Neutral Citation Number: [2019] EWHC 485 (Ch)

Claim No: HC-2015-003797

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
BUSINESS LIST (ChD)
Pensions

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 11 March 2019

Before :

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

KEYMED (MEDICAL & INDUSTRIAL EQUIPMENT) LIMITED

Claimant

- and -

(1) PAUL ARTHUR HILLMAN
(2) MICHAEL CHRISTOPHER WOODFORD

Defendants

- and -

OLYMPUS CORPORATION

Third Party

- -

- -

Mr John Wardell, QC, **Mr Andrew Mold** and **Mr Tim Matthewson** (instructed by **Fieldfisher LLP**) for the **Claimant** and **Third Party**
Mr Simon Salzedo, QC, **Mr Paul Newman, QC** and **Mr Stephen Midwinter, QC** (instructed by **Simmons & Simmons LLP**) for the **Defendants**

Hearing dates: 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28 March, 3 and 4 May 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The Claimant: KeyMed

1. The Claimant, KeyMed (Medical & Industrial Equipment) Limited ("KeyMed"[1]) is a company that specializes in the development, manufacture and sale of medical equipment. KeyMed was founded by Mr Albert Reddihough.[2] Since 1989, it has been part of the Olympus group. Specifically:

    (1) KeyMed's sole shareholder is "Olympus KeyMed Group Limited", itself a subsidiary of "Olympus Europa Holding SE". The ultimate controlling party of Olympus Europa Holding SE is the Third Party to these proceedings, "Olympus Corporation".

    (2) KeyMed itself had various subsidiaries, notably "KeyMed (Ireland) Limited" and "Olympus Industrial America Inc".

    I shall, for convenience, and where it is unnecessary to differentiate between companies in the Olympus group, simply refer to "Olympus" meaning either the group or a specific company within the group. Where it is necessary to distinguish specific entities, I refer to them by their proper corporate name.

(2) The Defendants: Mr Hillman and Mr Woodford

(a) The Defendants generally

2. The First Defendant, Mr Paul Hillman, joined KeyMed in 1978, from Coopers & Lybrand, as an accountant. The Second Defendant, Mr Michael Woodford, joined KeyMed in 1981 as a 20-year old salesman. Both rose through KeyMed and within Olympus more generally. Mr Woodford, although he joined KeyMed later than Mr Hillman and was the younger man, rose faster. In time, Mr Hillman became Mr Woodford's right-hand man and they worked together closely for most of their careers.

(b) Mr Woodford

3. Mr Woodford, having joined KeyMed in 1981 as a 20-year old salesman, was rapidly promoted. He became KeyMed's Managing Director a mere 9 years later (on 30 June

[1] Annex 1 contains a list of the various terms and abbreviations used in this Judgment, identifying the paragraph in the Judgment in which the term or abbreviation is first used.

[2] Annex 2 contains a list of the natural persons referred to in this Judgment, identifying the paragraph in the Judgment in which that person is first referenced.

1991) at the age of 29.[3] Mr Woodford was effectively Mr Reddihough's successor on his (Mr Reddihough's) retirement.[4] Thereafter, he rose within Olympus as follows:

(1) In 2005, retaining his position as Managing Director of KeyMed, he was also appointed to various other positions (the details do not matter) within Olympus.

(2) In 2008, he was promoted to become the Executive Managing Director and Chairman of Olympus Europa Holding GmbH. He ceased to be Managing Director of KeyMed at that point but remained a Director on KeyMed's board.

(3) In April 2011, he was again promoted to be President of Olympus Corporation. In October 2011 he was also made the Chief Executive Officer of Olympus Corporation. He held these positions only briefly. Mr Woodford was dismissed by Olympus in acrimonious and controversial circumstances on 14 October 2011. He ceased to be a Director of KeyMed on 12 December 2011.

4. It will, in due course, be necessary to consider the circumstances of Mr Woodford's departure from Olympus. For present purposes, it is only necessary to note that, on 19 December 2011, Mr Woodford began proceedings against Olympus in this jurisdiction (specifically the East London Employment Tribunal), claiming unfair dismissal on the grounds of racial discrimination and whistleblowing.

5. Mr Woodford's claim against Olympus was compromised by a settlement agreement dated 29 May 2012 (the "Compromise Agreement"). The Compromise Agreement was approved by the Olympus board in a meeting on 8 June 2012.

6. The recitals to the Compromise Agreement say as follows:

"Whereas:

(1) Mr Woodford was employed within [Olympus] from 16 March 1981 and by the [Olympus Corporation] from 1 April 2011 to 14 October 2011, when his employment was terminated. (The dates upon which his engagements started are: as president on 1 April 2011; as director on 29 June 2011; as representative director on 29 June 2011; and as chief executive officer on 1 October 2011, and his engagement ended: as president, representative director and chief executive officer on 14 October 2011; and as director on 1 December 2011).

(2) Following termination of his employment, Mr Woodford commenced proceedings in the Employment Tribunal under Case Number 3200002/2012 on 3 January 2012 for automatic unfair dismissal under the Employment Rights Act 1996 ("ERA") section 103A; unfair dismissal under ERA section 94; unfair detriment on the grounds of making one or more protected disclosures, contrary to ERA section 47B; unlawful discrimination and harassment due to his race, contrary to the Equality Act 2010 sections 39 and 40 (the "ET Proceedings").

(3) In order to achieve certainty and finality, it is the intention of Mr Woodford and [Olympus Corporation] in entering into this Agreement that it shall operate to terminate

[3] He was Chief Executive Officer between 1 December 1990 and 30 June 1991.

[4] Woodford 1/§6.2. This is a reference to Mr Woodford's first witness statement. Witness statements and expert reports will generally be referred to in this way. The witnesses who gave evidence to the court are described in Section E(3) below (in the case of factual witnesses) and in Section E(5) below (in the case of expert witnesses).

the relationship between them and, in consideration of the settlement set out herein, provide a full and absolute and irrevocable release by Mr Woodford and [Olympus] of all current and future Claims, in whatever jurisdiction, against (respectively) (i) [Olympus Corporation] or any Associated Company and (ii) Mr Woodford, whether or not the party in question has knowledge of them, whether or not they are in the contemplation of the parties and whether or not they exist in fact or law, as at the date of this Agreement.

(4) Further, [Olympus Corporation's] executive directors have undertaken to recommend to [Olympus Corporation's] full Board of Directors that the terms of this Agreement be approved at the Board meeting scheduled to take place on 8 June 2012 and the Agreement is entered into by Mr Woodford on this basis."

7. Mr Woodford's counterparty to the Compromise Agreement was Olympus Corporation. Clause 4 of the Compromise Agreement contains various definitions. The following are material:

"Associated Company"	A company which is a subsidiary or a holding company of [Olympus Corporation], as the case may be, or a subsidiary of that holding company, "subsidiary" and "holding company" in this definition having the same meaning as in section 1159 of the Companies Act 2006.
"Claims"	Any claim, potential claim, counterclaim, potential counterclaim, right of set-off or potential right of set-off, right of contribution, right to indemnity, potential right to indemnity, cause of action, potential cause of action or right or interest of any kind or nature whatsoever, whether in existence now or coming into existence at some time in the future, whether known or unknown, suspected or unsuspected, however and whenever arising, in whatever capacity or jurisdiction, whether or not within the contemplation of the parties at the time of this Agreement, including claims which as a matter of law did not at the date of this Agreement exist and the existence of which cannot currently be foreseen and any claims or rights of action arising from a subsequent change or clarification of the law.
"Effective Date"	The date on which the Board of Olympus Corporation notified Mr Woodford's legal advisers that the terms of the Compromise Agreement had been approved by the Board.
"Service Agreement"	The agreement between Olympus Corporation and Mr Woodford dated 5 March 2011.

8. Clause 11 of the Compromise Agreement provided (so far as material):

"**11. Full and Final Settlement**

11.1 The Parties hereby agree that the above terms are in the full and final settlement of (and hereby agree irrevocably to release) all and any Claims (in any jurisdiction) that (i) Mr Woodford may have now or in the future against [Olympus Corporation] or any Associated Company or any current or former director, officer, employee or shareholder thereof; and (ii) that [Olympus Corporation] or any Associated Company may have now or in the future against Mr Woodford, relating to or arising directly or indirectly out of or in connection with Mr Woodford's employment prior to the Termination Date, his engagement by [Olympus Corporation] under the Service Agreement, the termination of his employment with [Olympus Corporation] and/or of his Service Agreement, his treatment by [Olympus Corporation] following such termination, personal injury relating to matters arising from the termination of his employment, statements made by [Olympus Corporation] or Mr Woodford about each other and his shareholding in [Olympus Corporation] in the period up to and including the Effective Date including but not

limited to any claim relating to or arising out of Mr Woodford's directorships or other offices with [Olympus Corporation] or any Associated Companies or their termination (the "Specified Matters"). In particular, but without limitation, this full and final settlement (and release) extends (i) to the claims made in the ET Proceedings, (ii) to any Claim which Mr Woodford may otherwise have for breach or enforcement of his Service Agreement or other contract (including wrongful dismissal), unfair dismissal, any claim for unlawful discrimination (whether direct or indirect), harassment or victimisation on the grounds of race, any breach of (a) the Working Time Regulations 1998, and (b) section 47B or Part IVA of the Employment Rights Act 1996 (relating to detrimental treatment all dismissal relating to a protected disclosure) and any claim for defamation or (iii) to any Claim which [Olympus Corporation] or any Associated Company may otherwise have arising out of or in connection with the Protected Disclosures (the "Specified Claims").

11.2 Mr Woodford covenants in favour of [Olympus Corporation] and its Associated Companies that he will not commence and/or pursue any proceedings in any jurisdiction in respect of the Specified Matters, including without limitation the Specified Claims and [Olympus Corporation] covenants (on behalf of itself and the Associated Companies) in favour of Mr Woodford that neither [Olympus Corporation] nor its Associated Companies will commence and/or pursue any proceedings in any jurisdiction in respect of the Specified Matters, including without limitation the Specified Claims."

(c) Mr Hillman

9. Mr Hillman was, for most of his career at KeyMed and in the Olympus Group, Mr Woodford's right-hand man. Mr Hillman was, after his appointment as an accountant at KeyMed, in succession Chief Accountant (in 1979), Financial Controller (in 1981) and (in 1985) Finance Director, a board-level position. In 2008, he was appointed Managing Director of KeyMed in succession to Mr Woodford and a Director of Olympus Europa Holding GmbH.

10. He held a variety of other positions in parallel with these. It is unnecessary to set these out, but it is important to note their existence, since they would undoubtedly have made demands on Mr Hillman's time.

11. Mr Hillman's employment with Olympus ceased, as did his directorships, in November 2011. His departure from Olympus was directly related to Mr Woodford's.

(3) KeyMed's allegations against Mr Woodford and Mr Hillman and the structure of this Judgment

12. KeyMed alleges that Mr Woodford and Mr Hillman, in individual breach of their duties to KeyMed, and in conspiracy with one another against KeyMed, caused their interests to be preferred over those of KeyMed. This occurred in relation to Mr Woodford's and Mr Hillman's benefits under their pension with KeyMed. It should be stressed at the outset that – taken at its highest – KeyMed's case against Mr Woodford and Mr Hillman involves extremely serious allegations of dishonesty, although – against Mr Hillman at least – there are alternative contentions which do not involve establishing dishonesty.[5]

[5] There is a dispute as to whether these alternative allegations can be maintained against Mr Hillman or whether the case against him is confined to one of dishonesty. This question is considered in Section C(2)*(a)(ii)* and determined in Section C(3) below.

13. The nature of the allegations advanced by KeyMed cannot be understood without a clear appreciation of the pensions background. In particular, it is necessary to understand the specific occupational benefits provided by KeyMed to its employees over time, as well as the effects of significant changes to the law governing pensions introduced by the Pensions Act 2004 and the Finance Act 2004. This essential pensions background is described in Section B below.

14. In light of this pensions background, Section C below then describes:

(1) *The allegations made by KeyMed against Mr Woodford and Mr Hillman.* These are considered in Section C(1) below. The allegations focus on four particular decisions or series of decisions made by the Defendants, said to have been made pursuant to a conspiracy between them and in (dishonest) breach of fiduciary and other duties. These decisions relate to:

(a) The establishment of a separate and new pension scheme, independent of the pre-existing KeyMed pension scheme. For the purposes of this Judgment, I shall refer to the original scheme as the "Staff Scheme" and to the new scheme as the "Executive Scheme".

(b) The alleged removal or disapplication of an Inland Revenue limit from the Executive Scheme, which effectively removed a potential fetter on increases to the Defendants' pensions when once in payment.

(c) The amendment of the spousal benefit provisions in the Executive Scheme to the benefit of Mr Hillman.

(d) The allegedly unduly conservative funding and investment strategies adopted in relation to the Executive Scheme and the Staff Scheme.

(2) *The causes of action alleged by KeyMed against the Defendants.* These are considered in Section C(2) below. KeyMed relies upon a number of duties that, so it says, were breached by the Defendants, and it is necessary to set these out in some detail.

(3) *KeyMed's alternative case against Mr Hillman.* Section C(3) below considers and decides whether it remains open to KeyMed to allege as against Mr Hillman (as an alternative case) non-dishonest breaches of duty, or whether the case against Mr Hillman is – like that against Mr Woodford – confined to allegations of dishonest breach of duty.

(4) *Specific aspects of the breaches of duty alleged.* Section C(4) below considers a number of specific aspects arising out of the breaches of duty alleged by KeyMed. In particular, it considers conflicts of interest and duty as they arise in pension schemes, the test for dishonesty and the inter-relationship between the duty to declare an interest on the part of a director and the other duties imposed on a director. All of these aspects were recurring points in the trial before me.

15. Section D below describes briefly and in fairly broad-brush terms the context within which Mr Woodford and Mr Hillman operated. This involves describing KeyMed's position within Olympus, the way in which KeyMed took decisions, the administration

within KeyMed and the operation of the Staff Scheme through its trustees. I recognise that such a broad-brush consideration can be no substitute for a detailed examination of how the decisions criticised by KeyMed were made. That examination takes place later on in the Judgment: but nevertheless, some degree of context is necessary, and this is provided in Section D.

16. Section E considers the evidence before the court, and the evidential difficulties that this case, in particular, presented. Thus:

(1) Section E considers the difficulties thrown up by the documentary evidence and by the fact that the parties elected not to call certain witnesses whose evidence might have been extremely significant.

(2) Although Section E describes the factual witnesses who were called, it does not seek to make any evaluation of the credibility of the various factual witnesses who did give evidence. My conclusions regarding credibility and honesty are, instead, reserved to Section I below, where I consider – in light of all the evidence and in light of the conclusions I have reached on the multiple disputed issues of fact arising between the parties – whether KeyMed has made out the claims that it advances against the Defendants.

(3) Section E also describes the expert evidence adduced before me.

17. Section F below considers the circumstances in which the Executive Scheme came to be established and the removal or disapplication of the Inland Revenue limit from the Executive Scheme, which served to remove a potential fetter on increases to the Defendants' pensions when once in payment. Section F thus considers, together, two of the decisions criticised by KeyMed and forming central parts of KeyMed's claim against the Defendants.[6] It is necessary to consider these two aspects of KeyMed's claim together because they are so factually intertwined. Section F resolves a number of the factual disputes between the parties as to how the Executive Scheme came to be established and how the relevant Inland Revenue limit came to be disapplied. However, Section F does not seek to reach any conclusions regarding the causes of action alleged against the Defendants. My conclusions regarding the causes of action alleged against the Defendants are considered, as I have noted, in Section I below.

18. Section G below considers the factual issues surrounding the amendment of the spousal benefit provisions in the Executive Scheme, which were to the benefit of Mr Hillman.[7] As with Section F, Section G limits itself to determining the factual controversies between the parties, without reaching any conclusion regarding the causes of action alleged against the Defendants.

19. Section H below considers the factual issues regarding the allegedly unduly conservative funding and investment strategies adopted in relation to the Executive Scheme and the Staff Scheme. As with the previous sections dealing with the facts, Section H is confined to determining the factual controversies in this area.

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[6] That is, those issues identified in paragraphs 14(1)(a) and (b) above.

[7] That is, the issue identified in paragraph 14(1)(c) above.

20. Section I below considers, in light of the facts as I have found them, whether KeyMed's allegations against the Defendants succeed or not. This Section considers not only the specific facts as found in earlier section of the judgment, but also wider questions of the credibility of the witnesses before me.

21. Section J below considers quantum arising and other matters.

22. Section K below describes how I dispose of these proceedings.

B. THE PENSIONS BACKGROUND

(1) The Staff Scheme

(a) Constitution

23. At all material times, KeyMed operated an occupational pension scheme – the Staff Scheme, as I have described it.[8] The Staff Scheme was established with effect from 6 April 1975 by an Interim Trust Deed dated 3 April 1975.[9] The Staff Scheme was, initially, a defined benefit occupational pension scheme.[10] As will be described, in due course the Scheme ceased to be a defined benefit scheme and became (at least for entrants after that time) a defined contribution scheme. On 12 August 1992, a new trust deed and rules (the "1992 Trust Deed" and "1992 Rules") were made and adopted.[11] On 28 July 2000, a Definitive Trust Deed and Rules were adopted, which I shall refer to as the "2000 Staff Scheme Definitive Deed and Rules".[12]

(b) The trustees

24. Between 2004 and 2011 – which is the critical period for the purpose of these proceedings – the trustees of the Staff Scheme were as follows. Between 2004 and 2007, there were three trustees:

    (1) Mr Craig;

    (2) Mr Hillman; and

    (3) Mr Woodford.

25. Mr Hillman became a trustee in 1985, and Mr Woodford in 1989. Mr Craig had been a trustee from the Staff Scheme's inception in 1975.[13] Mr Woodford described Mr Craig's role as follows:[14]

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[8] See paragraph 14(1)(a) above.

[9] Hillman 1/§5.1. The Interim Trust Deed does not appear to have survived, but is referred to in the 28 July 2000 Definitive Deed.

[10] Hillman 1/§5.1.

[11] These documents do not appear to have survived, but are referred to in the 28 July 2000 Definitive Deed.

[12] Hillman 1/§5.1.

[13] Mr Hillman says from "around" 1975: Hillman 1/§5.5(C).

[14] Woodford 1/§8.4.

"John "Hugh" Craig was a fellow trustee of the Main Scheme, and had a long history with KeyMed, having been a close adviser and confidant to Albert Reddihough. Hugh was not a KeyMed employee and had been an independent trustee representative of the members of the scheme for many years. He was a partner with Bates, Wells & Braithwaite (a London law firm that acted as advisers to KeyMed), and for a time was its senior partner. Hugh gave ongoing legal advice to the company on a range of matters and also acted as KeyMed's Company Secretary until 31 March 2009. Over time, Hugh became a close and trusted personal friend."

26. Until 2011, these three remained trustees. Mr Hillman and Mr Woodford ceased to be trustees of the Staff Scheme when their relationship with Olympus ended in November 2011. Specifically, they ceased to be trustees on 1 November 2011. Mr Craig remained a trustee until 24 March 2015.

27. Mr John Rowe and Mr Richard Reynolds joined as additional trustees of the Staff Scheme in 2008.[15]

28. Mr Rowe will feature in the events described in this Judgment. Mr Rowe joined KeyMed in 1984 as an assistant accountant. Over the years he assumed ever more senior roles within KeyMed and Olympus. In March 2003, he was promoted to the position of UK Group Financial Controller, reporting directly to Mr Hillman as Finance Director. In April 2008, his title was changed to that of Director of Finance and HR, which title reflected the work he was then undertaking. He was not then a Director of KeyMed: he only became a director on 1 April 2016. By January 2009, his role had expanded to include responsibility for internal audit and compliance for Olympus Europa Holding GmbH. On 1 April 2009, he became KeyMed's company secretary, succeeding Mr Craig, who had previously held that role. He is now Regional Compliance Officer within Olympus.

29. Mr Rowe was also (from 28 July 2000) the "Administrator" of the Staff Scheme,[16] appointed pursuant to section 590(2)(c) of the Income and Corporation Taxes Act 1988 as then in force.[17] Section 590 sets out various conditions for the approval of retirement benefit schemes under the Act, one of which was that "there is a person resident in the United Kingdom who will be responsible for the discharge of all duties imposed on the administrator of the scheme under this Chapter". These duties essentially related to the discharge of certain function relating to the taxation of schemes.

30. Mr Reynolds does not – from the material before me – appear to feature very much in the events described in this Judgment. He was, from 2011, the Vice-President of KeyMed's Surgical Business and (presumably) was employed by KeyMed in some lesser capacity or capacities previously. His appointment as trustee of the Staff Scheme ceased at the same time as that of Mr Hillman and Mr Woodford (i.e., on 1 November 2011).

31. Mr Nick Williams was appointed a trustee of the Staff Scheme from 1 November 2011: he remains a trustee as at the date of this Judgment. Mr Williams will also feature in the events described in this Judgment. He became a Director of KeyMed on 12 April 2004, and ceased to be a Director on 31 March 2016, when he retired. He was the Managing

[15] See Rowe 1/§14. By a deed of appointment dated 25 July 2008, Mr Rowe and Mr Reynolds were appointed as member-nominated trustees of the Staff Scheme for the purposes of section 241 of the Pensions Act 2004.

[16] The provisions pursuant to which Mr Rowe was made Administrator are described in paragraph 37(3) below.

[17] The version of the 1988 Act that I am referring to was in force from 10 May 2000 to 4 December 2005.

Director of KeyMed from April 2011 until his retirement in March 2016. He remains a consultant on the Supervisory Board of "Olympus Europa SE & Co KG", another company in the Olympus group.

(c) The Staff Scheme actuaries

32. The Staff Scheme actuaries throughout the period 2004 to 2011 were Mercer Limited ("Mercer").[18] The principal person within Mercer with responsibility for the Staff Scheme was Mr Mel Wright, although of course others within Mercer acted in relation to the Staff Scheme. These others were (listed in alphabetical order according to surname):

(1) Mr James Brundrett.

(2) Mr Glenn Claisse.

(3) Mr Philip Clark.

(4) Mr Rakesh Girdharlal.

(5) Mr Raj Goswami.

(6) Mr James Maggs.

(7) Ms Deborah McWhinney.

(8) Ms Kendra Osenton.

(9) Ms Teresa Pound.

(10) Ms Karen Read.

(11) Mr Tim Robson.

(12) Mr Akash Rooprai.

(13) Ms Sonja Spinner.

I am not suggesting that all of these persons were involved over the entire period of the history recounted in this Judgment. They were not. Nor were they involved full-time in KeyMed's pension arrangements. They worked as and when necessary. However, it is worth noting that Mercer's involvement was an extensive one, as evidenced by the number of individuals involved from time-to-time and by the number of documents written by Mercer to KeyMed over time.

33. As will be described in greater detail, it is inherent in the nature of pension schemes that there is an enormous potential for conflict between the interests of the members of the scheme and the interests of the employer sponsoring the scheme. Naturally, the advice that an actuary might give could – entirely properly – be influenced by the party the

[18] Woodford 1/§8.5.

actuary was advising, particularly if the aims or objectives of members and employer diverged.

