

### **The PPF's position**

62. Finally, I have also considered the position adopted by the PPF, including the witness statement submitted by Mr Weir, the expert report from Mr Scott and the skeleton argument and oral submissions from PPF's counsel. The PPF confirmed its strong support for the Decision, pointing out that, if there was any realistic chance for Biwater's survival, the PPF had just as much to gain as the Scheme members. However, it was apparent that this was an illusory prospect in this case and that, given Biwater's financial circumstances, its mere survival would not, in any event, improve matters by way of meaningful deficit repair.
63. The PPF endorsed the reasoning of Henderson J in *ITS* (at [107]–[120]) that the prospective availability of PPF compensation was not a relevant consideration for trustees when deciding whether to exercise a power capable of detrimentally affecting the asset coverage for benefits under the Scheme. The PPF also submitted that this reasoning was equally applicable to this case because a decision not to issue a winding-up petition would (absent further contributions) result in a decline in asset coverage for benefits under the Scheme (in particular those not yet in payment). As the Trustee has itself already concluded, it could not seek to take advantage of the existence of the PPF to justify acting in a way which would otherwise be improper, in this case it was said, by failing to take steps to prevent the Scheme deficit (and drift) increasing further.

### **Discussion**

64. Before setting out my conclusions, I make two preliminary points. First, it is important to acknowledge that the Trustee recognises the momentous consequence of deciding to place Biwater in a liquidation process, with a view to the Scheme being wound up. The Trustee is well aware of the likely effect of the Decision, including Biwater staff losing their jobs and the financial impact on Scheme members.



However, the Trustee finds itself in an unenviable – in fact, invidious – position, created by the deteriorating financial position of the Scheme, itself the product of Biwater’s financial problems, leaving it with no alternative in its view than to take steps to protect the interests of the members of the Scheme as a whole.

65. Second, it is not necessary for me to make general observations as to the relevance or otherwise of the PPF. The Trustee has already concluded that, whether or not regard is had to the PPF, the Decision was the same. I simply add that I agree that the Trustee could not have sought in this case to take advantage of the existence of the PPF to justify failing to take steps to prevent the Scheme deficit (and drift) increasing further. In my view, that would be a situation of the sort in which Henderson J would rightly expect the court here to take a “*similar approach*” to that he took in ITS.
66. Turning to the Decision itself, I am satisfied that the Trustee has considered and taken into account:-
- (a) The financial circumstances facing the Scheme, including the debts owed to it and the likelihood of Biwater making good on any or all of them;
  - (b) The consequences for members of the continuation of the Scheme without its winding up *viz* Scheme Drift and the continued erosion of the Scheme’s assets, including by administration expenses;
  - (c) The Trustee’s duties to call in and protect the Scheme’s assets; and
  - (d) The Trustee’s duties to protect the interests of the beneficiaries, the Scheme members.
67. I should also add that the Trustee has sought to keep updated the information it has obtained concerning, for example, progress on contributions, the potential sale of Binc, the potential sale of the Group, Scheme funding and Biwater’s other creditors and statutory accounts. The most recent information has been shared with the court and other parties, including that gleaned shortly before the hearing.
68. The Trustee has also taken appropriate advice in relation to these matters by obtaining:-
- (a) from August 2020 onwards advice from EY as to estimated insolvency outcomes, the latest update having been obtained shortly before, and considered at, the meeting on 19 January 2023;
  - (b) actuarial advice from the Scheme Actuary on Scheme Drift as well as PPF benefit levels and PPF Drift; and
  - (c) legal advice from the solicitors firm, CMS Cameron McKenna Nabarro Olswang LLP, and Fenner Moeran KC.
69. Given these matters, I am satisfied that the test for approval indicated by Public Trustee v Cooper (and the other authorities cited to me) has been met. Specifically:-
- (a) The Trustee has in fact formed the opinion that it should act in the way for which it seeks approval;

- (b) The opinion of the Trustee was one which a reasonable trustee, correctly directed, could properly have arrived at, including taking into account relevant, and ignoring irrelevant, considerations; and
- (c) The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.

70. I am reinforced in my view by the steps taken by the Rep Ben in her representation of members and beneficiaries of the Scheme and her conclusion that there are no credible grounds to oppose the Decision and by the analysis provided by PPF.
71. For these reasons, I approved the Decision.