34. Save for very isolated instances occurring when the Executive Scheme was being established, Mercer were the only actuary involved in advising in relation to the Staff and Executive Schemes. In this capacity, Mercer advised individual members of the Staff Scheme, the trustees of the Staff Scheme and KeyMed itself. Mercer's approach appears to have been that it was appropriate for Mercer to act in this way, with Mercer keeping an eye on potential conflicts of interest. If such a conflict arose, Mr Wright said that Mercer would give notice of this, and from then on would only act for the trustees of the Staff Scheme.[19] The only occasion, in the history related in this Judgment, when Mercer considered there actually to be a conflict was in assessing the transfer value of the rights of Mr Woodford and Mr Hillman from the Staff Scheme to the Executive Scheme. Otherwise, Mercer were content to advise persons with very different interests in relation to the Staff Scheme.[20]

(d) The 2000 Staff Scheme Definitive Deed and Rules

(i) The deed

35. The 2000 Staff Scheme Definitive Deed and Rules comprise a trust deed (the "Trust Deed") and rules of the scheme (the "Scheme Rules"). For reference purposes only, it is helpful to differentiate between the two. The 2000 Staff Scheme Definitive Deed and Rules replaced the 1992 Trust Deed and 1992 Rules with effect from 6 April 1997.[21] The deed was executed by Mr Woodford and Mr Craig on behalf of KeyMed and was signed as a deed by Mr Craig, Mr Hillman and Mr Woodford as trustees. The signatures were witnessed by Mr Wright.

36. The 2000 Staff Scheme Definitive Deed and Rules contain detailed and lengthy provisions regarding the operation of the scheme. They will be referred to as and when necessary in this Judgment.

(ii) Relevant parties

37. Under the 2000 Staff Scheme Definitive Deed and Rules:

(1) The principal employer of the Staff Scheme was KeyMed.[22] When, in 2005, Mr Woodford came to be promoted with responsibilities beyond those of KeyMed Managing Director,[23] his contract of employment came to be with Olympus KeyMed Group Limited. At this point in time, Olympus KeyMed Group Limited should have been, but was not, admitted to participate in the Staff Scheme as a participating company pursuant to Rule 59 of the Scheme Rules. That position was

[19] Day 8/pp.73-74 (cross-examination of Mr Hillman).

[20] This was a point made by Mr Woodford: Day 9/pp.62-63 (cross-examination of Mr Woodford).

[21] Clause 1.1 of the Trust Deed. Clause 1.2 of the Trust Deed provided that the 2000 Staff Scheme Definitive Deed and Rules would not invalidate decisions taken or powers exercised under the pre-existing deed or rules.

[22] See the definition of the parties to the deed.

[23] See paragraph 3(1) above.

regularized at the time the Executive Scheme was created.[24] The point is only of significance because one of the costs of transferring Mr Woodford's interests from the Staff Scheme to the Executive Scheme entailed a payment by Olympus KeyMed Group Limited that would not otherwise have been due.

(2) The trustees of the Staff Scheme were Mr Craig, Mr Hillman and Mr Woodford.[25]

(3) The "present Administrator" was Mr Knight.[26] Mr Barry Knight was KeyMed's Finance Director from 13 November 1989 to 27 July 1999. The Trust Deed revoked the appointment of Mr Knight and appointed Mr Rowe in his place.[27]

(iii) Differences between Members in the Staff Scheme

The distinctions drawn

38. A "Member" of the Staff Scheme is, essentially, "any Employee who joins the Scheme in accordance with the" rules of the Scheme.[28] However, not all Members had equal rights under the Staff Scheme. The Staff Scheme drew various distinctions between Members. Thus, distinctions were drawn between:

(1) "Category 1 Members" and "Category 2 Members".

(2) Pre-21 July 1997 joiners and post-21 July 1997 joiners for the purpose of calculating increases for pensions in payment.

(3) Members who had to contribute to the Staff Scheme and those who did not.

These distinctions are considered in turn below.

Category 1 and Category 2 Members

39. Category 1 Members and Category 2 Members were defined as follows:

(1) A Category 1 Member "means a Member who is an Executive Member".[29]

(2) A Category 2 Member "means a Member who is not an Executive Member".[30]

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[24] By a Deed of Participation dated 13 November 2007, Olympus KeyMed Group Limited participated in the Executive Scheme. Recitals D and E of this Deed noted that Olympus KeyMed Group Limited had not been admitted to participate in the Staff Scheme, and the parties to the Deed agreed to procure that Olympus KeyMed Group Limited would be treated as if it had become a participating employer at the appropriate time.

[25] See the definition of the parties to the Trust Deed.

[26] See Recital B of the Trust Deed.

[27] See clause 6.1 of the Trust Deed.

[28] See the definition of "Member" in Rule 1.1 of the Scheme Rules.

[29] See the definition in Rule 1.1 of the Scheme Rules.

[30] See the definition in Rule 1.1 of the Scheme Rules.

40. The benefits of Category 1 and Category 2 Members were different: Category 1 Members had more generous lump sum death benefits[31] and a more generous "Scale Pension", which was defined as follows:[32]

"**SCALE PENSION** means,

A in the case of a Category 1 Member, 1/45th of his Final Pensionable Earnings for each complete year of his Pensionable Service with a proportionate amount for each additional complete month of an incomplete year of Pensionable Service (subject to a maximum of 30 years for the calculation of pension under Rule 15);

B in the case of a Category 2 Member, 1/60th of his Final Pensionable Earnings for each complete year of his Pensionable Service with a proportionate amount for each additional complete month of an incomplete year of Pensionable Service (subject to a maximum of 40 years for the calculation of pension under Rule 15)."

Essentially, the rights of Category 1 Members accrued more rapidly than those of Category 2 Members.

41. The Category 1 Members tended to be referred to as "Executive Members" of the Staff Scheme and the Category 2 Members as the "Staff Members". The different sections of the Staff Scheme tended to be referred to as the "Executive Section" and the "Staff Section". This terminology is helpful, provided that there is no confusion between the Executive Section of the Staff Scheme and the subsequently established Executive Scheme.

42. Although the precise dates do not matter, the Executive Section was established in 1994 and closed to new membership in 1997.[33]

Pre-21 July 1997 joiners and post-21 July 1997 joiners for the purpose of calculating rates of increase for pensions in payment

43. Rule 28.1 of the Scheme Rules provided:[34]

"This Rule 28 sets out how pensions in payment under the Scheme are to be increased.

28.1.1 Each person in respect of Members joining Pensionable Service prior to 21 July 1997 will increase in payment each year by 5% per annum compound (provided Approval[35] would not be prejudiced).

28.1.2 Each pension in respect of Members joining Pensionable Service on or after 21 July 1997 shall have compound increases applied each year by the lesser of:

[31] See the definition of "Scale Lump Sum Death Benefit" in Rule 1.1 of the Scheme Rules.

[32] See the definition in Rule 1.1 of the Scheme Rules.

[33] Day 5/p.160 (cross-examination of Mr Hillman).

[34] Emphasis supplied.

[35] Approval means approval by the Inland Revenue under the relevant legislation: see the definition in Rule 1.1 of the Scheme Rules.

28.1.1.1 the proportion by which the Index[36] as at the preceding 30 September in the previous calendar year has increased during the previous 12 months ending on that date; and

28.1.1.2 5%."

44. Rule 28 thus created a significant difference in terms of the entitlement of Members whose pensions are in payment. Those joining before 21 July 1997 obtain a significant benefit over those joining later.

45. A further difference was introduced in April 2005. The minutes of the trustees' meeting taking place on 4 April 2005 states at Item 10:

"10. **PENSION INCREASES**

10.1 Currently legislation requires increases on pension built up after 5 April 1997 in the Scheme, to be at least in line with increases in the Retail Prices Index ("RPI"), with a 5% annual maximum (5% "LPI"[37]). The Scheme currently grants 5% LPI for members who join the Scheme after July 1997 whilst members who joined before July 1997 still accrue pensions subject to fixed 5% per annum increases. The Pensions Act proposes that pensions built up after 5 April 2005 will only have to be increased in line with RPI with a 2.5% maximum (2.5% LPI).

The Company, in consultation with the Trustees, have proposed that the change to LPI maximums be changed with effect from 5 April 2005, i.e.:

10.1.1 Members' benefits built up in the Scheme from 5 April 2005 will increase by the rate of inflation up to a maximum of 2.5% each year. Pension for members in the [Executive Section] will continue to accrue with increases at 5% p.a.

10.1.2 Any pension built up before 6 April 2005 will increase at the following rates:

If the member joined the Scheme before 21 July 1997 – at 5% p.a.

If the member joined the Scheme on or after 21 July 1997 – at the rate of price inflation, up to a maximum of 5% p.a.

10.1.3 [Mr Rowe] to arrange for letters to be sent out to all Defined Benefits (DB) Scheme members."

46. Thus, going forward from 6 April 2005, whilst the Executive Members' pensions in payment would continue to increase at 5% *per annum*, other Members (not being Executive Members, and including pre-July 1997 joiners) would find their pensions in payment reduced. The letter that was sent to Members for and on behalf of KeyMed and the trustees of the Staff Scheme explained these changes very clearly. This is a case which shows, very starkly, the sorts of conflict of interest that can arise in pension schemes. In this case:

[36] "Index" means "the Index of Retail Prices (All Items)": see the definition in Rule 1.1 of the Scheme Rules.

[37] LPI stands for "Limited Price Indexation".

(1) There was a conflict between KeyMed (as the principal employer) and the Members. KeyMed – whilst no doubt conscious of the importance of pension benefits as a means of attracting and retaining employees – would also have in mind the costs to it of the Staff Scheme. In this case, Mercer assessed the future savings as amounting to £30,000 per annum as regards post-21 July 1997 joiners and £540,000 per annum as regards pre-21 July 1997 joiners.[38]

(2) There was also a conflict between Members. Self-evidently, the Members had, in this case, different rights. Changing them would have different consequences for different Members. The rights of the pre-21 July 1997 joiners were significantly more valuable than those of the post-21 July 1997 joiners. The effect of this change was that, going forward, only the Executive Members retained these benefits. For the future, therefore, the distinction between pre-21 July 1997 joiners and post-21 July 1997 joiners ceased to matter. What matters was the distinction between Category 1 (or Executive) Members and Category 2 (or non-Executive) Members.

Mercer were alive to these issues. In its letter of 31 March 2005, Mercer noted that a change to the Scheme Rules would be required and that the trustees of the Staff Scheme "may seek legal advice before agreeing to the change". In the event, the change was effected as I have described.

The obligation to contribute

47. Under Rule 12.1 of the Scheme Rules, Non-executive Members were obliged to contribute to the Scheme at the rate of 3% of "Contribution Earnings". Executive Members – amongst others – were not required to contribute.

48. By an Amended Deed made on 30 June 2003, this rule was varied so as to increase the contribution obligation of Non-executive Members to 4% of "Contribution Earnings". The position of Executive Members remained unchanged.

(2) A move away from Defined Benefits to Defined Contributions

49. Members joining from 23 April 2002 did not receive defined benefits under the Staff Scheme, but only a promise that defined contributions would be made to the Staff Scheme, the benefits accruing to Members being calculated by reference to the increase over time of these contributions. Members who had joined before this date would continue to receive defined benefits, calculated by reference to the individual's final salary. The defined benefits part of the Staff Scheme closed with effect from 30 September 2002.[39]

50. I shall refer to the right of a Member to a defined benefit under the Staff Scheme has having a "Defined Benefit" and being a "Defined Benefit Member"; I shall refer to the

[38] See Mercer's letter dated 31 March 2005 to Mr Rowe. Inevitably, a considerable amount of judgment would have to go into these figures, because they would turn on an assessment of what future rates of inflation would be. Because the later joiners received the lesser of RPI or 5%, self-evidently if inflation remained low, they would not lose very much by this change. By contrast, the earlier joiners – guaranteed year-on-year increases of 5% however low inflation – stood to lose a great deal. That difference, of course, is reflected in Mercer's figures.

[39] This information derives from Item 53 of the minutes of a KeyMed board meeting that took place on 14 and 20 December 2005.

right of a Member to the benefits of a defined contribution to the Staff Scheme as having a "Defined Contribution" and being a "Defined Contribution Member".

51. It was uncontroversial that a move away from Defined Benefits and to Defined Contributions would involve less risk on KeyMed. This point was put to Mr Hillman in cross-examination:[40]

Q (Mr Wardell, QC)	Now, by April 2003,[41] a decision had been made to set up a [Defined Contribution] Scheme, hadn't there?
A (Mr Hillman)	I believe so.
Q (Mr Wardell, QC)	And that was no doubt in the interests of saving costs?
A (Mr Hillman)	It was to take the risk out for the company in – essentially.
Q (Mr Wardell, QC)	Well, [Defined Contribution] Scheme, the risk is all on members of the Scheme?
A (Mr Hillman)	Correct.

In short, the change was to the advantage of KeyMed and to the disadvantage of Members joining after 23 April 2002.

(3) The Revenue Limits

52. Under the pensions regime as it existed at this time, there were certain limits as to how contributions to a pension scheme could be made and how benefits could be drawn. These are the so-called Inland Revenue limits, to which I have already made reference.[42] I shall refer to these limits as the "Revenue Limits", which is the term used by the 2000 Staff Scheme Definitive Deed and Rules.[43]

53. The Scheme Rules defined Revenue Limits as "the Inland Revenue's limits on maximum benefits and contributions set out in the Schedule to the Rules or any other Inland Revenue limits in force from time to time".[44] Clause 3 of the Trust Deed provided that:

> "The Revenue Limits shall override any other provisions to the contrary contained in the [2000 Staff Scheme Definitive Deed and Rules]. No contributions payable by any Member to the Scheme, nor any benefit payable to or in respect of any Member under the Scheme, may exceed the appropriate maximum limit set out in the Revenue Limits."

54. There were various different Revenue Limits, operating in different ways and affecting differently defined persons in the pensions regime as it existed up to 6 April 2006. It is unnecessary to set them all out here, but it is important to appreciate that there were multiple Revenue Limits of different scope and application. For this reason, the label is potentially quite a dangerous one. It is quite possible for someone not versed in pensions law either to consider that one particular Revenue Limit – e.g. the Earnings Cap – itself

[40] Day 5/p.173 (cross-examination of Mr Hillman).

[41] The date put does not match with the dates in the board minute referenced above, but I do not consider that anything turns on this.

[42] See paragraph 17 above.

[43] See Clause 3 of the Trust Deed.

[44] See the definition in Rule 1.1 of the Scheme Rules.

constituted all the Revenue Limits or (conversely) for the term Revenue Limits to be used to refer to only one of several Revenue Limits (to e.g. the Earnings Cap only). The potential for misunderstanding is, thus, rife.

55. One particular Revenue Limit does have to be explored in a little greater detail, for it is one of the central points in this dispute. This was the "pensions in payment" limit, which I shall refer to as the "PIP Limit". The PIP Limit provided that, once a maximum level of pension had been reached, pensions in payment could only be increased by (the greater of) 3% each year or the increase in RPI.[45] This, naturally, would have the effect – given the primacy accorded to the Revenue Limits by the 2000 Staff Scheme Definitive Deed and Rules[46] – of curtailing the rights of Members under Rule 28, where the PIP Limit was breached.

56. The effect of this restriction was described by Mr Wright in a letter dated 18 September 2002 to Mr Rowe. Given the significance of the PIP Limit in this case, and the importance of KeyMed's and the Defendants' understanding, it is appropriate to set out the entirety of this letter:

"Dear John

I said I would drop you a line to describe how pension increases are limited by Inland Revenue requirements.

Inland Revenue Rules permit pensions in payment to be paid at the level of the maximum pension at retirement (allowing for any cash taken), increased by the greater of 3% or the increase to the Retail Prices Index (RPI) (calculated on a year by year basis). As members who joined the Scheme after July 1997 receive increases at the lesser of 5% or RPI, this limitation will not apply. However, for members who joined before July 1997 who receive 5% per annum fixed increases, the limitation is relevant given the current low inflationary environment.

When a pre-July 1997 member retires, his retirement pension in all future years will need to be compared with the Inland Revenue maximum pension for each year and, if it is greater, must be limited to the maximum.

The following, for a pre-July 1997 member retiring at Normal Retirement Date (NRD), may make the position more clear:

1. The Scheme pension at the point of retirement is calculated using the Scheme's normal pension formula, i.e.

$$\text{Scheme Pension} = \frac{\text{Years of Pensionable Salary (max 40)}}{60} \times \text{Final Pensionable Salary}$$

Where Final Pensionable Salary is broadly a three year average of gross earnings at retirement. For Directors, the formula is more generous and is designed to give a full two-thirds pension after 30 years' service.

2. The Inland Revenue maximum pension at NRD is calculated as:

[45] See the description in Hillman 1/§10.4.

[46] See paragraph 53 above.

$$\text{IR Maximum Pension} = \frac{\text{Years of Company Service (max 20)}}{30} \times \text{Final Remuneration}$$

For pre 17 March 1987 entrants, the effective accrual rate is better than 30ths (members can accrue a full two-third pension after 10 years' service).

Final Remuneration is defined by Inland Revenue Rules and will generally produce a higher calculation than Final Pensionable Salary as it can include some earnings not included in Final Pensionable Salary.

You can therefore see that there is scope for the Inland Revenue maximum pension at retirement to be significantly bigger than the Scheme pension. However, for a member retiring after 40 years' service (or for a Director) with no benefits in kind, the two calculations will be similar.

3. Once the member has retired, the member's Scheme pension in subsequent years has to be compared to the Inland Revenue maximum at that point.

The Scheme pension in any future year is simply the pension in year 1 increased at 5% each year. However, this has to be compared with the Inland Revenue maximum pension in year 1 increased each year by the greater of 3% or the increase to the RPI for the year in question.

For example, if the Scheme pension at retirement is £10,000, and the Inland Revenue maximum pension is £15,000 and RPI increases at 1%, 2%, 6%, 5%, and 2% for the first 5 years then, at the end of year 5:

Scheme Pension = 10,000 x 1.05 x 1.05 x 1.05 x 1.05 x 1.05 = 12,763

IR Maximum Pension = 15,000 x 1.03 x 1.03 x 1.06 x 1.05 x 1.03 = 18,243

Therefore the Scheme pension is well within the Inland Revenue maximum.

If, however, the Inland Revenue Maximum Pension was £10,400 at retirement, then after 5 years:

IR Maximum Pension = 10,400 x 1.03 x 1.03 x 1.06 x 1.05 x 1.03 = 12,649

In this situation, the Scheme pension would need to be restricted to the maximum of £12,649 per annum for year 6.

The comparison would continue along similar lines for future years.

These annual checks are normally carried out by the organization paying the pension. In KeyMed's case this will be the insurance company paying the pension. The insurance company is given details of the Inland Revenue maximum pension at the time of retirement for this check to be carried out.

I hope this explains the situation clearly, but please let me know if anything is not clear."

Precisely what Mr Rowe, Mr Hillman and Mr Woodford understood about the PIP Limit is a matter for later consideration. For the present, I am simply using Mercer's letter as a convenient description of the PIP Limit and its potential effect on certain Members of the Staff Scheme.

(4) The Pensions Act 2004, the Finance Act 2004 and A-Day

(a) Reform of the pensions regime

57. From 2002, a number of consultations and reviews were undertaken of the UK pensions regime, which resulted in the introduction of the Finance Act 2004 and the Pensions Act 2004. These Acts introduced a number of changes to the UK's pensions regime.

(b) The Pensions Act 2004

58. The Pensions Act 2004 made the following changes (amongst others):

(1) *The Pensions Regulator.* The Act introduced the Pensions Regulator as the regulator of occupational pensions in the UK. The Pensions Regulator replaced the Occupational Pensions Regulatory Authority.

(2) *The Pension Protection Fund.* The Act introduced the "Board of the Pension Protection Fund", which is responsible for holding, managing and applying the "Pension Protection Fund". The Pension Protection Fund was designed to give members of defined benefit schemes a measure of protection where the employer of the scheme was insolvent. Very broadly, in such a case:

(a) The assets of the insolvent fund would be distributed in the following priority:

(i) To fund 100% of accrued pension rights of members reaching Normal Retirement Age;

(ii) To fund 90% of accrued pension for other members, up to a cap of £25,000 *per annum*.

(b) If and to the extent that there was a shortfall, the Pension Protection Fund would make up that shortfall.

(c) These rules would override any competing rules as to distribution of a scheme's assets and – self-evidently – would serve to prejudice any members of an insolvent fund having accrued rights exceeding £25,000 *per annum*. Such members would:

(i) Not be compensated beyond £25,000 by the Pension Protection Fund; and

(ii) Have their rights to the insolvent fund's assets ranked below the statutory prioritization described above.

The potential operation and effect of these rules on the Staff Scheme plays a significant role in these proceedings. I shall refer to this effect generally as the "PPF Risk".

(3) *Funding of schemes.* The Act replaced the pre-existing statutory minimum funding requirement for defined benefit schemes with a scheme specific funding standard,

requiring each scheme to have sufficient and appropriate assets to cover its liabilities or to have a recovery plan in place to achieve that within a stated period.

(4) *Adjustment to the indexation provisions of pensions.* The pre-existing regime contained an indexation requirement based on RPI capped at 5%. The Act reduced this to 2.5% in relation to defined benefits accrued after 6 April 2005.[47]

(c) The Finance Act 2004

59. The Finance Act 2004 made the following changes (amongst others):

(1) *Removal of the Revenue Limits.* These were removed.

(2) *Introduction of the Lifetime Allowance.* The Act introduced a single lifetime limit on the amount of pensions saving that attracted favourable tax treatment (the "Lifetime Allowance"). This was initially set at £1.5 million for the 2006/2007 tax year. Saving in excess of the Lifetime Allowance attracted a (disadvantageous) tax charge.

(3) *Introduction of an annual limit on inflows of value.* The Act introduced an annual limit (the "Annual Allowance") on the inflows of value to an individual's pension (both in the form of contributions and accrual) that attract favourable tax treatment. This was initially set at £215,000 for the 2006/2007 tax year.

(d) A-Day

60. Although various of the provisions of the Pensions Act 2004 came into force before 6 April 2006, 6 April 2006 was the date on which the Finance Act 2004 came into force. The collective effect of the Pensions Act 2004 and Finance Act 2004 meant that schemes like the Staff Scheme faced a very different regulatory environment from 6 April 2006, which date came to be known as "A-Day".

61. Obviously, schemes needed to plan for A-Day well before 6 April 2006. In the case of the Staff Scheme, planning began in 2004. One of the critical questions that needed addressing by schemes – like the Staff Scheme – affected by the A-Day changes was whether to keep in place, on (as it were) a voluntary basis, the Revenue Limits.

(5) Relevant Members

62. Mr Woodford joined the Staff Scheme in 1986 and became a Category 1 (or Executive) Member in 1994. Mr Hillman joined the Staff Scheme in 1979 and, like Mr Woodford, became a Category 1 (or Executive) Member in 1994.[48]

63. At all material times, there was only one other Category 1 (or Executive) Member still in accrual: this was another director of KeyMed, a Mr Peter Virgo. Mr Virgo was a Director

[47] It was this legislative change that caused the change to the Staff Scheme described in paragraph 45 above.

[48] Hillman 1/§5.2.

of KeyMed from 30 March 1988 until 23 April 2006, when he retired from KeyMed's employment.

64. Mr Williams was a Member of the Staff Scheme. He was a Defined Benefit Member, but he was not a Category 1 (or Executive) Member. He was, however, a pre-21 July 1997 Member,[49] and so would particularly have been affected by the change to future pensions in payment described above.[50]

65. The same was true of Mr (Richard) Luke Calcraft. Like Mr Williams, Mr Calcraft joined the board of KeyMed as a director on 12 April 2004, departing from the board on 31 March 2013. Mr Calcraft died on 1 August 2014. Like Mr Williams, Mr Calcraft was a Defined Benefit Member, but not a Category 1 (or Executive) Member. I did not hear unequivocal evidence that Mr Calcraft was a pre-21 July 1997 Member, but Mr Williams obviously thought that he was, and I proceed on that basis. On that basis, he, too, would particularly have been affected by the change to future pensions in payment described above.[51]

(6) The establishment of the Executive Scheme

66. In December 2005, it was decided to place the Category 1 or Executive Members of the Staff Scheme – who (as has been described) comprised only three people – into a separate scheme, namely the Executive Scheme.

67. The establishment of an Executive Scheme was considered at board meetings taking place on 14 and 20 December 2005. The minutes of these meetings record at "Item 53" as follows:

> "53.1.2 **Defined Benefit ("DB") Scheme**
>
> Under this arrangement, the benefits are defined, based on the individual's final salary. This scheme was closed to new entrants with effect from 30 September 2002 and has proven successful in the retention of experienced, long-serving employees, offering benefits comparable to similar [Defined Benefit] schemes in other companies.
>
> Consistent with the objective of simplification, it was agreed that the current "Executive Member" category, which is now closed to new members, would be discontinued within the current [Defined Benefit] scheme and the benefits and related liabilities for the remaining current active executive members transferred to a separate [Defined Benefit] company pension scheme.
>
> In this context, [Mr Woodford], [Mr Virgo] and [Mr Hillman] declared their interests in this change as the only remaining active [Executive Members] of the existing [Defined Benefit] scheme and Members of the proposed new [Executive Scheme]. The objective is for this new scheme to be wound up on cessation of the liabilities of these three remaining executive members.
>
> As the assets of this new scheme will effectively be held in trust for only three Members and their dependents, it was agreed that these Members, rather than [KeyMed], should

[49] Williams 1/§11. Mr Williams had been a Member since 1987.

[50] See paragraphs 55 to 56 above.

[51] See paragraphs 55 to 56 above.

have the sole power of appointing the trustees of the new scheme. In effecting this transfer, the fundamental principle of "no gain, no loss" to either the individual or the company would apply.

Importantly, there would be no enhancement of benefits for the existing active executive members compared with those currently derived from membership of the existing Executive Member category.

There would also be no enhancement in funding and both the new scheme and the existing [Defined Benefits] scheme would be funded to exactly the same actuarial funding level to ensure equality of treatment."

68. The decision to establish the Executive Scheme having been made at this meeting, the process by way of which the Executive Scheme came to be established was a protracted one. It was not until late in 2006 that Mercer were engaged to prepare an interim deed for the Executive Scheme (the "Executive Scheme Interim Deed"). It was over a year later, in November 2007, that the documents establishing the Executive Scheme were executed.

69. Clearly, the decision to establish the Executive Scheme and its eventual establishment will need to be considered in detail. For the present, I simply note the decision to establish the Executive Scheme at a KeyMed board meeting and the fact of the Executive Scheme's establishment nearly two years later on.

(7) KeyMed's treatment of the Revenue Limits after A-Day

70. As has been described, the retention of the formerly compulsory Revenue Limits became optional after A-Day. In April 2006, the Members of the Staff Scheme were informed of the A-Day changes. In a letter sent on behalf of both KeyMed and the trustees of the Staff Scheme, Members were told that the decision had been made to retain these limits in order to control costs and to help protect the long-term funding and security of the Staff Scheme. This included the retention of the PIP Limit.[52]

71. So far as the yet-to-be finalized Executive Scheme was concerned, Mercer were instructed to ensure that the PIP Limit was removed. Mercer's letter of engagement for preparing the interim deed for the Executive Scheme stated:

"The deed, without covering the benefit details, refers to the fact that benefits will be as set out in explanatory literature which will need to be attached to the deed. We understand the directors get fixed 5% pension increases. The existing KeyMed Rules would restrict these increases by the old IR limits rules which permit 3% RPI on the IR max pension. As requested, the literature will not refer to these old limits i.e. under the New Scheme, members will get fixed 5% increases (probably higher increases than previously would have been the case). This is a decision KeyMed have made as compensation for the fact that a 55% tax charge will be payable."

72. When finalized, the Executive Scheme – as this letter suggests – did not include the PIP Limit. This omission of the PIP Limit forms one major part of KeyMed's claim against the Defendants. It is to these claims that I now turn.

[52] This letter is considered further below, and the relevant parts are set out in paragraph 269 below.

C. KEYMED'S ALLEGATIONS AND THE RELEVANT LAW

(1) KeyMed's case

73. KeyMed's claim against Mr Hillman and Mr Woodford arises out of the creation and subsequent management and administration of the Executive Scheme. KeyMed's Re-Amended Particulars of Claim (the "Particulars of Claim") provide as follows:

> "7. KeyMed's claim relates to the setting up and administration of the Executive Scheme by the Defendants, where in breach of duty they preferred their own interests to those of KeyMed. Such breaches of duty were pursuant to an agreement or common understanding between the Defendants initially reached in or around 2005 (and continued thereafter) that they would, with an intent to injure and/or cause loss to KeyMed by those unlawful means, maximise the amount and security of their pension benefits (the "Conspiracy").
>
> 8. To that end, they obtained board approval for the establishment of the Executive Scheme at a KeyMed Group directors' meeting held on 14 and 20 December 2005 by concealing from the other board members the true purpose for establishing the Executive Scheme, which was to increase the security of their pension benefits. The minutes, which were drafted in advance of the meeting, simply recorded that the Executive Scheme was being set up for the purpose of "simplification".
>
> 9. The Defendants then caused the benefit structure of the Executive Scheme to be directly contrary to the basis agreed by KeyMed. At the directors' meeting of 14 and 20 December 2005, it was agreed that in establishing the Executive Scheme, there would be no enhancement of benefits for the Executive Members. Notwithstanding this:
>
> 9.1 the Executive Scheme (unlike the Staff Scheme) did not apply Inland Revenue limits to increases to pensions in payment; and
>
> 9.2 the Executive Scheme was amended by deed on 1 September 2009 to remove the provision (which applies to the Staff Scheme) for a reduction to a spouse's pension where the spouse is more than 10 years younger than the member.
>
> 10. The Defendants caused the Executive Scheme to adopt extremely conservative funding and investment strategies, which increased the security of the Defendants' pension benefits and led to the adoption of a basis for Mr. Woodford's transfer value that produced a larger transfer value than would otherwise have been the case. They also caused the Staff Scheme to adopt extremely conservative funding and investment strategies and it is to be inferred that the purpose of this was to conceal from the other directors of KeyMed that the Executive Scheme was being run by the Defendants in their own interests."

74. Thus, KeyMed's case begins with the establishment of the Executive Scheme as the first step in the Defendants' Conspiracy. There were then three further, more specific, elements in the operation of that Scheme which (so KeyMed contends) illegally benefited the Defendants:

(1) *The removal or disapplication of the PIP Limit.* As to this allegation:

(a) The allegation is closely tied to the establishment of the Executive Scheme itself, in that the limit was removed at the same time as the Scheme was

(formally) established. The disapplication of the PIP Limit thus cannot be considered apart from the establishment of the Executive Scheme itself.

(b) However, it is important to keep in mind that the establishment of the Executive Scheme itself is relied upon by KeyMed in support of its case. Paragraphs 24-33 plead KeyMed's case in relation to the establishment of the Executive Scheme, concluding (in paragraph 33) with the following averment:

> "…by December 2005 at the latest, the Defendants had agreed or reached a common understanding that they would, with an intention to injure and/or cause loss to KeyMed, by establishing and administering the Executive Scheme in breach of their duties, seek to maximise the value and security of their own pension benefits."

Amongst other things, KeyMed alleges an unlawful act conspiracy (i.e., the Conspiracy, as pleaded and as set out in paragraph 74 above), founded upon the Defendants' alleged breaches of duty, that the Defendants would, with an intent to injure and/or cause harm to KeyMed by those unlawful means, maximise the amount and security of their pension benefits.[53]

(c) KeyMed's case regarding the removal of the PIP Limit is separately pleaded at paragraphs 37-48 of the Particulars of Claim.

(2) *The amendment to the spousal benefit provisions in the Executive Scheme.* The relevant parts of the Particulars of Claim plead as follows:

"60. Clause 22.3 of the [2000 Staff Scheme Definitive Deed and Rules] provides that:

> "If a Member's Spouse is more than ten years younger than the Member, any pension payable to the Spouse shall be reduced. The reduction shall be determined by the Trustees on a basis which is certified by the Actuary as reasonable but shall not be applied to an extent which would cause the reduction, or the effect of it, to be more than a fixed rate of 2.5% simple for each complete year (without proportion for incomplete years) of age difference in excess of ten years by which the Member's age exceeds that of the Spouse."

61. In accordance with the "no gain, no loss" principle agreed at the KeyMed Group directors' meeting of 14 and 20 December 2005, this spousal reduction was reflected in the Interim Deed for the Executive Scheme.

62. However, by an Amending Deed dated 1 September 2009, the spousal reduction was removed from the Executive Scheme. This was contrary to the express restriction on the authority to establish the Executive Scheme specified at the meeting of 14 and 20 December 2005 in that it constituted an enhancement of benefits for members of the Executive Scheme.

63. The circumstances of the removal of the spousal reduction for the Executive Scheme were that:

[53] Paragraph 7 of the Particulars of Claim.

63.1 Mr Hillman was by the date of the Amending Deed intending to marry or alternatively had already married a spouse more than ten years younger than him and he therefore knew that the removal of the spousal reduction would be to his benefit;

63.2 Mr Hillman arranged the preparation and signing of the Amending Deed by corresponding with Mr Wright of Mercer about it and then sending the signed Amending Deed to him by email on 1 September 2009;

63.3 As pleaded at paragraph 48.1 above, the Defendants knew that there was no board authorization for the enhancement of their benefits under the Executive Scheme.

64. The inference should be drawn that Mr Hillman, with Mr Woodford's agreement, procured the amendment to be made for his own personal benefit at the expense of KeyMed and that the amendment was made in furtherance of the Defendants' Conspiracy."

(3) *The conservative funding and investment strategies.* Claims are advanced both in relation to the funding and the investment policy pursued by both the Staff and the Executive Schemes:

(a) It will be necessary to explain in some detail how both the Staff Scheme and the Executive Scheme were funded, as well as the various metrics that exist to assess how well or how badly any given scheme is funded. In essence, the case against the Defendants is that the Schemes (both the Staff and the Executive Scheme) were funded on such an extremely conservative basis as to amount to a breach of duty on the part of the Defendants and/or to constitute a part of the Conspiracy.[54]

(b) Equally, it is contended that the investment policy was excessively reliant on gilts and deprived both Schemes of the benefit of the greater investment return provided by equities.[55]

(2) Causes of action relied upon by KeyMed

(a) Overview

(i) The pleaded causes of action

75. The causes of action advanced by KeyMed against the Defendants essentially fall into three classes:

(1) *Breach of duties owed by Mr Woodford and Mr Hillman in their capacity as directors of KeyMed.* It is alleged that the Defendants breached various duties

[54] See paragraphs 71-76 of the Particulars of Claim.

[55] See paragraphs 77-83 of the Particulars of Claim.

arising out of their position as directors of KeyMed.[56] Specifically, the duties alleged and alleged to have been breached are:

(a) Breaches of directors' duties.[57]

(b) Breach of the duty that the Defendants should disclose to KeyMed their own or each other's misconduct as directors.[58]

(c) Breach of an implied term in Mr Hillman's contract of employment to act in KeyMed's best interests.[59]

(2) *Breach of duties owed by Mr Woodford and Mr Hillman in their capacity as trustees of the Staff and Executive Schemes.* It is alleged that the Defendants owed a duty – in their capacity as trustees of the Staff Scheme and of the Executive Scheme – to KeyMed in relation to the setting of investment and funding strategies for the Schemes, which duty they breached.[60]

(3) *Conspiracy between Mr Woodford and Mr Hillman.* The Conspiracy plea is at paragraph 7 of the Particulars of Claim and is set out at paragraph 74 above. The nature of the conspiracy alleged is an unlawful means conspiracy.[61] The unlawful means alleged are the breaches of the various duties described in the previous two sub-paragraphs.[62]

76. Paragraphs 94 to 98 of the Particulars of Claim elucidate the breaches of duty alleged by KeyMed and expand the plea on Conspiracy:

"**Breaches of duty by the Defendants**

94. The Defendants breached their duties as directors of KeyMed (specifically their duties under sections 171-175 of the [Companies Act 2006] and/or their fiduciary or equitable obligations and/or their tortious duty of care) and/or Mr Hillman breached his contractual duty to act in the best interests of KeyMed in that the Defendants:

PARTICULARS

a. concealed from the other KeyMed directors the true purpose of establishing the Executive Scheme, which was to maximise the security and value of the Defendant's pension benefits;

b. established the Executive Scheme for the purpose of maximizing the security and value of their own pension benefits which was not in the interests of KeyMed

[56] See paragraphs 13-16 of the Particulars of Claim (which plead the duties) and paragraph 94 of the Particulars of Claim (which pleads the breach of those duties).

[57] Specifically, paragraphs 13 and 14 of the Particulars of Claim plead the relevant duties.

[58] Paragraph 15 of the Particulars of Claim pleads this duty.

[59] Paragraph 16 of the Particulars of Claim pleads this duty.

[60] See paragraph 17 of the Particulars of Claim (which pleads the duty) and paragraph 95 of the Particulars of Claim (which pleads the breach of that duty).

[61] Paragraph 96 of the Particulars of Claim.

[62] Paragraph 97 of the Particulars of Claim.

c. proceeded with the establishment of the Executive Scheme notwithstanding that the transfer of assets to it from the Staff Scheme reduced the security of benefits for members of the Staff Scheme and caused KeyMed to incur the cost of restoring the level of security for members of the Staff Scheme;

d. caused the Interim Deed to place the most significant powers in the hands of the Defendants (as the only trustees);

e. caused the Interim Deed to remove the Inland Revenue limits on increases to pensions in payment contrary to the express board resolution that the Executive Scheme would not enhance benefits for its members;

f. removed the spousal reduction from the Executive Scheme contrary to the express board resolution that the Executive Scheme would not enhance benefits for its members;

g. caused the Executive Scheme to adopt very conservative funding and investment strategies in order to improve the security of their own pension benefits and to increase the transfer value of Mr Woodford's accrued pension benefits;

h. caused the Staff Scheme to adopt very conservative funding and investment strategies in order to conceal the improper funding and investment strategies being pursued in the Executive Scheme;

i. misleadingly informed other KeyMed directors that Mercer had advised that the level of special contributions that were paid to the Schemes should be made;

j. failed to have regard to the risk of a surplus in the Executive Scheme which may be irrecoverable by KeyMed;

k. did not provide the other directors of KeyMed with sufficient understanding of the pension Schemes for them to be able to make properly informed decisions on behalf of KeyMed;

l. did not sufficiently disclose to the other KeyMed directors that they were the only members of the Executive Scheme;

1a. concealed the value, security and cost of their pension benefits;

m. failed to manage their conflict of interest and duties and preferred their own interest;

ma. did not ensure that KeyMed received sufficient actuarial advice about the funding implications of establishing the Executive Scheme and investment advice about the implications of investment policies of the Schemes;

n. did not ensure that KeyMed received separate legal advice in relation to the Executive Scheme, despite recommendations to obtain the same from Mr Craig and/or Mercer; and

o. failed to disclose their own (or each other's) misconduct to KeyMed at any time.

95. Further, the Defendants acted in breach of their fiduciary and equitable duties and/or their tortious duty of care as trustees of the Schemes which they owed to KeyMed by adopting investment and funding approaches which were excessively conservative and

which would cause KeyMed to have to make greater contributions than would otherwise be the case. No reasonable trustee in the circumstances would have adopted such an approach. By adopting the approach which they did, the Defendants failed to take proper account of KeyMed's interests and exercised their powers in bad faith in furtherance of the Conspiracy and for the improper purpose of improving their own personal position rather than for reasonably providing for the benefits under the Scheme.

Unlawful means conspiracy

96. As pleaded above, in or around 2005, the Defendants reached an agreement or understanding that they would, with an intention to injure and/or cause loss to KeyMed, use unlawful means in order to maximise the security and value of their own pension benefits.

97. The breaches pleaded in paragraphs 94 and 95 above constitute the unlawful means by which the Defendants implemented their Conspiracy.

98. The overt acts carried out by the Defendants pursuant to the Conspiracy are pleaded at paragraphs 24 to 93 above."

77. Mr Hillman and Mr Woodford denied all of the breaches of duty alleged by KeyMed. Although there was, to a large extent, agreement about the nature of the duties owed by the Defendants, there were some points of controversy. It is in any event necessary to consider precisely what the duties alleged by KeyMed entail. These duties are considered in Sections C(3)*(b)* below (directors' duties), C(3)*(c)* below (tortious and contractual duties), C(3)*(d)* below (duty to report misconduct) and C(3)*(e)* below (duties owed as trustees of the Schemes to KeyMed).

78. Conspiracy is considered in Section C(3)*(f)* below.

(ii) KeyMed's ability to maintain an alternative case against Mr Hillman

79. In its written closing submissions, KeyMed stated:[63]

"KeyMed's primary case is that the Defendants breached their duties fraudulently (i.e., knowing their actions were contrary to the interests of KeyMed or being recklessly indifferent to whether their actions were in KeyMed's best interests or not) and further that it should be inferred from the entire course of conduct that the Defendants acted pursuant to an unlawful means conspiracy. However, even if the Court is not satisfied that fraud is proved, then KeyMed relies upon the non-fraudulent breaches of duty committed by the Defendants. The non-fraudulent breach claim can only succeed against Mr Hillman, as Mr Woodford will be protected by his Compromise Agreement unless fraud is proven."

80. In the course of opening submissions, it was contended by the Defendants that the alternative, non-fraudulent breach, claim was no longer open to KeyMed and that KeyMed's case was limited to one of dishonesty, even as against Mr Hillman. That was disputed by KeyMed.

81. The parties agreed that this dispute as to the scope of KeyMed's case could have no bearing on the evidence and agreed (assuming KeyMed maintained its alternative case,

[63] At paragraph 3.

which it did) that this pleading issue should be determined at the conclusion of the case, in this Judgment. I consider and determine the point in Section C(3) below.

(b) Directors' duties

(i) Introduction

82. Until 1 October 2007 in respect of all rules save those relating to conflicts of interest, and until 1 October 2008 in respect of these rules, the common law described the duties owed by a director to his company. These duties were then codified in the Companies Act 2006. Generally speaking, this statutory formulation of the duties of a director can be taken as a codification of the pre-existing common law. Indeed, these sections are to be interpreted in light of the common law. Thus, section 170 of the 2006 Act provides as follows:

> "**170 Scope and nature of general duties**
>
> (1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.
>
> …
>
> (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

83. Save to the extent that the 2006 Act introduced differences in approach, the 2006 Act is a good articulation of the common law rules. Because the events considered in this Judgment straddle the 1 October 2007 and 1 October 2008 dates, it is necessary to be alive to the potential for differences between the common law and the statutory regimes.

(ii) Duty to act within powers

84. Section 171 of the Companies Act 2006 provides:

> "**171 Duty to act within powers**
>
> A director of a company must–
>
> (a) act in accordance with the company's constitution, and
>
> (b) only exercise powers for the purposes for which they are conferred."

85. A company's constitution is non-exhaustively defined in sections 17 and 257 of the 2006 Act. The Particulars of Claim do not actually plead with any specificity or at all any act by the Defendants *ultra vires* KeyMed or in breach of its constitution pursuant to section 171(a). Rather, the thrust of the particulars of breach set out in paragraph 94 of the Particulars of Claim (reproduced in paragraph 75 above) appears to be asserting a breach of the duty to exercise powers for the purpose(s) for which they were conferred. What is alleged is a breach of the duty contained in section 171(b). In essence, it is said by

KeyMed that the Defendants abused their powers by favouring themselves at the cost of KeyMed in the four respects described in paragraph 73 above.

86. The "proper purpose rule", as I shall refer to it, "imposes a duty upon the directors to exercise each of the powers conferred on them only for their proper purpose. The rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason".[64]

87. In *Howard Smith Ltd v. Ampol Petroleum Ltd*,[65] Lord Wilberforce (giving the opinion of the Privy Council) described the approach in proper purpose cases as follows:

> "In their Lordships' opinion, it is necessary to start with a consideration of the power whose exercise is in question, in this case the power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the *bona fide* opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

88. Thus, the court must:

(1) First, construe the power and determine the limits within which it must be exercised. This is a question of law.[66]

(2) Secondly, consider the purpose actuating the exercise of the power and determine whether it falls within the proper limits of the power. As Lord Sumption noted in *Eclairs Group Ltd v. JKX Oil & Gas plc*,[67] this involves a subjective element:

> "The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in *Hindle v. John Cotton Ltd*, (1919) 56 Sc LR 625, 630, "the state of mind of those who acted, and the motive on which they acted, are all important".

89. It is clear, therefore, that the duty under section 171 of the Companies Act 2006 is closely linked with the duty next considered in this Judgment, namely the duty under section 172 to act in good faith in the interests of the company. To this extent, therefore, breaches of section 171(b) and 172 both involve subjective states of mind. However, it is dangerous to press these similarities too far. Section 172 is essentially concerned with a lack of *bona*

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[64] Mortimore, *Company Directors*, 3rd ed. (2017) ("*Mortimore*") at [11.35]. See also *Eclairs Group Ltd v. JKX Oil & Gas plc* [2015] UKSC 71 at [15] (*per* Lord Sumption).

[65] [1974] 1 AC 821 at 835.

[66] See Lord Wilberforce in *Howard Smith*, above; *Mortimore* at [11.36].

[67] [2015] UKSC 71 at [15].

fides, i.e. dishonesty. By contrast, section 171(b) is concerned with the director's subjective purpose in exercising a power – which need not necessarily be dishonest. It is perfectly possible for a power to be exercised for an improper purpose, even though the director *bona fide* believes the power is being exercised in the company's best interests.

90. According to the Particulars of Claim, the improper purpose held by the Defendants was to maximise the amount and security of their pension benefits to the detriment of KeyMed or contrary to the best interests of KeyMed.[68] The alleged improper purpose – which is not clearly set out in the Particulars of Claim – must go beyond simply a purpose of maximising the amount and security of the pension benefits of the Defendants. That – provided it does not harm the company – might be said to be a key duty and proper purpose of the directors. I find that the improper purpose alleged against the Defendants is the purpose pleaded in relation to the Conspiracy in paragraph 7 of the Particulars of Claim. No other alleged improper purpose emerges from the pleading. Equally, questions of dominant or subsidiary purposes do not appear to arise in the present case: the allegation, as it seems to me, is that furthering the Conspiracy was either the only or else the dominant purpose as to why the Defendants exercised their powers in relation to the Executive Scheme in the way that they are said to have done.

(iii) Duty to promote the success of the company

91. Section 172 of the Companies Act 2006 provides:

> "**172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to–
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

[68] See, for instance, the articulation of the Conspiracy in paragraph 7 of the Particulars of Claim.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

92. The purposes that a director must have in mind – specified in sections 172(1)(a) to (f) – were somewhat controversial in the enactment of this section,[69] but the essence of the director's duty is subjectively to "exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company".[70] In *Re Regentcrest plc v. Cohen*,[71] Jonathan Parker J (referring to the common law, now translated into the 2006 Act) said this:

"The duty imposed on directors to act *bona fide* in the interests of the company is a subjective one. The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

93. Of course, determining what is in the company's best interests involves questions of judgment:[72]

"…corporate management often requires the exercise of judgement on which opinions may legitimately differ, and requires some give and take. A board of directors may reach a decision as to the commercial wisdom of a particular transaction by a majority. A minority director is not thereby in breach of his duty, or obliged to resign and to refuse to be party to the implementation of the decision. Part of his duty as a director acting in the interests of the company is to listen to the views of his fellow directors and to take account of them. He may legitimately defer to those views where he is persuaded that his fellow directors' views are advanced in which they perceive to be the best interests of the company, even if he is not himself persuaded. A director is not in breach of his core duty to act in what he considers in good faith to be the interests of a company merely because if left to himself he would do things differently."

94. Thus, the essence of the duty is not to act deliberately – knowingly – contrary to the interests of the company. Hence the duty is often referred to as the "duty of good faith". By way of example, a mere disagreement – at board level – where one side is outvoted by the other, but not persuaded, is very far from a breach of this duty.

95. The allegations in the case of the Defendants in regard to this duty are serious. Again, they draw their essential colour from the Conspiracy that is alleged: the absence of good faith that is alleged arises out of an agreement or common understanding between the

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[69] See, for example, *Mortimore* at [12.02].

[70] *Re Smith & Fawcett Ltd*, [1942] 1 Ch 304 at 306 (*per* Lord Greene MR). Of course, there are some extreme cases, where the courts go beyond a mere appraisal of the director's subjective state of mind. In *Hutton v. West Cork Railway Co*, (1883) LR 23 Ch D 654 at 671, Bowen LJ noted: "*Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational." It is unnecessary to consider this type of breach of duty, as this was not alleged by KeyMed.

[71] [2001] 2 BCLC 80 at 120.

[72] *Madoff Securities International Ltd v. Raven*, [2013] EWHC 3147 (Comm) at [191], [193] (*per* Popplewell J).

Defendants, initially reached in or around 2005 (and continued thereafter), that they would, with an intent to injure and/or cause loss to KeyMed by those unlawful means, maximise the amount and security of their pension benefits.

(iv) Duty to exercise independent judgment

96. Section 173 of the Companies Act 2006 provides:

> "**173 Duty to exercise independent judgment**
>
> (1) A director of a company must exercise independent judgment.
>
> (2) This duty is not infringed by his acting–
>
> (a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or
>
> (b) in a way authorised by the company's constitution."

97. Section 173 codifies the pre-existing common law.[73] *Mortimore* says this of the section 173 duty:

> "13.05 In the conduct of the management of its affairs, a company is entitled to the benefit of collective decision-making by its directors acting as a board, save to the extent that duties have been duly delegated. Breach of the duty to exercise independent judgment compromises collective decision-making. This duty under section 173(1) may be regarded as supporting the core duty to promote the success of the company, as stated in section 172, which used to be described as the duty to act in good faith in the interests of the company.
>
> 13.06 Breach of the duty under section 173(1) invariably arises when a director's relationship with a third party puts him in a position of conflict of interest. It is, therefore, closely linked with the director's duty under the 2006 Act, section 175(1) to avoid conflicts of interest and the duty under section 177 to declare his interest in proposed transactions or arrangements with the company. For example, where a director makes a prior agreement to vote in a third party's interests on a particular transaction, thereby leaving himself no independent discretion as to how to act, he will be in breach of section 173(1)."

98. In this case, it is contended that the Defendants failed to act independently in that – without properly informing the board – they subordinated KeyMed's interests to their own, and so failed to exercise independent judgment. Again, the essence of this breach arises out of the Conspiracy that has been alleged against the Defendants, whereby they are said deliberately to have prioritised their interests over those of KeyMed, without informing the board of KeyMed that this was their approach.

99. The duty to exercise independent judgment clearly bears some relationship with the duty to avoid conflicts of interest. This, latter, duty is further considered in Section C(2)*(b)(vi)* below.

[73] *Mortimore* at [13.02].

(v) Duty to exercise reasonable care, skill and diligence

100. Section 174 of the Companies Act 2006 provides:

> "**174 Duty to exercise reasonable care, skill and diligence**
>
> (1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with–
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has."

101. At common law, this duty was not a fiduciary duty, but a duty of care in tort. This is recognised by section 178(2) of the 2006 Act.[74] Hence the reference to a duty of care in tort in paragraphs 13 and 94 of the Particulars of Claim.

102. This duty stands as a counter-point to the duty of good faith. Essentially, as was noted by Romer J in *Re City Equitable Fire Insurance Co Ltd*,[75] "so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense". The distinction between "negligence" and "gross negligence" has not been maintained,[76] but the fact is that dishonesty or deliberate breach of duty is the purview of section 172 (and perhaps section 171), in that they are based upon a degree of subjectivity in the director's own mind. The duty in section 174, by contrast, is an objective one, based upon a duty to exercise care, skill and diligence.

103. Of course, that does not mean that a breach of a director's section 171 or 172 duties is not also a breach of his or her section 174 duty. That is the question that arises out of the pleadings here: is the reference to section 174 purely a duplicative one, repeating allegations which – if made good – arise out of the Conspiracy or does KeyMed allege a distinct breach by the Defendants of the duty to exercise reasonable care, skill and diligence founded on the failure of the Defendants to exhibit the degree of skill that may reasonably be expected from a person having that director's knowledge and experience?[77]

104. I can discern nothing in the Particulars of Claim that amounts to a proper plea that the Defendants or either of them fell short of an objective standard of care, skill and diligence. It is certainly true that some of the allegations of breach can be read in insolation as a falling short in such an objective way. But there is no plea, anywhere in the Particulars of Claim, setting out the manner in which the Defendants' conduct fell objectively short of the level of skill and care that the Defendants (given their experience)

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[74] Section 178(2) provides: "The duties in those sections (with the exception of section 174 (duty to exercise reasonable care, skill and diligence)) are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors."

[75] [1925] 1 Ch 407 at 427.

[76] *Mortimore* at [14.19].

[77] To adapt the words of Romer J in *Re City Equitable Fire Insurance Co Ltd*, [1925] 1 Ch 407.

should have had. In my judgment, the section 174 breach of duty allegation turns also on the allegation of Conspiracy, and goes no further than this.

(vi) Duty to avoid conflicts of interest

105. Sections 175 to 177 of the Companies Act 2006 deal with conflicts of interest in three distinct ways:

(1) Section 175 states a duty on a director to avoid conflicts of interest which do not arise in relation to a transaction or arrangement with the company.[78]

(2) Section 176 states a duty on a director not to accept benefits from third parties.[79]

(3) Section 177 states a duty on a director to declare to the board his or her interest in a proposed transaction.

106. Clearly, this is a case falling within section 177. The transactions described in paragraphs 66 to 74 above concerning the Executive Scheme were all transactions or arrangements with KeyMed. Although paragraph 14.5 of the Particulars of Claim references section 175, the pertinent duty in the present case is section 177, pleaded at paragraph 14.6 of the Particulars of Claim. Section 177 provides as follows:

"**177 Duty to declare interest in proposed transaction or arrangement**

(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

(2) The declaration may (but need not) be made–

(a) at a meeting of the directors, or

(b) by notice to the directors in accordance with–

(i) section 185 (notice in writing), or

(ii) section 185 (general notice).

(3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

(4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.

(5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.

For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

[78] Thus, section 175(3) provides that: "This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company".

[79] On its face, it does not deal with transactions or arrangements with the company.

(6) A director need not declare an interest–

(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or

(c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered–

(i) by a meeting of the directors, or

(ii) by a committee of the directors appointed for the purpose under the company's constitution."

107. Section 177 thus provides that a director's interest in a proposed transaction or arrangement with a company must declare the nature and extent of that interest to the other directors. The duty is an objective one. Although, by section 177(5), a director is not obliged to declare matters of which he or she is ignorant, what a director ought to be aware of (and so, if within section 177, ought to declare) is objectively framed.[80] Equally, the obligation to declare a conflict is strict: if the director's interest falls within section 177 on an objective test, then the director must declare an interest. Any declaration required by the section must be made before the company entered into the transaction or arrangement.[81] This is to enable the directors, on behalf of the company, to decide whether to enter into the transaction, on what terms, and with what safeguards.

108. KeyMed quite rightly emphasised the importance of <u>full</u> disclosure of any conflict, citing Mummery LJ in *Gwembe Valley Development Company Ltd v. Koshy*:[82]

"Disclosure requirements are not confined to the nature of the director's interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are "fully informed of the real state of things", as Lord Radcliffe said in *Gray v. New Augarita Porcupine Mines* [1952] 3 DLR 1 at 14."

109. Section 177 of the Act significantly changed the pre-existing common law.[83] Under the pre-existing common law, a director could not have an interest in a transaction with the company unless he or she had disclosed all material facts about the interest to the <u>members</u> of the company, and they had approved or authorised him/her having the interest.[84]Authorisation by the board was <u>not</u> sufficient.[85]

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[80] *Mortimore* at [17.33].

[81] *Mortimore* at [17.13].

[82] [2003] EWCA Civ 1048 at [65]. See also, *Mortimore* at [17.21] to [17.22].

[83] *Mortimore* at [17.07].

[84] *Mortimore* at [17.01].

[85] *Mortimore* at [17.01].

110. However, the rigours of the position at common law were often ameliorated by the provisions of a company's articles of association.[86] In this case, KeyMed's articles of association incorporated the Companies Act 1948 Table A Articles of Association.[87] Article 84(1) provided that "[a] director who is in any way, whether directly or indirectly interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 199 of the [Companies Act 1948]". Although Article 84(2) provided that a director so interested should not be able to vote, that provision was varied by Article 13 of KeyMed's articles of association, permitting interested directors to vote.

111. Before me, both parties proceeded on the basis that – by virtue of these provisions – the Defendants' duties, so far as conflicts of interest were concerned – were as stated in section 177 and that there was no (or at least no material) difference between them.

(c) Tortious and contractual duties

112. The tort in question is the pre-2006 Act breach of the duty to exercise reasonable care, skill and diligence that was codified into section 174 of the Companies Act 2006. This was considered in Section C(2)*(b)(v)* above,[88] and that consideration is not repeated here.

113. So far as the contractual duty is concerned, paragraph 16 of the Particulars of Claim pleads that "[p]ursuant to an implied term in his contract of employment dated 19 October 1978 (as amended), Mr Hillman was also under a contractual duty to act in KeyMed's best interests".

114. The precise nature of this duty is not further articulated. I shall treat it as being co-terminous with the fiduciary duties considered above, and not more extensive than these duties. It accordingly does not require separate consideration.

(d) Duty to report misconduct

115. The law as regards a director's duty to disclose his/her misconduct or the misconduct of another director is as follows:

(1) There is no separate or independent duty to disclose misconduct to the company. Rather, the duty to disclose misconduct is a manifestation or a part of the duty to promote the success of the company (also known as the duty of good faith).[89]

(2) Accordingly, the question whether a duty to disclose misconduct exists turns on the specific circumstances of the case. *Mortimore* puts the point like this:[90]

> "However, in certain circumstances, the director's duty to promote the success of the company for the benefit of the members as a whole will require him to report breaches of duty either of his fellow directors or himself. Thus, in *British Midland Tool Ltd v. Midland*

[86] *Mortimore* at [17.03] to [17.04].

[87] See Article 1.

[88] Paragraphs 100*ff* above.

[89] *Fassihi v. Item Software (UK) Ltd*, [2004] EWCA Civ 1244 at [41] (*per* Arden LJ).

[90] At [12.26].

International Tooling Ltd,[91] Hart J held that the director's duty to act so as to promote the best interests of the company includes a duty to inform the company of any activity, actual or threatened, which damages those interests. This in itself includes a duty to inform the company of any breaches of duty being carried out and perhaps even contemplated by other directors. Similarly, in *Item Software (UK) Ltd v. Fassihi*,[92] the Court of Appeal held that a director was under a duty to disclose his own misconduct."

116. Once again, it is necessary to ask what, exactly, KeyMed alleges against the Defendants. I have no doubt that an innocent – or non-fraudulent – breach of duty is capable, in appropriate circumstances, of amounting to something that a director ought to disclose. However, I do not consider that such a case has been pleaded by KeyMed in this instance. Rather, it seems to me that the breach(es) of duty it is said the Defendants ought to have – and did not – disclose are the breaches of duty committed pursuant to their Conspiracy. That is the case that I find is made against the Defendants considering the pleadings as a whole.

(e) Duties owed as trustees of the Schemes to KeyMed

117. It was accepted by KeyMed that there is no authority which considers directly the question of whether a trustee of a pension scheme owes a fiduciary or equitable duty to the employer sponsoring that pension scheme.[93] KeyMed contended that because a trustee of a pension scheme was – in certain cases – obliged to consider the employer's interests, "it is perfectly consistent with (and indeed follows from) this line of authority that a trustee of a pension scheme owes a duty to an employer. If the proper purpose of the trust involves taking an employer's interests into account (as it must do when, for example, considering whether to return a surplus to the employer) then it ought to follow that a duty is owed to the employer to properly take its interests into account".[94]

118. For their part, the Defendants denied the existence of such a duty on trustees:[95]

"A central tenet of a fiduciary duty is one of loyalty: the principal is entitled to the single-minded loyalty of the fiduciary. Thus, a fiduciary cannot act for the benefit of a third person without the informed consent of his principal. In the pension scheme context, there is obviously potential for the interests of members and the sponsoring employer to be different. In these circumstances, it is impossible for the trustees to owe funding and investment duties to both the members and the employer simultaneously, such as to render the trustees liable to compensate both for the losses caused by a breach of that duty to either of them. The position is that the trustees owe their duties to the beneficiaries, i.e. the members. That is not to say that the trustees of a pension scheme cannot take the interests of the employer into account if they so wish in the exercise of their powers, but the key point is that the trustees are not required to take those interests into account, and there is no claim against the trustees if they do not, and instead prefer the interests of the members over those of the employer."

119. In my judgment, the position is as follows:

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[91] [2003] EWHC 466 (Ch).

[92] [2004] EWCA Civ 1244.

[93] See paragraph 248 of KeyMed's written closing submissions.

[94] See paragraph 250 of KeyMed's written closing submissions.

[95] See paragraph 352 of the Defendants' written closing submissions.

(1) The duty of a trustee to act in the beneficiaries' best interests cannot be separated from the proper purpose of the trust itself. As Asplin J noted in *Merchant Navy Ratings Pension Fund Trustees Ltd v. Stena Line Ltd*:[96]

> "…it seems to me that the way in which the matter was put by Lord Nicholls extra judicially sums up the status of the best interests principle and the way it fits in to the duties of a trustee. It is necessary first to decide what is the purpose of the trust and what benefits were intended to be received by the beneficiaries before being in a position to decide whether a proposed course is for the benefit of the beneficiaries or in their best interests. As a result, I agree with his conclusion that "…to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created"."

(2) By way of example, the Staff Scheme contained the following provision as regards KeyMed's ordinary annual contributions. Rule 11.1 of the Scheme Rules provided:

> "Each Employer shall pay contributions to the Scheme in respect of its Employees who are Members. An Employer's contributions shall be paid at a rate which:
>
> (a) from time to time the [t]rustees, after obtaining Actuarial Advice, shall determine to be necessary to provide the benefits under the Scheme for and in respect of the Members, taking into account any contributions payable by Members under Rule 12 (Members' contributions) and any additional liability falling on an Employer under Rule 10 (Maternity absence);
>
> (b) will not prejudice Approval."

In the case of this provision, it is very clear that the trustees' obligation is to ensure that an Employer's contributions are at the level necessary to provide the benefits under the Scheme. It is possible that the employer's interests may be relevant when considering this duty. Thus, the trustees would very likely be concerned not to prejudice the strength of the Employer's covenant by imposing on the Employer payment obligations that might overstretch it. But, in this case, the trustees would actually only be balancing different and competing interests of the Members of the Scheme as regards seeking high contributions now (with the risk of Employer solvency, but having the monies in hand) versus seeking lower contributions now (protecting the Employer covenant, but running the risk of a deficiency that might never be filled).

(3) Rule 11 of the Scheme Rules is actually an excellent example as to why a divided loyalty of a trustee – owing duties to both the beneficiaries of a scheme and to the employer – is profoundly undesirable. The suggestion that, as a matter of course, a trustee of a pension fund owes fiduciary duties (or, indeed, duties of care in tort) strikes at the heart of the critical point that a fiduciary should serve only one master:[97]

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[96] [2015] EWHC 448 (Ch) at [228].

[97] See Finn, *Fiduciary Obligations*, 1st ed (1977) ("*Finn*") at [580].

"To ensure loyalty which is undivided the courts have prohibited a fiduciary from serving "two masters" at the same time and in the same matter or transaction unless he has first obtained the informed consent of both "masters" to his so acting. As Donaldson J observed in the agency case, *North & South Trust Co v. Berkley*,[98]

> Fully informed consent apart, an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal…

And even if informed consents are obtained, they will not absolve the fiduciary from liability to one master if he cannot properly discharge his duties to him because of conflicting duties owed to the other. Despite the courts' inveighings against fiduciaries acting "two ways" – and the protests have been most sustained in the case of solicitors in conveyancing transactions – the practice remains a common one occurring not only in agency transactions but also in dealings, for example, between trusts sharing common trustees and between companies having common board members."

(4) The Defendants – as Directors of KeyMed and trustees of both the Staff and Executive Schemes – might well be said to be serving three masters. The implications of this are considered below. However, I do not consider it to be arguable that as a general proposition the law will create, when there is no clear or compelling reason to do so, a conflict of interest fundamental to the manner in which the trustee of a scheme carries out his or her duties. Such conflicts may arise, but the law should certainly not go out of its way to create them.

(5) There is a further reason why the duty suggested by KeyMed does not arise in this situation. Where a conflict of interest or duty arises, it is possible – as has been seen in the case of director's duties – for the fiduciary to declare that conflict.[99] The same is true of the trustee. Indeed, the Scheme Rules provided as much in Rule 49. However, it is difficult to see how a trustee could sensibly explain his divided duty to the other trustees and to the company: the trustee would be hamstrung between having to explain to each why the other was being done-down.

(6) That said, it is clear that – provided the trustees have regard to their primary purpose, and do not subordinate it to other interests – they are entitled to have regard to the employer's interests, even if the protecting of these interests is a matter of indifference to the beneficiaries of the scheme.[100] Of course, if the employer's interests conflict with those of the beneficiaries, the trustee's course is clear. The employer's interests are subordinate to those of the beneficiaries of the trust.

(7) Taking account of an employer's interests, in a case such as this, does not involve any kind of conflict of interest: the employer's interests are only relevant if they do not conflict with the trustee's primary duty. The employer's interest does not, therefore, derogate from my conclusion that the trustee does not (by virtue of his position as trustee of a pension scheme) owe a fiduciary duty to both the beneficiaries of the scheme and the employer sponsoring the scheme. I certainly do

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[98] [1971] 1 WLR 470 at 484-485.

[99] See Section C(2)*(b)(vi)* above (paragraphs 105*ff* above).

[100] *Merchant Navy Ratings* at [231] and [233].

not regard the decision of Asplin J in *Merchant Navy Ratings* as in any way suggesting that such a duty follows from the fact that a trustee may consider the interests of the employer.[101] Rather, Asplin J was saying that provided the primary duty that trustee owes to his or beneficiaries is respected, then it is not improper to consider other interests. Considering the specific case before her, Asplin J said:[102]

> "Accordingly, in my judgment, as long as the primary purpose of securing the benefits due under the Rules is furthered and the employer covenant is sufficiently strong to fulfil that purpose, it is reasonable and proper should the Trustee consider it appropriate to do so, to take into account the Employers' interests both when determining to widen the pool of those liable to contribute and when considering whether to seek to reduce the element of cross-subsidy. In such circumstances, it seems to me that it is legitimate to take into account the relative burdens placed upon the Employers as commercial competitors."

120. Accordingly, I hold that, as a matter of law, the Defendants *qua* trustees owed no duties to KeyMed.[103]

(f) Conspiracy

121. The form of conspiracy alleged by KeyMed is unlawful means conspiracy. This tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage.[104] There is no need for the parties to the combination to have a predominant purpose to injure: it is enough for them to have an intention to injure the claimant, and it is no defence for them to show that their primary purpose was to further or protect their own interests.[105] The intention to injure must simply be a contributing cause of the defendant's conduct.[106]

122. What constitutes "unlawful means" appears to be broadly defined, although there remains a degree of uncertainty as to what this embraces.[107] However, it is clear that a director acting in breach of his or her fiduciary duties constitutes unlawful means.[108] I find that the causes of action alleged by KeyMed in this case and as described above at paragraphs 76 *et seq* are all capable of amounting to "unlawful means" for the purposes of conspiracy by unlawful means.

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[101] That is the suggestion in paragraph 250 of KeyMed's written opening submissions.

[102] At [233]. Emphasis supplied.

[103] That is not to say that there might not arise special circumstances – such as in *White v. Jones* – where a duty might arise. But no such special circumstances have been pleaded in this case.

[104] Jones (ed.), *Clerk & Lindsell on Torts*, 22nd ed (2017) ("*Clerk & Lindsell*"), [24-98].

[105] *Clerk & Lindsell*, [24-99].

[106] *Clerk & Lindsell*, [24-100].

[107] *Clerk & Lindsell*, [24-101]*ff.*

[108] *Clerk & Lindsell*, [24-101] at fn 543.

(3) The pleading point: KeyMed's alternative case

(a) The ambit of KeyMed's case: KeyMed's contentions

123. It is said by KeyMed that it is entitled to rely upon non-fraudulent breaches of duty committed by the Defendants, as its alternative case against Mr Hillman.[109] In support of this contention, KeyMed relies upon the following points:

(1) First, that the Claim Form in these proceedings originally advanced no "claim based on fraud at all, but claimed against Mr Hillman for breach of his directors' duties, for breach of contract and in the tort of negligence, and against both Defendants for breach of their duties as trustees".[110] The Amended Claim Form was amended to add additional claims of fraud as against both Defendants, but did not abandon or limit the non-fraudulent allegations.[111]

(2) Secondly, that the Particulars of Claim pleaded in relation to breach of duty at paragraph 94 of the Particulars of Claim[112] contain "no suggestion at all that these causes of action were only relied upon insofar as the Defendants' conduct was fraudulent and indeed that would have been inconsistent with the express reliance upon breach of the tortious duty of care. Particularisation of the allegations of breach at paragraphs 94a-n then provided the particulars of breach, a number of which did not require or imply intentional wrongdoing…".[113]

(3) Thirdly, that paragraph 95 of the Particulars of Claim[114] advanced claims against the Defendants as trustees, including breach of their tortious duty of care.[115]

(4) Fourthly, the Reply relied upon section 21(1)(b) of the Limitation Act 1980, which would not have been necessary if the only claims being pursued were based on fraud.[116]

(b) The ambit of KeyMed's case: ruling

124. I do not consider that KeyMed's alternative case remains open to it. I have reached this conclusion for the following reasons:

(1) The ambit of the Particulars of Claim is entirely clear, and unambiguously pleads only fraudulent breaches of duty on the part of the Defendants. The alternative case set out in the Claim Form is not pleaded in the Particulars of Claim in their present form.

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[109] KeyMed's written closing submissions at paragraph 3.

[110] KeyMed's written closing submissions at paragraph 7.1.

[111] KeyMed's written closing submissions at paragraph 7.1.

[112] Set out at paragraph 76 above.

[113] KeyMed's written closing submissions at paragraph 7.2.

[114] Set out at paragraph 76 above.

[115] KeyMed's written closing submissions at paragraph 7.3.

[116] KeyMed's written closing submissions at paragraph 7.4.

(2) If the alternative case has been abandoned in the Particulars of Claim, neither the fact that such claims were made in the Claim Form nor the fact that the Reply made reference to such claims can keep them in play.

125. These two points are expanded upon below.

(i) The ambit of the Particulars of Claim

Introduction

126. The Particulars of Claim contain a regrettably unclear statement of what, in terms, is being alleged against the Defendants. That is apparent from that fact that – at the opening of the trial – the Defendants (and Mr Hillman in particular) were uncertain as to precisely what was being alleged against them. It is necessary to consider various aspects of the pleading.

The centrality of the Conspiracy plea

127. Although pleaded under the title "Summary of Claim", paragraphs 7 to 12 of the Particulars of Claim set out and define the essential limits of KeyMed's case, namely that the Defendants conspired against KeyMed, and that they committed various breaches of duty pursuant to that Conspiracy.[117] The alleged breaches of duty and the alleged Conspiracy are inseparably linked. Because the Conspiracy allegation is based on an unlawful act conspiracy, the alleged breaches of duty are an essential element of this allegation; and the Conspiracy allegation itself necessarily involves deliberate wrongdoing.[118]

128. Of course, the fact that the Conspiracy allegation requires KeyMed to show that the Defendants had an intention to injure KeyMed does not necessarily imply that the breaches of duty on which the Conspiracy is based were done dishonestly, but it is suggestive of that.

129. However, KeyMed's case goes further than this. It is said that the breaches of duty alleged to have been committed were committed "pursuant" to the Conspiracy:[119]

> "…Such breaches of duty were pursuant to an agreement or common understanding between the Defendants initially reached in or around 2005 (and continued thereafter) that they would, with an intent to injure and/or cause loss to KeyMed by those unlawful means, maximise the amount and security of their pension benefits…".

In light of this nexus between the Conspiracy and the unlawful means which found the Conspiracy, I do not consider that it is open to KeyMed to maintain an alternative case of innocent breach of duty on the part of the Defendants. I expand on this further below.

[117] The material parts of these paragraphs are set out at paragraph 73 above.

[118] See paragraph 121 above.

[119] Paragraph 7 of the Particulars of Claim.

The substance of the breaches of duty alleged

130. My conclusion is largely borne out when the specific allegations of breach of duty are considered:

(1) The allegations that the Defendants breached their duties to act within their powers,[120] to promote the success of KeyMed[121] and to exercise independent judgment all rest on the Conspiracy allegation pleaded in paragraph 7 of the Particulars of Claim. The allegations, as framed in the Particulars of Claim, are, and can only be, ones of deliberate wrongdoing.

(2) In the ordinary case, the duty to exercise reasonable care, skill and diligence stands as a counter-point to the duty of good faith. Whereas breach of the latter duty involves bad faith, breach of the former generally occurs where the director has failed to exhibit the degree of skill that might reasonably be expected from a person having that director's knowledge and experience. In this case, however, for the reasons I have given,[122] I find this allegation also rests on the Conspiracy allegation and is, again, framed as one of deliberate wrongdoing.

(3) The same is true of the alleged breach of the duty to report misconduct, itself a scion of the duty to promote the success of KeyMed,[123] and of the alleged breach of contract.[124] Self-evidently, as I have noted, it is true of the Conspiracy claim itself.[125]

(4) That leaves the duty to avoid conflicts of interest. As I noted in paragraph 107 above, the duty to avoid conflicts of interest is a strict one that can – in the ordinary course – be established without having to allege dishonesty. The question is whether the Particulars of Claim have maintained such a case, where the breach of duty alleged is an innocent one, or whether KeyMed has elected to plead a case in this regard that is also based upon the Conspiracy. That is a point that needs to be considered in the wider context of KeyMed's pleaded case.

131. Thus, an analysis of KeyMed's pleas in relation to all duties save the duty to avoid conflicts of interest bears out my conclusion in paragraph 128 above that a case alleging dishonesty is the only one being advanced.

KeyMed's pleaded case in relation to the specific allegations regarding the Executive Scheme

132. The expansion of KeyMed's case in subsequent paragraphs of the Particulars of Claim bears this out:

[120] See paragraphs 84 to 90 above.

[121] See paragraphs 91 to 95 above.

[122] See paragraphs 127 to 129 above.

[123] See paragraphs 96 to 98 above.

[124] See paragraph 113 above.

[125] See paragraphs 127 to 129 above.

(1) *The creation of the Executive Scheme.* Paragraphs 32 to 33 make clear that the allegation necessarily involves dishonesty on the part of the Defendants. Thus, paragraph 32 states that "[i]t is to be inferred that the Defendants intentionally concealed the true purpose of establishing the Executive Scheme and the cost of doing the same from the other KeyMed directors at the meeting of 14 and 20 December 2005 in order to obtain board approval for the establishment of the Executive Scheme…". Paragraph 33 expressly links the creation of the Executive Scheme to the Conspiracy. There is no alternative case based upon non-fraudulent breach of duty.

(2) *Removal of the Revenue Limits.* As regards the removal of the Revenue Limits, paragraph 48 pleads that "[i]t is to be inferred that the Defendants instructed Mercer to remove the Inland Revenue limits on increases to pensions in payment in order to enhance their own pension benefits at the expense of KeyMed and in furtherance of their Conspiracy…". Again, this is plainly an allegation of dishonesty, and there is no alternative case based upon non-fraudulent breach of duty.

(3) *The removal of the Spousal Reduction.* Paragraph 64 of the Particulars of Claim provides, in relation to the Spousal Reduction, that "[t]he inference should be drawn that Mr Hillman, with Mr Woodford's agreement, procured the amendment to be made for his own personal benefit at the expense of KeyMed and that the amendment was made in furtherance of the Defendants' Conspiracy". Again, this is plainly an allegation of dishonesty, and there is no alternative case based upon non-fraudulent breach of duty.

(4) *Funding and investment.* Paragraphs 73 ("…intentionally pursued a policy of funding the Schemes on extremely conservative bases…"), 74 ("…the Defendants preferred the security of their own pension benefits to the interests of KeyMed…"), 75 ("…it is to be inferred that the conservative funding strategy adopted in relation to the Staff Scheme was intended to conceal from the other KeyMed directors the extremely conservative funding strategy being implemented by the Executive Scheme. KeyMed relies on the same as demonstrating the Defendants acted in furtherance of their Conspiracy"), 76 ("…the Defendants caused them to be paid in furtherance of their Conspiracy"), 83 ("…the adoption of very conservative investment policies for the Schemes was effected by the Defendants in furtherance of their Conspiracy") demonstrate that KeyMed is advancing a case based on dishonesty, and there is no alternative case based upon non-fraudulent breach of duty.

133. Viewed on their own, the paragraphs of the Particulars of Claim dealing with conflicts of interest (paragraphs 84*ff*) are less clear in whether KeyMed is necessarily asserting a dishonest breach of duty or merely an innocent one. The pleas in paragraphs 85 and 87 of the Particulars of Claim are certainly suggestive of dishonesty, but in my judgment when viewed on their own these paragraphs are capable of being read as advancing a case on innocent breach of duty.

134. The problem with these paragraphs is that, when read in isolation, they appear to allege only an innocent breach of duty, whilst read in the context of the other allegations it is hard to see how anything other than a deliberate breach of duty can have been intended. One thing is clear: these paragraphs cannot, in my judgment, plead alternative cases of deliberate breach of duty and innocent breach of duty. There is no alternative case.

135. It seems to me, given the context, that even as regards the duty to avoid conflicts of interest, it must be KeyMed's case that if and to the extent that the Defendants failed to declare their interests, that failure was not an innocent failure, but a very deliberate one, without which the Conspiracy would have failed.

(ii) If the ambit of the Particulars of Claim is clear, then that ambit cannot be widened by the Claim Form or the Reply

136. I have concluded that the ambit of the Particulars of Claim is limited to a dishonest claim against Mr Woodford and Mr Hillman. I accept that the allegations in the Claim Form and the Amended Claim Form are wider than this, but I do not consider this to be material.[126]

137. Equally, a subsequent pleading – like a Reply – cannot rectify a claim that has been abandoned.

(4) Specific aspects of the breaches of duty alleged by KeyMed

(a) Introduction

138. Having set out and considered the relevant law and the scope of the case KeyMed is advancing, it is necessary to consider a number of other aspects relating to:

(1) Certain aspects regarding conflicts of interest and conflicts of duty as they arise in pensions schemes.

(2) The test for dishonesty and the extent to which dishonesty is relevant to the causes of action here in play.

(3) The relationship between the duty to disclose conflicts of interest and other director's duties.

(b) Conflicts of interest in the context of pensions schemes

139. *Finn* draws a distinction between conflicts of interest and conflicts of duty.[127] In terms of a fiduciary's responsibilities, English law draws no such distinction: the rules apply as much to conflicts of duty and duty as they do to conflicts of duty and interest.[128] Nevertheless, the distinction is a valuable one in the present case.

140. It is readily apparent that in the context of occupational pension schemes, the potential for conflicts of interest and conflicts of duty will be rife. In the present case, Mr Woodford and Mr Hillman were:[129]

(1) Both directors of KeyMed.

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[126] Jacob & Goldrein, *Pleadings: Principles and Practice*, 1st ed (1990) at 106-107.

[127] *Finn*, ch 21 and ch 22.

[128] In the context of section 175, see section 175(7). See also, *Moody v. Cox & Hunt*, [1917] 2 Ch 71.

[129] As is pleaded in paragraph 84 of the Particulars of Claim.

(2) Both trustees of the Staff Scheme and (when it came to be established) both trustees of the Executive Scheme.

(3) Both Executive Members of the Staff Scheme until – on the establishment of the Executive Scheme – they transferred to became members of the Executive Scheme and ceased to be members of the Staff Scheme.

141. This is not an uncommon situation in the pensions field and it is worth seeking to identify the various conflicts – both of interest and of duty – that can arise:

(1) *A conflict of interest between the trustee of a pension scheme and one or more "classes" of member under that scheme.* In many cases, there will be different classes of member under a scheme. This may – to take just two examples – be because the scheme had different classes of member from the outset or because – with the passage of time – the rights of members joining the scheme after certain dates are less than those joining before that date. A trustee of the scheme will, often, be a member of the scheme and so belong to one class or another. When acting as trustee, it is easy to see cases arising where a trustee who is also a member may be placed in a conflict of interest.

(2) *A conflict of duty between director's and trustee's duties.* Where a trustee (even if not a member of the scheme) is also a director of the company sponsoring the scheme, a conflict of duty may arise. The due and proper execution of both duties may not be possible, in that what is in the company's interests may not be in the scheme's interests (and *vice versa*).

(3) *A conflict of interest between a member and the company.* Where a director of the company sponsoring the scheme is also a member of that scheme, a conflict of interest may well arise. To take one example, the company may wish to limit its obligations under the scheme, whereas a member will probably seek to enhance his or her benefits as much as possible.

142. In this case, the breaches of duty alleged by KeyMed involved conflicts between the Defendants' interests as members of the Staff and then Executive Schemes and their duties as directors of KeyMed. It is worth noting, however, that when cross-examining the Defendants, Mr Wardell, QC, ranged rather more widely and put to both Defendants other decisions concerning the Schemes in which they had been involved.

(c) Dishonesty

143. In *First Subsea Ltd v. Balltec* Ltd, the Court of Appeal considered when a breach of a director's duty might be said to be "fraudulent":[130]

> "For a breach of trust to be fraudulent, it is not enough to show that it was deliberate. There must also be an absence of honesty or good faith. This can include being reckless as to the consequences of the action complained of. The Judge's finding was that Mr Emmett was dishonest because he committed his breaches of duty towards the company knowing that they would injure [the company] and intending that they should."

[130] [2017] EWCA Civ 186 at [64].

144. In *Armitage v. Nurse*,[131] Millett LJ said that "actual fraud" "connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not."

145. The test, in civil proceedings, as to whether particular conduct amounts to dishonesty was set out by the Privy Council in *Barlow Clowes International Ltd v. Eurotrust International Ltd*:[132]

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterized as dishonest, it is irrelevant that the defendant judges by different standards."

146. This test was reaffirmed in civil actions and introduced into criminal actions – overturning the test in criminal proceedings laid down in *R v. Ghosh*[133] – by the Supreme Court in *Ivey v. Genting Casinos (UK) Ltd*.[134] Lord Hughes stated:[135]

> "…When dishonesty is in question, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

(d) The inter-relationship between the duty to declare an interest and other director's duties

147. In submissions, KeyMed emphasized that a director's compliance with his or her duty to declare an interest does not in any way relieve that director of his or her <u>other</u> director's duties. I accept this submission. In *Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald (No 2)*,[136] Alan Steinfeld, QC (sitting as a deputy judge in the Chancery Division) stated:

> "…the mere fact that the strict equitable self-dealing rule is excluded or modified, does not entail that the director is relieved from his other obligations to the company, including his duty to act *bona fide* in the company's interests. The conflict between a director's duty to the company and his personal interest does not disappear merely because the strict equitable rule against self-dealing has been excluded. On the contrary, if the conflict remains, there is a distinct danger that the director will be tempted, in breach of his duty to the company, to place his interests before that of the company. It is, indeed, this very danger that gave rise to the strict equitable rule. When the rule has, as I see it, been excluded, it becomes the duty of the court, in my judgment, to

[131] [1998] 1 Ch 241 at 251.

[132] [2006] 1 WLR 1476 at [10].

[133] [1982] 1 QB 1053.

[134] [2017] UKSC 67.

[135] At [74].

[136] [1995] 1 BCC 1000 at 1016-1017.

scrutinize the transaction with great care so as to determine whether in carrying it out the director has truly managed to avoid the temptation of putting his personal interests before that of the company."

D. THE CONTEXT WITHIN WHICH MR WOODFORD AND MR HILLMAN OPERATED

(1) KeyMed's position within the Olympus group

148. KeyMed was acquired by Olympus in around 1989. From then on, there were always Japanese directors on the KeyMed board, but they did not take an active role in the company's operations.[137] Thus, although the Japanese directors would be copied in on board minutes, the governance of KeyMed and the authority to make decisions for KeyMed lay with the UK directors.[138]

149. As Managing Director of KeyMed, Mr Woodford's reporting line was to Olympus Corporation's then President, Mr Kikukawa.[139]

(2) The KeyMed Board

150. Mr Woodford had joined KeyMed's board (the "Board") in 1987, when his fellow directors were Mr Hillman (who had joined in 1985) and a Mr George Parker (who joined the board at the same time as Mr Woodford[140]). Mr Woodford had joined the board as Sales Director. When Mr Woodford became Managing Director in 1991, Mr Hillman (up to then Finance Director) switched to become Sales Director.

151. In the years following 1987, Board membership increased, but fluctuated. As at 2003, in addition to Mr Hillman and Mr Woodford, the directors were:

(1) Mr Peter Virgo, the Technical Services Director;[141]

(2) Mr Stuart Greengrass, initially Products Director and then Technical Services Director;[142] and

(3) Mr Masaharu Okubo. Mr Okubo was appointed by the Olympus Group. Mr Woodford said this of KeyMed's Japanese directors:[143]

> "There were always Japanese directors on the KeyMed board, appointed by Olympus, however they did not take an active role in the company's operations."

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[137] Woodford 1/§7.9.

[138] Day 9/p.8 (cross-examination of Mr Woodford).

[139] Woodford 1/§7.9.

[140] Mr Parker left KeyMed in October 1993 and does not feature in this case.

[141] Woodford 1/§7.3.

[142] Woodford 1/§7.3.

[143] Woodford 1/§7.9.

152. In 2004, it was clear that Mr Virgo and Mr Greengrass would be retiring in the fairly short-term.[144] In fact, Mr Virgo ceased to be a director in 2006, and Mr Greengrass retired some two years earlier, in 2004. With an eye to these retirements, two new directors were appointed in 2004:

(1) Mr Calcraft;[145] and

(2) Mr Williams.[146]

A further Japanese director – Mr Haruhito Morishima – joined the Board in 2005.

153. This remained the composition of the Board until 2011 when, in circumstances that I will come to describe, Mr Woodford and Mr Hillman came to leave KeyMed and the Olympus group.

(3) ExCom

154. Apart from its Board, the principal organ for the management of KeyMed was KeyMed's Executive Committee ("ExCom"). ExCom had a wider membership than the Board and included KeyMed's senior managers as well as Board directors.[147]

155. ExCom appears to have been established in late 2005 or early 2006,[148] although Mr Williams thought that it was earlier than this.[149]

(4) Administration within KeyMed

156. My focus is on those who had responsibility within KeyMed for pensions. The persons with principal responsibility in this regard – apart from the Board and the trustees – were Mr Rowe and Ms Sally McBrearty. There is an issue as to the extent to which Mr Rowe and Ms McBrearty had a purely ministerial or administrative role and the extent to which they actually took decisions. That is a matter I consider further when determining the facts and in Section I below.

157. Mr Rowe has already been introduced.[150] The events chiefly considered in this Judgment begin in 2005. By this time, Mr Rowe occupied the fairly senior position – but below Board rank – of UK Group Financial Controller, reporting directly to Mr Hillman. He had held this position since March 2003. He was also, as I have described – the Staff Scheme Administrator, a position he had held since July 2000.

158. Ms McBrearty joined KeyMed in 1988, working in its Accounts Payable function. In 1991, she moved to the Payroll function. On returning to work from maternity leave in

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[144] Woodford 1/§7.4.

[145] Woodford 1/§7.4.

[146] Woodford 1/§7.4.

[147] Woodford 1/§ 7.9.

[148] This is according to a Board agenda for a meeting of the Board on 14 December 2005. The agenda contained an item entitled "Formation of [KeyMed] 'Ex-Com' group".

[149] Day 1/p.126 (cross-examination of Mr Williams).

[150] See paragraph 28 above.

2002, Ms McBrearty worked part-time in the Pensions administration, whilst also supporting the Payroll function. From about this time, she assumed responsibility for some of the in-house administration of the Staff Scheme.

(5) The operation of the Staff Scheme

159. I have described the potential for conflicts of interest and duty in the context of pension schemes like the Staff Scheme in general terms in paragraphs 141 above. Most of the persons featuring in these events were Members of the Staff Scheme, albeit with potentially very different levels of entitlement. These included the Defendants, but also Mr Williams, Mr Calcraft and – no doubt – Mr Rowe and Ms McBrearty.

160. A smaller number were involved in the administration and decision-making of the Staff Scheme. Given the fact that there was a potential conflict between the interests of the Staff Scheme and the interests of KeyMed, it is unfortunate, albeit understandable, that the same people were involved on both sides. Thus:

(1) *Mr Woodford and Mr Hillman.* Most obviously, Mr Woodford and Mr Hillman were (very senior) directors of the Board, but also trustees of the Staff Scheme. They were, as will be seen, deeply involved both as directors and as trustees.

(2) *Mr Craig.* Mr Craig was the only trustee of the Staff Scheme not also a director of KeyMed. He was, however, KeyMed's company secretary until April 2009. As regards his roles:

(a) As an officer of KeyMed, Mr Craig would have owed KeyMed fiduciary duties and duties of skill, care and diligence.[151] Generally speaking, the functions of a company secretary are ministerial and administrative, rather than managerial,[152] and this seems to have been particularly so as regards Mr Craig. Mr Craig did not attend Board meetings (although he was on the distribution list for the minutes of Board meetings) nor ExCom meetings (although again he was on the distribution list for the minutes of these meetings).

(b) My impression from the documents – Mr Craig did not give evidence – is that so far as the Staff Scheme was concerned, Mr Craig was considerably more active on the trustee side than on the company secretary side. He was the chairman of the trustees.

(c) On the witness statements, there was disagreement as to whether Mr Craig was a cypher for Mr Woodford and Mr Hillman or whether he exercised independent judgment. Mr Rowe suggested that Mr Woodford's views would – in the event of any disagreement amongst trustees – prevail.[153] Mr Woodford's and Mr Hillman's views were that Mr Craig was his own man,

[151] *Mortimore* at [3.76].

[152] *Mortimore* at [3.75].

[153] Rowe 1/para. 20.

capable of taking his own view and defending it.[154] In cross-examination, Mr Rowe did not defend his statement regarding Mr Craig particularly strongly and similarly did not resist the statements of Mr Woodford and Mr Hillman.[155] As regards this aspect, I prefer the evidence of Mr Woodford and Mr Hillman: it seems to me, looking at the nature of Mr Craig's interventions in relation to the Staff Scheme and the extent to which he was consulted by Mr Woodford and Mr Hillman, that Mr Craig was a robust and capable individual, whose views would be independent and carry weight.

(3) *Mr Rowe.* Mr Rowe was not a member of the Board: he was simply an employee – albeit a senior one – with responsibilities for the Staff Scheme. He was a trustee of the Staff Scheme from 2008. His responsibilities went in both directions. Mr Rowe simultaneously administered the Staff Scheme for KeyMed, but also assisted the trustees of the Staff Scheme. Thus:

(a) Mr Rowe was a member of ExCom, and (as such) received the minutes of ExCom meetings. When – as was common after the creation of ExCom – there were joint Board and ExCom minutes, Mr Rowe would have received these.

(b) Mr Rowe was not a trustee of the Staff Scheme until 2008,[156] but typically he would attend meetings of the trustees of the Staff Scheme and keep the minutes.

I do not suggest that there was anything remotely improper in Mr Rowe's involvement in both the KeyMed and trustee sides. Mr Rowe was an employee, and he did what he was told. But he was a senior employee, and he would have seen (or, at least, would have had the opportunity of seeing) the whole picture.

(4) *Ms McBrearty.* Like Mr Rowe, only more so, Ms McBrearty did what she was asked to do. Her role was purely ministerial, but that role did not appear to differentiate between her acting for KeyMed in relation to the Staff Scheme and acting for the trustees. So far as Ms McBrearty is concerned, the point is of no importance: Ms McBrearty, as an employee, did what she was paid to do. However, the way in which she performed her functions – without differentiating between the different interests at play – does shed valuable light on the way KeyMed operated.

(5) *Mercer.* Mercer were the scheme actuaries for the Staff Scheme. As I have described,[157] so far as those interested in the Staff Scheme were concerned, Mercer were indiscriminate in terms of who they provided advice to. Thus, there were regular meetings between KeyMed and Mercer, where Mercer provided advice to the company. Yet Mercer were also in attendance at meetings of the trustees. Yet still further, they provided individual advice to members of the Staff Scheme

[154] Woodford 2/para. 6; Hillman 2/para. 9.6.

[155] Day 2/pp.133 to 136 (cross-examination of Mr Rowe). Indeed, he spent most of his time fencing with counsel for the Defendants, without particularly expressing a view. That was a hallmark of Mr Rowe's evidence.

[156] See paragraph 28 above.

[157] See paragraph 34 above.

regarding the implications of A-Day. This they did on instruction from KeyMed: but, clearly, the interests of individual members would very likely have been different from the interests of the company.

E. THE EVIDENCE

(1) Introduction

161. There were voluminous chronological and other files of documents before the court. Both parties adduced evidence from factual witnesses, and I heard evidence from most of them. In addition, both parties relied upon expert actuarial evidence.

162. I shall consider first the significance of documentary evidence in a case such as this. I shall then describe the evidence of the factual witnesses that was before me. Next, I shall describe those witnesses whose evidence might well have been helpful, but who (for one reason or another) were not called by either party. Finally, I shall describe the expert evidence.

(2) The importance of documentary evidence

163. This was a factually contentious case, involving serious allegations of dishonesty. The allegations were stale, in that the Claim Form was issued on 28 August 2015 and the trial took place in 2018, whereas the relevant events took place some years earlier, the critical period being 2005 to 2007. The general problems presented by witnesses of fact are well-known and were clearly articulated by Leggatt J in *Gestmin SGPS SA v. Credit Suisse (UK) Limited*.[158] Even absent allegations of dishonesty, it would be surprising if (speaking in entirely general terms) any witnesses retained a clear recollection of events taking place a decade or more previously, particularly when the relevant events related to the discussion of technical topics, considered in multiple meetings taking place over months, even years.

164. This renders the documents in the case of particular importance. In the ordinary course, when assessing factual evidence, a Judge has well in mind the approach of Lord Goff in *Grace Shipping Inc v. CF Sharp and Co (Malaya) Pte Ltd*:[159]

> "In such a case [where witnesses were seeking to recall events and telephone conversations of five years earlier] memories may very well be unreliable; and it is of critical importance for the judge to have regard to the contemporary documents and to the overall probabilities…"

165. In this case, given the nature of the allegations being made by KeyMed, it is obviously necessary to understand the process of how decisions were made, and on the basis of what information and documentation. Unfortunately, the documentary record in this case was far from satisfactory. In particular, the following factors stand out:

(1) *Absence of personal files.* As to these:

[158] [2013] EWHC 3560 (Comm) at [15] to [22].

[159] [1987] 1 Lloyd's Rep 207 at 215.

(a) For the most part, the personal files of the protagonists – to the extent they ever existed – had not been retained.[160] The limited exception was Mr Hillman's "trustee files", that is files kept in relation to his responsibilities as a trustee of the Staff Scheme and the Executive Scheme. Personal files can be extremely useful in reconstructing events. Often, they will contain annotations by the person on whose behalf the file was kept. At the very least, the file will serve as evidence that the person whose files these were saw certain documents. In this case, such material was almost wholly absent.[161]

(b) Some of the notebooks used by the protagonists – notably those of Mr Williams and Mr Hillman – had survived,[162] and were of some assistance. But these were not personal files of documents, but more notes that could be more or less informative from case-to-case.[163]

(2) *Very few intra-company communications.* Either they have not survived and/or KeyMed did not operate in this way,[164] but there were no documents evidencing communications within KeyMed. For instance, Mr Rowe might often receive a letter from Mercer, regarding the Staff Scheme, addressed only to him. There was no documentary evidence (like a covering letter or email forwarding the communication) before me to demonstrate the wider circulation of such documents within KeyMed.

(3) *Unhelpful minutes.* As to these:

(a) This is not intended as a criticism, for I anticipate that the manner in which minutes were kept within KeyMed ensured that the day-to-day business ran smoothly. Essentially, the minutes of meetings of KeyMed's Board and of ExCom fell into two parts or sections:

(i) The first part or section recorded minutes from previous meetings (verbatim), with notes explaining what had been done. Where the matter had completely been actioned, the minutes would record that that specific item should be removed from the minutes.[165] That note appearing in the minutes, the item would be removed from and not appear in the minutes for the next meeting.

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[160] To be clear, I make no criticism of this and draw no inferences from the absence of this material.

[161] Mr Hillman would – very occasionally – make a "file note", an example of which is at paragraph 211 below. However, he kept such notes rarely (Day 6/p.137-138 (cross-examination of Mr Hillman), and the example at paragraph 211 is the only such note relevant to these proceedings to have been uncovered.

[162] Mr Hillman's notebooks were in fact discovered by KeyMed shortly before or even during the trial: see Day 5/p.81 (examination in-chief of Mr Hillman), such that Mr Hillman had to be taken through certain entries in his examination in-chief.

[163] As it happened, Mr Hillman's notes were actually quite detailed and capable of providing a narrative. Mr Williams' notes, whilst they no doubt meant more to him at the time, were very much *aide-memoires*.

[164] Such evidence as there was, suggested the use of covering notes and (later on) the circulation of documents under email cover. That said, it was said on a number of occasions that KeyMed operated on a relatively informal basis, and that may have meant the production of less paperwork.

[165] Typically, the minutes would record "Actioned – remove from minutes", or words to that effect.

(ii) The second part or section recorded new business, which would, at the next meeting, transfer to part one of the minutes of that next meeting.

(b) The minutes contained a column, where the initials of the person (always an individual) responsible for actioning the matter would be entered. The minutes also would typically contain a distribution list.

(c) This form of minutes, which may explain the absence of detailed agendas, since the first part or section could operate as an agenda, whilst long (minutes often ran to 50 plus pages), was not very informative for the purposes of resolving questions of fact in subsequent judicial proceedings. Discussions were not recorded, nor do I consider that the minutes necessarily recorded the order in which matters were discussed. There were no particularly informative agendas, and generally meetings seemed to have operated without agendas at all. Nor was there any reliable evidence as to what material was before the board or a committee on any particular occasion: there were no "board packs" containing materials relevant for a meeting circulated in advance of that meeting. Material would be produced at the meeting, as necessary.

166. These features of the documents meant that I was more dependent than I would have liked to have been on the evidence of the witnesses in terms of reconstructing what would have happened. I say this out of no disrespect of any of the witnesses. In many instances, the witnesses had no actual recollection of certain, specific, events, but were themselves seeking to reconstruct events. I have no doubt that documents and information circulated within KeyMed: it could hardly have functioned otherwise. But, in many cases, witnesses were being asked whether a specific document had been circulated to them.[166] Without having to hand documents which one could say with confidence were before the witnesses at the given time, and without the material showing what the witness did thereafter, the reconstruction of events is enormously difficult and liable to be unreliable.

(3) Factual witnesses called by the parties

167. This section does not consider the credibility of the witnesses who gave evidence before me. I consider it more appropriate to set out my findings in this regard after I have set out the material facts, and determined the various factual controversies arising. This section is, therefore, confined to a bare description of the persons giving factual evidence before me.

168. I heard from the following witnesses of fact called by KeyMed:

(1) *Mr Stefan Kaufmann.* Mr Kaufmann joined the Olympus group in 2003. Mr Woodford was his direct line manager between April 2008 until his appointment as President of Olympus in 2011. Mr Kaufmann was involved in managing the departure of the Defendants from the Olympus group. He gave two statements, the first dated 16 November 2017 ("Kaufmann 1") and the second dated 18 December 2017 ("Kaufmann 2"). He gave evidence on Day 1 of the trial (13 March 2018). He gave his evidence in English, although this was his second language. He had no

[166] See, e.g., Day 6/p.3 (cross-examination of Mr Hillman); Day 2/p.125-127 (cross-examination of Mr Rowe).

difficulty in understanding the questions put to him nor in making himself understood.

(2) *Mr Nick Williams.* Mr Williams joined KeyMed in 1986 as a territory manager. He became a member of the KeyMed board in 2004, at which time he was seconded to an American part of Olympus' business. He returned from secondment in 2008, and subsequently held various senior posts within KeyMed and Olympus until he retired from KeyMed's employment in April 2016. He now works as a consultant, and is on the Supervisory Board of Olympus Europa Holding SE. He became a trustee of the Staff Scheme in 2011. Mr Williams gave two statements, the first dated 16 November 2017 ("Williams 1") and the second dated 18 December 2017 ("Williams 2"). Mr Williams gave evidence on Days 1 and 2 of the trial (13 and 14 March 2018).

(3) *Mr John Rowe.* The role and position of Mr Rowe has already been described in paragraphs 28, 29 and 160(3) above. Mr Rowe gave two statements, the first dated 16 November 2016 ("Rowe 1") and the second dated 18 December 2017 ("Rowe 2"). Mr Rowe gave evidence on Days 2, 3 and 4 of the trial (14, 15 and 16 March 2018).

(4) *Mr Yasuo Takeuchi.* Mr Takeuchi began working for the Olympus group in 1980 and has held a variety of positions throughout his career with Olympus. Mr Takeuchi's involvement in the events relating to these proceedings arises at and after the departure of the Defendants from the Olympus group. Mr Takeuchi gave a single witness statement dated 16 November 2017 ("Takeuchi 1"). He gave evidence on Day 4 of the trial (16 March 2018). English was not Mr Takeuchi's first language, and he had the benefit of an interpreter in the witness box. However, I encouraged him to attempt to give his evidence relying as little as possible on the interpreter, as this would assist me in evaluating his evidence.[167] As a result, Mr Takeuchi made relatively little use of the interpreter, and I am grateful to him for this.

(5) *Ms Sally McBrearty*. Ms McBrearty's role and position has already been described in paragraphs 158 and 160(4) above. Ms McBrearty gave a single witness statement dated 16 November 2017 ("McBrearty 1"). She gave evidence on Day 5 of the trial (19 March 2018).

(6) *Mr Richard Cherry.* Mr Cherry is employed by KeyMed. He played no part in the events with which these proceedings are concerned, save to give evidence regarding the deletion of certain emails. This is a matter that I consider further below. He gave a single witness statement dated 9 February 2018 ("Cherry 1"). Mr Cherry gave evidence on Day 5 of the trial (19 March 2018).

169. KeyMed also adduced evidence from:

(1) Mr Kuniaki Saito of Olympus in a witness statement dated 16 November 2017 ("Saito 1");

[167] Day 4/p.89 (evidence of Mr Takeuchi).

(2) Mr Tatsuro Osa of Olympus in a witness statement dated 16 November 2017 ("Osa 1"); and

(3) Mr Ewan Brown, a solicitor and partner in Slaughter and May, in a witness statement dated 15 November 2017 ("Brown 1").

The Defendants did not require these witnesses to attend for cross-examination, and so I did not see them give evidence. The evidence in their witness statements is admitted, and I take account of it.

170. The only witnesses called by the Defendants were the Defendants themselves. Mr Hillman gave two witness statements, dated 14 November 2017 ("Hillman 1") and 15 December 2017 ("Hillman 2"). Mr Hillman gave evidence on Days 5, 6, 7 and 8 of the trial (19 to 22 March 2018).

171. Mr Woodford was called after Mr Hillman and gave evidence on Days 8, 9 and 10 of the trial (22, 23 and 26 March 2018). He gave two witness statements, the first dated 14 November 2017 ("Woodford 1") and the second dated 15 December 2017 ("Woodford 2"). Given the allegations made against the Defendants, Mr Woodford agreed not to be present in court when Mr Hillman gave evidence, and so did not see his cross-examination.

(4) Factual witnesses not called by the parties

172. The following did not give evidence before me:

(1) *Mr Stuart Greengrass.* Mr Greengrass was both a trustee of the Staff Scheme and a director of KeyMed. A witness statement of Mr Greengrass, on behalf of the Defendants, was produced, but Mr Greengrass was not called to give evidence and I leave the content of his statement out of account.

(2) *Mr Richard (Luke) Calcraft.* As I have described,[168] Mr Calcraft was a director of KeyMed. He was involved in a number of key points relevant to these proceedings. His evidence would have acted as an extremely helpful counterpoint to or reinforcement of the evidence of Mr Williams. Mr Calcraft unfortunately died on 1 August 2014, before these proceedings began.

(3) *Mr Peter Virgo.* As I have described,[169] Mr Virgo was a director of KeyMed and – with Mr Hillman and Mr Woodford – the only unretired member of the Executive Section of the Staff Scheme. It was envisaged that, like Mr Hillman and Mr Woodford, Mr Virgo would transfer to the new Executive Scheme. In the event, Mr Virgo retired before that occurred. Mr Virgo was not a trustee of the Staff Scheme. I do not know whether Mr Virgo could have given evidence to the court. Had Mr Virgo been capable of giving, and available to give, evidence, such evidence might have been extremely helpful, because Mr Virgo was not involved in the Staff or Executive Schemes as a trustee and would have spoken with the knowledge of a director of the Board and a member of the Executive Scheme only.

[168] See paragraph 65 above.

[169] See paragraph 62 above.

As has been described,[170] at the Board meeting at which KeyMed decided to establish the Executive Scheme, the interests in that decision of the Defendants and Mr Virgo were declared. That, as will be seen, was a decision that came under considerable examination during the course of the trial.

(4) *Mr John (Hugh) Craig.* Mr Craig's role has already been described.[171] Mr Craig was significantly involved in the Staff Scheme (as the chairman of the trustees) and in the decisions regarding the establishment of the Executive Scheme. He would have been able to give evidence, but neither side chose to call him.

(5) *Persons from Mercer.* No-one from Mercer was called to give evidence. Mr Wright, who was probably the key individual involved, was not called. I do not know why this was the case. As will be described, as a poor substitute for the evidence of Mercer, I was presented with the evidence of expert actuaries, to fill the gap. For the reasons I explain below, I found their evidence on the whole unhelpful, although this should not be taken as a criticism of these experts. It is, rather, a comment on the role that the experts were forced to assume, given the absence of any evidence from Mercer (apart from documentary evidence: some was obtained from Mercer, just as it was from Mr Craig's former firm, Bates, Wells & Braithwaite).

173. I have very little doubt but that I would have been assisted by evidence from Mr Calcraft, Mr Craig and Mr Wright. I suspect Mr Virgo's evidence might also have been of assistance. I have some doubts about the significance of Mr Greengrass' evidence, given his limited role in the events with which these proceedings are concerned.

174. Mr Calcraft, of course, died before these proceedings commenced, but there was no reason (or at least none was given to me) why Messrs Craig, Wright and Virgo could not have given evidence. I was invited to draw inferences from the failure to call these witnesses. For instance, Mr Craig was a friend of Mr Woodford's and although retired from Bates, Wells & Braithwaite, and not in the best of health, was at the time of the trial working as a consultant at a provincial law firm, and capable of giving evidence. KeyMed suggested that adverse inferences should be drawn from the Defendants' failure to adduce the evidence of Mr Greengrass and their failure to obtain evidence from Mr Craig.[172]

175. I do not accept this contention. Obviously, a court is permitted to draw inferences from a failure to call a witness,[173] but that does not mean to say it is obliged to do so. In this case, I can understand why the Defendants' elected not to call Mr Greengrass; and both parties were in a position to call Mr Craig. KeyMed itself was in a better position to obtain evidence from Mercer (indeed, KeyMed did obtain documentary evidence from both Bates, Wells & Braithwaite and Mercer) and (I anticipate) Mr Virgo.

176. It might be said – as the party alleging a most serious fraud by the Defendants against it – that KeyMed should have adopted a "cards on table" approach to this litigation and –

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[170] See paragraph 67 above.

[171] See paragraphs 25 above.

[172] See KeyMed's written closing submissions at paragraphs 59*ff*.

[173] *Wisziewski v. Central Manchester Health Authority*, [1998] PIQR 324 at 340; *Prest v. Petrodel Resources Ltd*, [2013] 2 AC 415 at [44].

instead of just calling Mr Williams and Mr Rowe, both still connected with Olympus – KeyMed should have presented the evidence of these witnesses. If I were minded to draw an inference, that is the inference that I would draw: but I do not consider it safe to do so. As I have noted, given the absence of a decent documentary record to anchor the evidence of witnesses of fact, this is a case where any able and experienced legal team (and both teams were very experienced and able) would anticipate the dangers of calling witnesses of fact, and would incline to a "safety first" approach. That, I suspect, is what happened here, and I do not criticize either party for it: still less, am I going to draw inferences.

177. However, it is important to underline the parameters imposed upon me in the fact-finding exercise I have had to undertake. Because of the nature of the documentary evidence, I have been more reliant on the factual witnesses than I would have liked. And the factual witnesses I heard from were by no means the full set of witnesses that I could have heard from.

(5) The experts

178. I heard evidence from Mr Ronald Bowie, of Hymans Robertson LLP, who gave evidence on behalf of KeyMed; and from Mr Bob Scott and Mr Philip Boyle, both of Lane, Clark & Peacock LLP, who gave evidence on behalf of the Defendants. The experts submitted the following reports to the court:

(1) A report by Mr Bowie dated 16 November 2017 ("Bowie 1").

(2) A report by Mr Scott dated 16 November 2017 ("Scott 1").

(3) A report by Mr Boyle dated 16 November 2017 ("Boyle 1").

(4) A supplemental report by Mr Bowie dated 26 January 2018 ("Bowie 2").

(5) A supplemental report by Mr Scott dated 26 January 2018 ("Scott 2").

(6) A supplemental report by Mr Boyle dated 26 January 2018 ("Boyle 2").

(7) A joint statement – to which all three experts contributed – dated 6 March 2018 (the "Joint Statement").

179. The experts all gave evidence. Mr Bowie gave evidence on Days 10 and 11 (26 and 27 March 2018); Mr Boyle and Mr Scott gave evidence on Day 12 (28 March 2018).

180. The issues to be covered by the experts in their reports were specified in an order of Deputy Master Arkush made on 25 October 2017. Some of the issues went to quantum. Two issues, in particular, went to liability, notably:

(1) *Issue 1*. What a reasonably competent actuary would have advised KeyMed about the proposed establishment of the Executive Scheme, having regard (in particular) to:

(a) The membership profiles of the Staff Scheme and the covenant provided by the employer;

(b) The implications of creating separate schemes compared to maintaining all members within the same scheme;

(c) The impact upon the security of the Defendants' pension benefits as well as those who were to remain in the Staff Scheme;

(d) The cost, if any, to KeyMed of establishing the Executive Scheme?

(2) *Issue 5.* Issue 5 dealt with funding and investment, and comprised the following sub-issues:

(a) Taking account of the membership profiles and the covenant afforded to the scheme(s) by the employer, were the funding and investment strategies adopted by the Staff Scheme and the Executive Scheme between 13 November 2007 and 30 April 2014 inappropriate from an actuarial and/or investment advisory point of view?

(b) To what extent were the funding and investment strategies followed by the Staff Scheme in the period 13 November 2007 to 1 November 2011 "extremely conservative" compared to typical strategies adopted by schemes with a similar membership profile and an equivalent covenant over that period?

(c) To what extent were the funding and investment strategies followed by the Executive Scheme in the period 13 November 2007 to 30 April 2014 "extremely conservative" compared to typical strategies adopted by schemes with a similar membership profile and an equivalent covenant over that period?

(d) What would have been reasonable funding and investment strategies in the Staff Scheme in the period 13 November 2007 to 30 April 2014 if the Executive Scheme had not been established and the Defendants had instead remained as members of the executive section of the Staff Scheme?

(e) How does the frequency with which the funding position of the Schemes was reviewed and special contributions were made during the period from 13 November 2007 to 1 November 2011 compare to the approach adopted by pension schemes with a similar membership profile and employer covenant during that period?

181. On questions of liability,[174] I found the expert evidence remarkably unhelpful: indeed, the material tended to obscure, rather than elucidate. This is not a reflection on the experts, all of whom clearly were expert and who did their best to assist the court. Rather, it is because the issues framed for expert evidence had little bearing on the issues that I actually had to decide, which turned on questions of the honesty or otherwise of the Defendants. I would have been assisted by Mercer's insight into these questions, but the experts could obviously not provide this insight. Their evidence was clearly directed to filling this gap – thus, I heard a great deal about the sort of advice an actuary would have tendered to KeyMed, had that actuary been asked – which, I am afraid, fell far short of

[174] Questions of quantum are an altogether different matter.

being useful. It is obvious that expert evidence on a question of professional negligence can be critical. But this was not such a case: no-one criticized or sought to criticize the competence of Mercer.

F. THE ESTABLISHMENT OF THE EXECUTIVE SCHEME AND THE DISAPPLICATION OF THE PIP LIMIT

(1) Introduction

182. It will be necessary to consider the circumstances in which certain key decisions, central to the Conspiracy alleged by KeyMed, were taken. For the purposes of KeyMed's case, the key decisions were: first, the establishment of the Executive Scheme itself; and then, secondly, the disapplication of the PIP Limit.

183. In fact, the position is more complex than this. It is necessary to bear in mind that the establishment of the Executive Scheme and the disapplication of the PIP Limit took place against the backdrop of the changes being introduced by A-Day. It is also necessary to bear in mind that the actual implementation of the decision to establish the Executive Scheme took place some two years after the decision in principle was taken. In these circumstances it is necessary to consider four specific matters:

(1) First, the in-principle decision by the Board of KeyMed to establish the Executive Scheme in the first place.

(2) Secondly, the circumstances in which KeyMed came to agree voluntarily to apply the Revenue Limits – including the PIP Limit – to the Staff Scheme. It will be recalled that one of the consequences of A-Day was to remove the Revenue Limits,[175] so that their application would no longer be mandatory. Of course, the financial consequences to the employer of not applying the Revenue Limits could – and generally would – be significantly adverse. Thus, many companies chose to continue to apply the Revenue Limits as new (voluntary) limits to the rights of scheme members. This is what happened at KeyMed. The timing of this decision is, however, significant. The decision voluntarily to apply the Revenue Limits, including the PIP Limit, was made after the decision to establish the Executive Scheme, but before the Executive Scheme was in fact established. It will be necessary to understand precisely how that decision came to be made, and the extent of Mr Woodford's and Mr Hillman's involvement in this decision. To be clear, Mr Woodford and Mr Hillman contended that they had no involvement in this decision.

(3) Thirdly, the circumstances in which Mr Woodford and Mr Hillman came to be aware of the issue of the retention of the Revenue Limits, and specifically the decision voluntarily to apply the PIP Limit. This, third, question is obviously closely related to the second point. If, contrary to their contentions, Mr Woodford and Mr Hillman knew of and/or were involved in the decision to apply the Revenue Limits, then this question does not arise as a separate matter to be determined.

[175] See paragraph 59(1) above.

(4) Fourthly, the manner in which the decision to remove – or, perhaps more accurately, not apply – the PIP Limit came to be taken.

184. These four aspects will be considered in turn below. Thus, Section F(2) considers the decision to establish the Executive Scheme; Section F(3) considers the decision voluntarily to apply the PIP Limit; Section F(4) considers the circumstances in which the Defendants came to know of the decision to retain the PIP Limit; and Section F(5) considers the agreement to remove, and the removal of, the PIP Limit in the case of the Executive Scheme.

(2) The Board's decision to establish the Executive Scheme

(a) The Board's composition

185. The position in 2005 was that Mr Woodford and Mr Hillman were the two most senior Board directors. They were also the only Board members to be trustees of the Staff Scheme. Mr Virgo and Mr Greengrass had also been directors for some time. Mr Williams and Mr Calcraft were recent appointments to the Board.

186. Mr Williams' terms of appointment (and, it is to be inferred, Mr Calcraft's) were set out in a letter dated 19 March 2004. Although promotion to the Board meant some enhanced benefits for both Mr Williams and Mr Calcraft, the letters notifying them of their new terms stated that "[b]enefits under the Defined Benefits Pension Scheme…continue unchanged". Mr Williams did not consider this unfair at the time,[176] indeed he frankly acknowledged that he would have accepted promotion to the Board on inferior terms.[177]

(b) Mr Williams' state of mind in 2005

187. Mr Williams was probed about what he knew of the Staff Scheme at this time. In his witness statement, Mr Williams said this:[178]

> "At the date of my appointment as a Director, I was already a member of the Staff Scheme and had been since 1987. I was never a member of the Executive Section of the Staff Scheme. This was also the case for Mr Calcraft. Mr Calcraft and I were more junior to the other Directors. It was my understanding at the time that, with the exception of myself and Mr Calcraft, all the other UK based Board members, as well as former Directors, were included in the Staff Scheme with more favourable benefits than the general members of the Scheme. I assumed from the fact that Mr Stuart Greengrass, a former Board member, retired at 52 that he and some of the other Board members that had been with KeyMed for very many years had beneficial pension arrangements that were not open to Mr Calcraft and me."

188. Thus, Mr Williams knew in a generalized way that he and Mr Calcraft had less beneficial pension entitlements than those of the other, more senior, directors, but he did not know exactly what these differences were.[179] He also, I find, knew: of the existence of the

[176] Day 1/p.89 (cross-examination of Mr Williams).

[177] Day 1/p.91 (cross-examination of Mr Williams).

[178] Williams 1/§11.

[179] Day 1/p.91 (cross-examination of Mr Williams).

Executive Section of the Staff Scheme; that he was not a Member of that part of the Scheme; but that Mr Woodford and Mr Hillman (at least) were.[180]

189. Mr Williams was taken to the change made to pensions in future payment in April 2005. These changes were described in paragraph 45 above. The minutes of the meeting of the trustees, at which the change was agreed, were distributed to Mr Williams (and to Mr Calcraft) and Mr Williams accepted that he would have received the letter to Members describing the change in pension benefit entitlement.[181] As to this:

(1) Mr Williams' approach to minutes is a matter that I will consider in greater detail when I consider his overall credibility. As will be seen, he claimed not to have read those parts of minutes sent to him that he did not think concerned him. This included matters relating to pensions.

(2) Although he probably knew of the change to his entitlement in April 2005 – which, as I have described,[182] created a further distinction between Executive Members of the Staff Scheme and Members who were not Executives – because of the letter he was sent, he did not pay very much regard to this change. He accepted that "in 2005, I wasn't pension focused personally at all. So clearly I read it, but I clearly did not understand the ramifications for myself".[183] I quite accept that Mr Williams may well have taken a casual or laid-back approach to his pensions entitlements, but I do not accept that, if he read the letter, he would not have understood its ramifications. The change being made was perfectly clear.

190. Mr Williams sought to suggest that had he considered the minute and the letter to Members, the change would have struck him as unfair and been the catalyst for a discussion with Mr Calcraft.[184] I do not accept this. In cross-examination, Mr Williams gave the following evidence:[185]

Q (Mr Salzedo, QC)	And if you had read that minute at the time, do you think that would have struck you as unfair or a matter of concern to you at that time?
A (Mr Williams)	It might have been a catalyst for a discussion with [Mr Calcraft].
Q (Mr Salzedo, QC)	Okay. And do you think if you had had such a discussion, you would remember that now?
A (Mr Williams)	Yes.
Q (Mr Salzedo, QC)	Right. So does that follow then, do you think that you…

[180] Mr Williams' evidence on this point was not altogether clear. Williams 1/§17 clearly implies some knowledge of the Executive Section prior to the signing, by Mr Williams, of the documentation constituting the Executive Scheme in November 2007, and Mr Williams accepted that this was the case in cross-examination: Day 1/pp.157-158 (cross-examination of Mr Williams). Mr Williams' earlier evidence on this point was more equivocal: Day 1/pp.103-104 (cross-examination of Mr Williams).

[181] Day 1/p.94 (cross-examination of Mr Williams).

[182] See paragraph 45 above.

[183] Day 1/pp.95-96 (cross-examination of Mr Williams).

[184] Day 1/pp.98-99 (cross-examination of Mr Williams).

[185] Day 1/pp.99-100 (cross-examination of Mr Williams).

A (Mr Williams)	Didn't have a discussion with Luke.
Q (Mr Salzedo, QC)	Didn't have a discussion?
A (Mr Williams)	No.
Q (Mr Salzedo, QC)	And presumably that also means that Luke didn't raise anything with you?
A (Mr Williams)	No.
Q (Mr Salzedo, QC)	I suggest to you that the more likely scenario is that at least one of you looked at this enough to read it, because in part it directly related to your pensions, and you were not concerned because you already knew that you were not having pensions at the same level as the Executive category.
A (Mr Williams)	I honestly don't – do not recollect any of this, so, you know, I'm at fault for not seeing that, particularly as I'm – it affects me personally. But to reiterate, pension was not at the forefront of my mind at that time at all.
Q (Mr Salzedo, QC)	And you would accept, I think, that whether or not you actually read these minutes, the fact that directors were getting 5% per annum increases while others were being reduced to 2.5% LPI was not concealed from you?
A (Mr Williams)	Yes.

191. Mr Williams' and Mr Calcraft's knowledge of and attitude towards these differences in entitlement – particularly as regards the rights attaching to future pensions in payment – matters because of what Mr Williams says his likely reaction would have been when presented (in 2007) with the documentation regarding the removal of the PIP Limits from the Executive Scheme. In 2005, the position was as follows:

(1) The differences in entitlement of different types of member was open for any director – indeed, any Member – to see.

(2) Mr Williams was subjectively aware of the existence of these differences and – although he did not pay very much regard to the point – he was aware both of the pre-April 2005 differences and the even starker post-April 2005 differences to pensions in payment.

(3) Mr Williams did not consider these differences to be unfair and I do not accept that these differences would have been a matter for comment or discussion between Mr Williams and Mr Calcraft. As Mr Williams himself said, he was extremely pleased to be promoted to the Board, and – whilst he was aware that his and Mr Calcraft's pension rights were inferior to those of the other directors – this did not trouble him.

(4) To the extent that Mr Williams now says he would have found these differences troubling or unfair, I do not believe him. I consider that such statements to be after-the-event invention (albeit not deliberate) created because of Mr Williams' involvement in this litigation. They do not accurately reflect Mr Williams' past state of mind.

(c) The minutes of the Board meetings in December 2005

(i) The Board meetings

192. The KeyMed directors met on 14 and 20 December 2005. The decision to establish the Executive Scheme was made by KeyMed at one of these Board meetings.

193. The agenda for the meeting – which was circulated in draft on 9 December 2005 – contained no reference to the Executive Scheme proposal. Mr Rowe had no explanation for this,[186] but I find this not unusual given the manner in which KeyMed's minutes were drawn up and the fact that agenda were the exception and not the rule.[187]

194. Mr Rowe claimed to recall being asked "by Mr Hillman to prepare a draft minute for the pension issues to be discussed at the Directors' meeting scheduled to take place on 14 December 2005".[188] However, his witness statement does not make any reference to any supporting documents: it only refers to the finalized minute set out in paragraph [197] below. Absent some form of paper trail, I am not prepared to accept Mr Rowe's evidence on this point.[189] What is more, as I describe more fully in paragraphs 205 *et seq* below, it appears that the drafting of the minute occurred after the 20 December 2005 meeting.

195. Detailed minutes of the meetings were kept. Recorded as present were: Mr Woodford, Mr Hillman, Mr Virgo, Mr Williams, Mr Calcraft and Ms Carter (who is recorded as taking the minutes). Unfortunately – although one can see the efficiency – the minutes of both meetings are presented as a single record. It is not possible to determine exactly what was considered on 14 December 2005 and what was considered on 20 December 2005.[190] This matters because the composition of the two meetings was different. So far as it is possible to tell, the position was as follows:

(1) Mr Woodford did not attend the meeting on 14 December 2005,[191] but did attend on 20 December 2005.[192]

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[186] Rowe 1/§66. Nor did Mr Hillman: Day 6/pp.118-199 (cross-examination of Mr Hillman). Mr Hillman suggested, as a possibility, that the agenda had been prepared before the Board meeting on 14 December 2005, and that the issue of the Executive Scheme cropped up between that meeting and the meeting on 20 December 2005. That is speculation, and I see no reason why that should have been the case. As will be seen, there were discussions regarding a possible Executive Scheme between Mercer and the trustees of the Staff Scheme well before 14 December 2005. I therefore doubt that this is the explanation. Mr Woodford suggested that the meeting on 20 December 2005 was specifically to deal with the establishment of the Executive Scheme: Day 9/p.53 and p.60 (cross-examination of Mr Woodford). Again, this seems to be speculation on the part of Mr Woodford: I have seen no other evidence to support this suggestion.

[187] See paragraph 165(3) above.

[188] Rowe 1/§67.

[189] I therefore discount Rowe 1/§§67-70. There was discussion of the terms of a draft minute at a trustee meeting, which Mr Hillman noted. It may be that this is what Mr Rowe had in mind.

[190] Day 1/pp.115-117 (cross-examination of Mr Williams).

[191] Woodford 1/§13.1.

[192] Woodford 1/§13.3; Day 1/p.104 (cross-examination of Mr Williams).

(2) Mr Hillman appears to have been present at both meetings. He was certainly present on 20 December 2005.

(3) Mr Calcraft attended – indeed, chaired – on 14 December 2005, in the absence of Mr Woodford[193] and appears to have been present on 20 December 2005.[194] I find that he was present because, after the meeting on 20 December 2005, he was sent an email by Mr Hillman asking him to review the draft minute recording the discussions regarding the Executive Scheme. He would not have been sent this document had he not been present.[195]

(4) Mr Williams attended the meeting on 14 December 2005, but only part of the meeting on 20 December 2005, because he had to catch a flight to the US.[196] I consider below whether Mr Williams was present for the discussion regarding the Executive Scheme.

(5) Mr Virgo was present at one or other or both of the two meetings: it is not possible to say. I find that, on balance, he was present. That is because of the way in which the minute recording the outcome of the meeting is framed: it refers to Mr Virgo declaring his interest, which is more consistent with him being present than not.[197]

196. It was not controversial that the discussion regarding the Executive Scheme took place on 20 December 2005.[198] There are many factors that point in this direction, notably the documents that were produced before and after this meeting[199] and the fact that Mr Woodford was present for the discussion. As I shall describe, Mr Williams' inability to remember the discussion is at least consistent with his partial absence on 20 December 2005.

(ii) The minutes

197. Item 53 – under "Section 6 – New Business" – in the minutes for these meetings states:

"**KeyMed Pension & Assurance Scheme – Comprehensive Review of Company Pension Provision**

53.1 Following a comprehensive review of pension legislation, the UK Government is introducing a range of rule changes with effect from 6 April 2005 ('A Day'), with the

[193] Day 1/p.104 (cross-examination of Mr Williams).

[194] Mr Williams was asked, in re-examination, to assume Mr Calcraft was present: Day 2/p.98 (re-examination of Mr Williams).

[195] This exchange is described in paragraphs 252 to 253 below.

[196] Day 1/pp.105-106 (cross-examination of Mr Williams).

[197] I take fully into account the drafting history of the minute: see paragraphs 205 *et seq* below. Given that the specific wording regarding declarations of interest was inserted at the suggestion of Mr Craig, it is entirely possible that Mr Virgo's name was inserted, even though he was not present. As I say, however, I conclude – on balance – that the wording is suggestive that he was there. In Hillman 1/§14.7, Mr Hillman says that he recalled Mr Virgo asking some questions about the effect on his benefits under the new Executive Scheme, which obviously suggests Mr Virgo's presence.

[198] See Day 1/pp.134-135 (cross-examination of Mr Williams).

[199] See the discussion at paragraphs 224*ff* below.

aim of streamlining pension provision and establishing a simple and transparent tax regime.

One of these new provisions is the introduction of a 'recovery charge', the implication of which is to create an effective tax rate of 55% on a significant element of the pension received by higher paid employees on retirement, compared with the current 40% tax rate.

The directors discussed the practical implications of this and the action being taken by other companies in this respect, whereby some are compensating those affected by this change to equalise the after-tax effect for the individual. It was agreed, however, that in relation to Olympus KeyMed Group companies, the impact of this should be borne wholly by the individual without any compensation by the company – i.e., the company would provide no enhancement whatsoever of pension, salary, incentive or remuneration, to compensate any director or employee affected by this legislation.

In the context of this objective of simplification and streamlining of pension provision, following a comprehensive review, and in consultation with the company's pension advisors, the directors agreed to rationalise the pension provision available to directors/employees as follows:

53.1.1 **Defined Contribution ("DC") Scheme**

Under this scheme, the company contributes a defined proportion of salary, by way of pension provision, i.e. the contribution is defined, not the final pension received. This has been available to all new starters since 23 August 2002 and has proven competitive in recruitment of new staff, representing a real and positive benefit to individual members. No changes would therefore be made to the benefits available under, or the structure of, this scheme.

53.1.2 **Defined Benefit ("DB") Scheme**

Under this arrangement, the benefits are defined, based on the individual's final salary. This scheme was closed to new entrants with effect from 30 September 2002 and has proven successful in the retention of experienced, long-serving employees, offering benefits comparable to similar DB schemes in other companies.

Consistent with the objective of simplification, it was agreed that the current 'Executive Member' category, which is now closed to new members, would be discontinued within the current DB scheme and the benefits and related liabilities for the remaining current active executive members transferred to a separate DB company pension scheme.

In this context, [Mr Woodford], [Mr Virgo] and [Mr Hillman] declared their interests in this change as the only remaining active executive members of the existing DB scheme and members of the proposed new separate DB scheme. The objective is for this new scheme to be wound up on cessation of the liabilities of these three remaining executive members.

As the assets of this new scheme will effectively be held in trust for only three members and their dependents, it was agreed that these members, rather than [KeyMed], should have the sole power of appointing the Trustees of the new scheme. In effecting this transfer, the fundamental principle of 'no gain, no loss' to either the individual or the company would apply.

Importantly, there would be no enhancement of benefits for the existing active executive members compared with those currently derived from membership of the existing Executive Member category.

There would also be no enhancement in funding and both the new scheme and the existing DB scheme would be funded to exactly the same actuarial funding level to ensure equality of treatment.

53.1.3 [Mr Rowe], Group Financial Controller, to liaise with Mercers, the company's pension advisors, to implement the above changes with effect from 1 February 2006."

198. The last item – Item 53.1.3 – contained, in the right-hand margin – an action point:

"PAH (JER) 31/01/06"

This meant that Mr Hillman with Mr Rowe were responsible for effecting these changes by 31 January 2006. In the event, that deadline was never achieved.

199. The minutes record the following decisions:

(1) That the impact of the adverse tax changes were to be borne by the individuals affected, without any compensation to them from KeyMed.

(2) That, following a comprehensive review and with the aim of streamlining KeyMed's pension provision, the Executive Section of the Staff Scheme would be closed and a new Executive Scheme opened.

(3) That, because the new Executive Scheme would only have three members, and would be closed to new members, these members – rather than KeyMed – should have the sole power of appointing trustees.

(4) That the transfer of the Executive Members out of the Staff Scheme and into the new Executive Scheme would involve no enhancement of benefits.

200. The interest of Mr Woodford, Mr Virgo and Mr Hillman in the Executive Scheme being proposed is clearly recorded in the minutes.

(iii) Circulation of the minutes

201. The minutes were circulated to those present, as well as Mr Kikukawa, Mr Morishima, Mr Okubo and Mr Craig. Mr Hillman described this as follows:[200]

"The full minutes of the board meeting were sent to the directors by email and to [Mr Kikukawa], [Mr Morishima] and Mr [Okubo] in Japan by DHL. No comments were received from any of the recipients of these minutes. An extract of these minutes was also reviewed by the directors at the ExCom meeting on 9 March 2006. I believe that the extract that was reviewed was Items 53 and 54."

[200] Hillman 1/§14.9.

202. It will be necessary to consider the circulation to Japanese directors and the review at the ExCom meeting later on.

(iv) Analysis

203. The minutes are opaque as to why the Executive Scheme needed to be created. Item 53 simply refers to the "rationalization" of the pension provision available to directors/employees, which conveys nothing.[201] I do not see anything suspicious in this: it is quite evident that these minutes do not record the discussions of the directors themselves, but the outcomes of those discussions, including decisions made and actions required. That is the function of minutes, and it is not surprising (although it is unfortunate from the point of view of trying to understand, after the event, why a decision was made) that the minutes are framed in the way they are.

204. In order to determine what was said at the meeting, and so what informed the decision to establish the Executive Scheme, it is necessary to consider other material, as follows:

(1) *The drafting of Item 53.* The minutes set out above underwent a process of careful drafting. What is set out in paragraph 197 above is simply the end product of that process. Clearly, the drafting history will shed some light on what was actually said. This is considered in Section F(2)*(d)* below.

(2) *The evidence of the persons present at the relevant part of the meeting.* Subject, of course, to the frailties of recollection that I have noted in paragraph 163 above, this evidence obviously needs to be assessed, and is considered in Section F(2)*(e)* below.

(3) *Prior discussions.* Unsurprisingly, the proposal for the establishment of an Executive Scheme did not come "out of the blue". A consideration of discussions and documents pre-dating 20 December 2005 will shed light on how the proposal to establish the Executive Scheme would have been presented. This is considered in Section F(2)*(f)* below.

(4) *Points made by Mr Williams.* In his witness statement, Mr Williams made a number of further points regarding the 20 December 2005 meeting, and the documents surrounding it. These are considered in Section F(2)*(g)* below.

In light of this material, I state my findings of fact in Section F(2)*(h)* below.

(d) The drafting of Item 53 in the minutes

205. Obviously, these minutes would have been finalized after the meeting on 20 December 2005. Here, I consider the drafting history of the minutes.

(i) Draft minutes prior to the meeting

206. As I have noted, absent documentary support, I do not accept Mr Rowe's evidence regarding the existence of a draft minute prior to the 20 December 2005 meeting. Mr

[201] The reference to "simplification and streamlining of pension provision" appears to be a reference to the A-Day reforms, and not anything that KeyMed was doing. The same is true of the reference to a "comprehensive review".

Rowe was cross-examined on the evidence in his witness statement, and was unable to identify the documents suggesting the existence of a draft minute prior to the directors' meeting; nor did he assert any independent recollection.[202] Mr Hillman's handwritten notes of the trustee's meeting on 17 November 2005[203] note as an action point that Mr Hillman was to draft a minute to put to the KeyMed Board. This evidences the care that went into the proposal to the Board,[204] but I do not consider that a draft minute was actually produced before the meeting.[205]

(ii) Communications with Mr Craig

207. On 21 December 2005, Mr Hillman emailed a draft of Item 53 to Mr Craig for his comments. At that time, for reasons that are unknown and probably do not matter, this was Item 67 of the minutes. More significantly, Item 67 contained no explicit reference to the existence of a conflict of interest on the part of Mr Woodford, Mr Hillman and Mr Virgo.[206] The draft did, however, identify the interest of Messrs Woodford, Hillman and Virgo. Thus, the draft reads in part:

> "Consistent with the objective of simplification, it was agreed that the current "Executive Member" category, which is now closed to new members, would be discontinued within the current [Defined Benefit] scheme and the benefits and related liabilities for the remaining current active members (MC Woodford, P Virgo and PA Hillman) transferred to a separate [Defined Benefit] company pension scheme. The objective is for this new scheme to be wound up on cessation of the liabilities in respect of these remaining executive members."

It was Mr Hillman's evidence[207] that the interest of Messrs Woodford, Hillman and Virgo was clear at the meeting and on the face of this draft. The subsequent addition of the words "[Mr Woodford], [Mr Virgo] and [Mr Hillman] declared their interests in this change" – which, as will be seen, was inspired by Mr Craig – was, according to Mr Hillman, simply clarifying the language.

208. Mr Hillman and Mr Craig spoke over the telephone. Mr Craig then emailed his note of their conversation. This note stated:

> "Advising that proposed minute 67 sent with today's email should be revised as follows:
>
> 1. At the start it should state that Michael Woodford, Paul Hillman and Peter Virgo declared their interests in the matters dealt with below as Executive Members of the

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[202] See Rowe 1/§67, which contains the assertion by Mr Rowe; and Day 3/pp.6*ff* (cross-examination of Mr Rowe) in which Mr Rowe was unable to and did not support that assertion.

[203] This meeting is considered further in paragraphs 230*ff* below.

[204] When the possibility of a draft minute prior to the Board meeting was put to Mr Woodford, he did not consider that surprising or uncommon. Asked what was the point of producing a draft minute before the meeting, he responded: "To give structure. That wasn't uncommon. On something important you would give it structure": Day 9/p.43 (cross-examination of Mr Woodford).

[205] There was a draft minute, in which the Executive Scheme appeared as Item 67. However, that seems to me to represent a post-meeting draft of the entire minutes, rather than a pre-meeting draft of a single item.

[206] In re-examination, this was put to Mr Williams, who noted the absence: Day 2/p.97 (re-examination of Mr Williams).

[207] Day 6/p.135 (cross-examination of Mr Hillman).

Existing Defined Benefit Scheme and members of the proposed new separate Defined Benefit Scheme.

2. The third paragraph of 67.1.2 should begin:

"As all the assets of this new Scheme will (effectively) be held on trust for only three members and their dependents it is agreed that those three members should have the sole power of appointing trustees of the new Scheme to the exclusion of [KeyMed]. However, in effecting the transfer to the new Scheme...".

209. The note is dated 21 December 2005, and I infer that the conversation it purports to record took place on this date. There is then a <u>further</u> note from Mr Craig, apparently recording a conversation he had with both Mr Woodford and Mr Hillman on 22 December 2005, recommending the deletion from the draft of the words "to ensure good governance" and stressing that "it was important for [KeyMed] to understand the implications of establishing the separate Executive Scheme". The note records that Mr Woodford and Mr Hillman said that Mercers would be approving a copy of the minute and would be asked to confirm that there would be no adverse consequences to [KeyMed] arising from the new arrangement."

(iii) Communications with Mr Wright

210. In an email dated 22 December 2005, Mr Hillman emailed Mr Wright:

"It was good to talk to you again this morning. As discussed, at our meeting earlier this week, the directors agreed to proceed with the changes to the pension arrangements we discussed and, in this context, please find attached the relevant excerpt from the draft minutes relating to this part of the meeting.

I would appreciate your reviewing these and letting me know any comments you may have – if you call me, we can talk these through and make any necessary amendments."

Mr Wright responded by email on the same day, stating that "the terminology and detail of the minute is consistent with our discussions earlier this week", and making a few minor and immaterial comments.

211. This discussion on 22 December 2005 refers to an earlier conversation ("again"). That appears to be a reference to a telephone conversation between Mr Hillman and Mr Wright, on 20 December 2005, taking place <u>before</u> the Board meeting on 20 December 2005. Mr Hillman was clarifying the options before the company for the purposes of the meeting, and he recorded these in a type-written file note which reads as follows:

"Further to the recent discussions on rationalizing the Defined Benefits Pension Scheme, in the context of the "A-Day" changes to streamlining pension provision and establish a simple and transparent tax regime, [Mr Wright] outlined the options to rationalize the position in relation to the Executive Member category.

The Executive Member category is now closed to new members. The objective is to simplify the main DB scheme and deal separately with the liabilities in respect of the three remaining Executive Members. This should be done in such a way that there would be no enhancement of benefits compared with those currently resulting from being a member of the existing Executive Member category and on the principle of "no gain, no loss" to either the individual or the company.

[Mr Wright] outlined three options:

Option 1 – Retain the existing single DB scheme with the existing two categories of membership (i.e., "Staff" and "Executive") with separate investment pools allocated to each category – the same Trustees would be responsible for both categories.

Option 2 – Set up a new separate DB scheme for the Executive Members with separate Trustees. As the assets of the scheme would effectively be held in Trust for only three remaining Executive Members and their dependents, the Trustees could be nominated by the Members rather than by the company.

Option 3 – Set up "Self Invested Personal Pension" schemes (SIPPs) for each of the individuals whereby annual contributions were paid into this vehicle. This would be supported by an undertaking from the company to the individual that it would be funded to a level so that it would provide the same level of benefit entitlement currently available under the Executive Member category.

This would have the advantage that the assets were under the control of the Beneficiary. It would, however, have the disadvantage that the company would have to undertake to contribute to the scheme at such a level that, at the individual's retirement date, there was a sufficient fund to purchase an annuity to provide the pension which would be likely to be more expensive than Option 2. There would also be an issue in terms of how any shortfall was made up and over what period.

[Mr Hillman] explained that these options would be considered by the company and a decision reached as to the way forward – if there were any further points of clarification required, he would discuss them with [Mr Wright]."

212. It is clear that this file note – or the notes Mr Hillman made, which were typed up to become the file note – was intended to provide something of a speaking note for Mr Hillman at the board meeting. Although the note sets out various options, like Item 53 itself the file note is silent about why the changes were being considered: it simply refers to "the recent discussions on rationalizing the Defined Benefits Pension Scheme".

(e) The evidence of the persons present at the relevant part of the meeting

213. The only persons present at the meeting on 20 December 2005 who gave evidence before me were Mr Woodford, Mr Hillman and Mr Williams. I shall consider the evidence of Mr Woodford, Mr Hillman and Mr Williams in that order.

(i) The evidence of Mr Woodford

214. Mr Woodford's recollection of the meeting was as follows:[208]

> "13.3 I returned to the UK and was present for the second part of the directors' meeting, which was held on 20 December 2005. One of the items discussed was the review of the company's pension arrangements in the context of 'A Day' and the advice that Mercer had been providing to the trustees in their report.
>
> 13.4 I recall that Paul explained the introduction of the A day changes, with the associated new tax regime that included a 'recovery charge' on pension income, which meant that we would both in effect incur a tax rate of 55% above the lifetime allowance, compared

[208] Woodford 1.

with the then higher rate of 40%. We discussed the fact that some companies were compensating affected individuals, but we agreed that KeyMed would not do this, and that Paul and I would bear the financial consequences personally. I felt strongly that it was important to record explicitly that the company would not provide any enhancement whatsoever, whether through pension, salary, incentive or any other remuneration, to compensate the individuals affected.

13.5 I also recall that Paul explained to the meeting the distortion created in the management of the scheme by the liabilities in relation to the Executive Category members. That effect was created by the fact that the Executive Category represented a large proportion of the overall pension scheme liabilities, which was compounded by any salary increases I was awarded. It was important to ensure that these liabilities were adequately funded over the period until our retirement (all within the next ten years), so as to prevent a deficit which would adversely affect the security of the pensions of all members and create an unfunded liability for the company. After discussion, the group agreed that the most attractive option was to set up a new, separate, scheme (the "Executive Scheme").

13.6 I emphasised to the other directors that, in the course of creating the new arrangements, there would be no enhancements of benefits for [Mr Hillman], [Mr Virgo] and me compared to those we had already by virtue of our existing membership, within the Executive Category. I recall making it clear that the funding levels (as opposed to funding basis) across both schemes would, over time, be targeted to achieve equality of treatment between the members."

215. Mr Woodford stated that these decisions "were significant issues, and I therefore reviewed the relevant section of the minutes with great scrutiny. I note that [Mr Hillman] asked Mercer to review and comment on the minute relating to the creation of the new scheme."[209] This is true, but (as I have noted) neither the minutes nor the draft minutes shed any particular light on <u>why</u> the decision was taken.

216. As can be seen, Mr Woodford's explanation was that the distortion in the Staff Scheme created by the Executive Section was the trigger for the decision to establish the Executive Scheme.[210] That this was the explanation was challenged by Mr Wardell, QC, in cross-examination, but Mr Woodford stood by his statement.[211] He described the distortion in the following way:[212]

"…the most effective way of ensuring security for all members, including the Executive category, was the option of breaking the Executives away – we had this distortion that we were around 20% of the scheme. My salary increase earlier that year, when I had been made head of the European medical business, in itself generated millions more liability. We couldn't fund within the existing scheme and give preference to one particular category. The liabilities of those people were coming due, Peter Virgo in one year, Paul Hillman in three years, myself within the foreseeable future, and the conclusion was that that would be the most effective way and most cost-effective way to manage these liabilities, which were distorting the whole scheme. Very unusual."

In short, the <u>scale</u> of the liabilities owed to the Executive Members and the <u>timing</u> as to when these liabilities would have to be paid caused, according to Mr Woodford, a

[209] Woodford 1/§13.7.

[210] In particular, Woodford 1/§13.7.

[211] See, in particular, Day 9/pp.33*ff*, 52*ff* and 80

[212] Day 9/p.33 (cross-examination of Mr Woodford).

distortion to exist. The distortion lay in the fact that the assets that the Staff Scheme had accumulated looked healthier than was in fact the case: put another way, if the liabilities of the Executive Members were discharged, there might be a funding issue for the non-Executive Members.

217. In terms of his recollection of the meeting, Mr Woodford said this:[213]

Q (Mr Wardell, QC)	…You claim to have an accurate recollection of the discussion on 20 December?
A (Mr Woodford)	Mm-hm.
Q (Mr Wardell, QC)	And is this recollection or reconstruction?
A (Mr Woodford)	Can I see what I said? I do remember that meeting, for obvious reasons.
Q (Mr Wardell, QC)	I'll take you to the detail of what you said in a moment. But just to help my Lord, please, to what extent do you actually have a recollection of who said what at that meeting?
A (Mr Woodford)	And I recollect explaining the context of why and where we were coming from. Paul Hillman gave the overall presentation, but I remember emphasizing I would be on a non-gain basis, but – you know, that was what I was most concerned about, and you will have seen in relation to the minute which I personally checked. And also, whilst – as you referred to the pension options report – there were two issues: one was security and one was to look at providing the same net benefits after the recovery charge. It was the decision that we shouldn't seek compensation from the company, and those where the elements I remember emphasizing.
Q (Mr Wardell, QC)	There was no Board pack produced, was there?
A (Mr Woodford)	We didn't generally produce Board packs. We produced presentations.
Q (Mr Wardell, QC)	There was no prior warning that this was on the agenda, was there?
A (Mr Woodford)	We've looked at the agenda. I don't know when the decision was made to carry this out. That wouldn't be unusual. It wasn't…
Q (Mr Wardell, QC)	The Board – the independent Board members weren't given copies of Mercer's papers, were they?
A (Mr Woodford)	Paul Hillman would have had them available.
Q (Mr Wardell, QC)	How was anyone to get any handle on the issues, if you don't give them copies of the relevant documents and advices?
A (Mr Woodford)	I think the summary of what those issues were was distilled down into something which was digestible and easy to understand. But if anyone wanted more, they would have taken – they could have had copies, they could have asked for copies. [Mr Hillman] would have had them with him.

[213] Day 9/pp.51-53 (cross-examination of Mr Woodford).

Q (Mr Wardell, QC)	Now, Mr Williams has no recollection of any discussion at all, and it's clear, isn't it, that he left the meeting early?
A (Mr Woodford)	He had a flight to leave – and what was actually discussed at that meeting, the item remaining, which necessitated me being there, was this particular item. I don't know if anything else was discussed on that day, but he was there.

There are two points to note in relation to this evidence:

(1) First, although there may be elements of actual recollection here, Mr Woodford was at least in part reconstructing what he thought might have happened. His statement that Mr Hillman "would" have had copies of the relevant documents, and that anyone interested "could" have asked for copies, has all the flavour of reconstruction.

(2) Secondly, however, when describing the key points of the discussion – what Mr Woodford referred to as the "two issues" – it is, to my mind, significant that Mr Woodford identified these as *(i)* security and *(ii)* same net benefits to the transferring Executive Members. He did not mention "distortion".

(ii) The evidence of Mr Hillman

218. Mr Hillman recalled that the relevant part of the meeting was 20 December 2005.[214] Prior to this meeting, Mr Hillman recalled a conversation with Mr Wright. According to Mr Hillman, "[t]he purpose of that discussion was to ensure that I fully understood the options that would be presented to the other board members in respect of the Staff Scheme."[215] This is a reference to the file note described at paragraph 212 above.

219. In terms of his explanation to the Board, Mr Hillman's evidence was as follows:[216]

> "14.3 I remember that I gave a high-level overview of A-Day to the attendees of the meeting, including the fact that the introduction of the Lifetime Allowance would result in an effective 55% tax charge on high earners. I am reminded by the board minutes that other companies were compensating executives to equalize the after-tax effect for the individual. Mercer's IR Report had stated that KeyMed may wish to consider compensating for the effect of the additional tax liability to put the individual in the same position as before the changes. However, I remember that Michael felt strongly that the impact of this change should be borne by the relevant individuals (including Michael and me), without any compensation by KeyMed, to which the directors agreed. I am reminded that this point is clearly stated in the minutes of this meeting.
>
> 14.4 I recall that I explained to the other directors the various options available to simplify and streamline pension provision, using a manuscript version of my file note dated 20 December 2005 as a prompt. I recollect that I explained to the other directors that to fully fund the whole Staff Scheme on a buyout basis would be disproportionately expensive as Mercer had indicated that this would cost nearly £40 million and would require an

[214] Hillman 1/§14.1.

[215] Hillman 1/§14.2.

[216] Hillman 1.

estimated £8 million annual contribution to ensure that the Staff Scheme remained fully funded on a buy-out basis.

14.5 I remember highlighting that Mercer had put forward an option for the executive category of the Staff Scheme to be discontinued and the remaining executive members to be transferred to a new Executive Scheme. I pointed out that the liabilities of the executive category of the Staff Scheme created a distortion which could be better managed under a separate Executive Scheme and that the aim was to reorganize KeyMed pension liabilities so that these could be managed more effectively.

14.6 During the discussion that ensued, I made it clear to the attendees of the meeting that Michael, Peter and I were the only remaining members of the executive category of the Staff Scheme and that we would therefore be directly and personally affected by the establishment of the Executive Scheme. I also explained that the objective was that the new scheme would be wound up once the last member had retired and the liabilities of the scheme had crystallised. I explained that the intention was for the Executive Scheme to move to a buy-out basis to allow this objective to be fulfilled.

14.7 I remember Peter asking some questions about how the changes would affect his benefits. I also recall that Michael and I explained that both Schemes would be funded on an equal basis, meaning that each Scheme would be funded to achieve the same percentage funding level (although I explained that the funding basis and the investment strategy might differ between the Schemes). I do not remember Luke or Nick posing any questions.

14.8 Following that discussion, and as recorded in the minutes of the meeting, I remember that the directors agreed that a separate Executive Scheme should be established and that, in doing so, there would be (i) no enhancement of benefits for the members of the Executive Scheme compared with those derived from the executive category of the Staff Scheme; and (ii) no enhancement in funding (i.e. that both schemes would be funded to exactly the same actuarial funding level to ensure equality of treatment). It was also agreed that the members of the Executive Scheme should have the power to appoint the Trustees of the Executive Scheme."

220. Like Mr Woodford's witness statement,[217] and his evidence in cross-examination,[218] Mr Hillman referred to a "distortion" that could be better managed under a new Executive Scheme.[219] In cross-examination, this evidence was challenged: it was suggested by Mr Wardell, QC that Item 53 in the minute said nothing about the security of the Executive members, and that the question of distortion was nowhere mentioned:[220]

Q (Mr Wardell, QC) So, all we've got so far – we've got a minute that says nothing about security, which was the focus of the November advice from Mercer, and all we've got is your – you are asking us to accept your word that one of the drivers, even though it's not mentioned in any of the documentation, one of the drivers was to get rid of distortions, but even that isn't properly referred to in this document, is it? Because all you say is the objective is for the

[217] Woodford 1/§13.5, quoted in paragraph 214 above.

[218] See paragraph 216 above.

[219] Hillman 1/§14.5, quoted in paragraph 219 above.

[220] Day 6/pp.127-130 (cross-examination of Mr Hillman).

scheme to be wound upon cessation of the liabilities. That's looking for the future, not about a current distortion?

A (Mr Hillman) Well, the issue of simplification was intended to encapsulate this idea that we were simplifying the management of the scheme and addressing – we had had a problem with the size and influence of the liabilities in respect of the executive members, and this was an opportunity to correct that.

Q (Mr Wardell, QC) Well, I suggest you've just made that up, because you're conscious of the fact that Mercer's advice only related to security and that the only proper justification for setting up an executive scheme was to deal with the security issue in the event of insolvency, and you never made that clear to your fellow directors?

A (Mr Hillman) But this is the security of everyone's pension, not just the executive members.

Q (Mr Wardell, QC) But they were already secured. They were covered by the new legislation. Mercers advised that. We've seen it. I don't want to go back to it. The only people exposed were you and Mr Woodford?

A (Mr Hillman) In terms of the PPF benefits, yes. But then if we had a responsibility to ensure everybody's pensions were protected up to the level of the maximum and not just the PPF limits, we wanted to ensure that everybody's pension was fully funded on the least cost basis.

Q (Mr Wardell, QC) And wouldn't any rational director thinking about this want to know what it's going to cost, this new proposal?

A (Mr Hillman) Well, you mean, in terms of the…

Q (Mr Wardell, QC) Additional contributions that have to be made?

A (Mr Hillman) Ah, okay. Well, the contributions would flow from the investment strategy – the funding basis and the investment strategy that was employed.

Q (Mr Wardell, QC) Can you answer the question, please? Wouldn't any rational director, thinking about this, not want to know what it was going to cost?

A (Mr Hillman) Yes.

Q (Mr Wardell, QC) And there was no mention at all anywhere, in your draft minute, of costs?

A (Mr Hillman) Other than that we had been advised by Mercer that this was the least cost approach for funding these.

Q (Mr Wardell, QC) Yes, but as a company you need to know what is it going to cost?

A (Mr Hillman) Well, Mercer are telling us that actually this is the least cost approach.

Q (Mr Wardell, QC) Only in the context of security. We've seen that. They've never given you any advice saying: "This is what you need to do, even if you're not interested in security", have they? At any stage?

A (Mr Hillman) Sorry, I'm not sure I understand the question.

Q (Mr Wardell, QC)	They've never said: "You must do this, even if security is not an issue"?
A (Mr Hillman)	But security was an issue…
Q (Mr Wardell, QC)	Yes.
A (Mr Hillman)	…for everybody.
Q (Mr Wardell, QC)	Well, that's not what you told your fellow directors?
A (Mr Hillman)	My recollection of the discussion with the fellow directors was actually to talk about how we could organize things so as to ensure the schemes were properly funded for the benefit of everybody. I'm not denying that part of that process was the security over the PPF levels for the executive members, but it was how can we ensure the security of the schemes for everybody.

(iii) The evidence of Mr Williams

221. Mr Williams' evidence was that he was not present for that part of the meeting at which the setting up of the Executive Scheme was discussed:[221]

> "For the purpose of making this statement, I have reviewed my notebook that I kept at the time to see if the setting up of the Executive Scheme was discussed at the meeting on 14 December 2005 or that part of the meeting on 20 December 2005 which I attended (I left KeyMed at approximately 1.55pm that day to take a flight from Heathrow to return to the US where I was working). I have no recollection of any such discussion taking place on 14 or 20 December 2005 and there is no record of any discussion in my day book about the Executive Scheme for either date. As Mr Woodford did not attend the meeting on 14 December 2005, I believe that any discussion about the pension must have occurred after I had left the meeting on 20 December 2005."

222. I consider that Mr Williams' recollection – aided by his reference to his travel plans – is correct and that he was not actually present for the relevant part of the meeting, and that this explains his inability to recall a discussion on this point.[222] It is fair to say that Mr Woodford had a strong recollection of Mr Williams being present – which, of course, he was for part of the meeting – but also that Mr Williams was present for the discussion regarding the setting up of the Executive Scheme.[223] I find that, for entirely understandable reasons, Mr Woodford's recollection is faulty in regard to this point.

223. Of course, Mr Williams was sent the minutes once finalized,[224] and he accepted that their content was in no way concealed from him.[225] Had he read the minutes – and, of course,

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[221] Williams 1/§13.

[222] Mr Williams was cross-examined on this: Day 1/pp.100*ff* (cross-examination of Mr Williams). It was suggested to him that his day book bore no particular reflection of what had been discussed at the meeting on 20 December 2007 in any event, and that the inference of his non-attendance based on the day book was slight. I accept this: but that does not say anything about whether Mr Williams was in fact present. On balance, given the fact that he did leave the meeting part-way through and was not involved in subsequent discussions regarding Item 53 (in contrast to Mr Calcraft) suggests Mr Williams' recollection is right.

[223] See, for example, Day 9/pp.53 and 60 (cross-examination of Mr Woodford).

[224] Day 1/p.133 (cross-examination of Mr Williams).

[225] Day 1/pp.133, 134 (cross-examination of Mr Williams).

Mr Williams' practice meant that he did not do so[226] – there was nothing in the minute to cause him concern,[227] although the reference to a conflict of interest would have caused him to prick up his ears.[228]

(f) Prior discussions and documentation regarding the Executive Scheme

(i) Introduction

224. Unsurprisingly, given the A-Day changes, KeyMed's Staff Scheme received a great deal of attention from both KeyMed and its advisers during this time. Basing myself in the first instance on what the documents show was discussed, I find the following:

(1) The introduction, on A-Day, of the Pension Protection Fund, would have had an adverse or potentially adverse effect on Executive Members. This is the PPF Risk that is described in paragraph 59(2) above. This PPF Risk was expressly discussed. Clearly, it would have been a factor pointing in the direction of establishing a separate scheme.

(2) The documentary evidence does not support Mr Woodford's or Mr Hillman's explanation that volatility caused by the Executive Members to the Staff Scheme (the "distortion" of which they spoke) was a source of concern in these conversations.

(3) However, an immediate consequence of establishing the Executive Scheme would be to give rise to or crystallise precisely the sort of distortion that Mr Woodford and Mr Hillman spoke of in their witness statements.

In the following paragraphs, I consider these points in greater detail. Section F(2)*(f)(ii)* considers the discussions regarding the PPF Risk and the manner in which it could be ameliorated; Section F(2)*(f)(iii)* considers whether the evidence supports some other reason – apart from the PPF Risk – to justify establishing the Executive Scheme; and Section F(2)*(f)(iv)* considers the question of "distortion".

(ii) Discussions regarding the effect of the Pension Protection Fund on the Executive Members

The 4 April 2005 trustees' meeting

225. On 4 April 2005, there was a meeting of the trustees of the Staff Scheme, with Mr Rowe, Mr Wright and Mr Brundrett in attendance.

226. Item 11.1 of the minutes of this meeting records:

"The Pensions Act has confirmed the introduction of the Pensions Protection Fund (PPF) from 6 April 2005. The PPF will be funded by a levy on all pension schemes that have a final salary

[226] See paragraphs 462(3) below, where I consider the practice, and its implications. In Williams 1/§12, he expressly includes these minutes as ones to which he would not have paid attention.

[227] Day 1/pp.135-136 (cross-examination of Mr Williams).

[228] Day 1/p.131 (cross-examination of Mr Williams).

([Defined Benefit]) element and will take on responsibility for some of these schemes if their employer becomes insolvent."

227. Mr Woodford said he recalled the discussion, and explained his understanding that "one effect of the introduction of the PPF was to change the way in which pension fund assets would be split in the event of insolvency, with the result that the pensions of higher earners, including those in the Executive Category, of which I was a member, were less secure than they had been previously."[229]

Mercer's paper "Pension Options for Senior Executives following A-Day"

228. On 14 November 2005, Mercer published this paper. It was specific to KeyMed and specific to the positions of Mr Woodford and Mr Hillman. A copy of the report was emailed to Mr Hillman, copied to Mr Woodford and Mr Rowe. The report – which followed on from Mercer's report of 10 December 2004 and the discussions regarding that report – looked at two particular points:

(1) Security of funding: how to maximise the security of benefits.

(2) Compensation for the effects of A-Day.

229. On the first question, security of funding, the report made the following points:

(1) A key reason for funding defined benefit pension schemes was to provide security for pensions that had accrued. Where no further funding was available, a scheme would begin to "wind-up". In such a case, only the accumulated assets would be available to provide for the pensions earned to date.

(2) Many schemes were funded on an "on-going" basis:

> "In practice to date, schemes have tended to be funded on the basis they are "ongoing", i.e. that they are not about to wind up and so funding has been based on the assumption that a good proportion of the cost of benefits will be met by the expected future out-performance of a scheme's equity holdings. However, the cost of pensions set by insurance companies makes no such allowance for this equity out-performance. As a result, in the event of a wind-up, buying out accrued pensions typically results in insufficient assets to secure benefits in full, i.e. pensions have to be cut back."

(3) The report identified two measures in the Pensions Act 2004 intended to improve the security of member's benefits: the "Statutory Funding Objective" and the Pension Protection Fund. The Pension Protection Fund, as has been described, would provide compensation to scheme members equal to:

(a) 100% of accrued pension for members reaching Normal Retirement Age; and

(b) 90% of accrued pension for other members (subject to a cap of £25,000 p.a.)

[229] Woodford 1/§11.3.

(4) As regards high earners – like Mr Woodford and, indeed, Mr Hillman – Mercer identified the PPF Risk as a problem:

> "Although the PPF will provide extra security for defined benefit scheme members, it provides less security for high earners, such as Mr Woodford, owing to the £25,000 cap in (b), above.
>
> We have previously estimated that the KeyMed Scheme is fully funded as measured on the PPF basis. (I refer you to my letter to the Trustees dated 13 October 2005, which quoted a PPF funding level of 151% as at 5 April 2005.)
>
> If KeyMed were to become insolvent, the Trustees would have to wind up the KeyMed Scheme. It is unlikely that any compensation would be payable from the PPF. Assuming no debt were recoverable from KeyMed, the Trustees would have to apply the assets of the KeyMed Scheme to secure benefits for the members. Benefits would be secured according to the KeyMed Scheme's priority rule and overriding regulations. It is likely that there would be sufficient assets to meet PPF level benefits (i.e. benefits capped at £25,000 p.a. for individuals under Normal Retirement Age), but not enough to provide full benefits."

(5) In order to provide "additional security for Mr Woodford (and other senior executives)", the paper identified three options:

- **(a)** Fully fund the KeyMed Scheme on a "buy-out" basis for all Members. This would involve immediate (by 5 April 2005) additional funds in the amount of £38.9 million and an ongoing substantial annual contribution of around £8 million p.a. to maintain the fully funded position.
- **(b)** Obtain a guarantee from Olympus Corporation that it would fully fund the Staff Scheme in the event of KeyMed's insolvency.
- **(c)** Set up a separate pension arrangement for Mr Woodford (and possibly other senior executives) and fully fund that arrangement on a "buy out" basis.

In cross-examination, Mr Woodford accepted that these options were focused not on the security of all Members of the Staff Scheme, but only on the Executive Members.[230]

(6) As regards this, third, option, the report noted:

> "Note that it may be technically possible to achieve this under the KeyMed Scheme by 'sectionalising' it, i.e. creating a separate Executive Section. However, such an approach would likely raise serious concerns for the Trustees, as they would be asked to consider agreeing to fund one section of the KeyMed Scheme on a more generous basis than another. For this reason, it is not likely to be feasible, and I have not considered this possibility further in this report. However, if you would like us to investigate this in any more detail, please let me know."

(7) Having more-or-less dismissed the notion of a sectionalised scheme, the report went on to consider various issues regarding the setting up of a separate pension arrangement.

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[230] Day 9/p.23 (cross-examination of Mr Woodford).

The trustees' meeting of 17 November 2005

230. On 17 November 2005, there was a meeting of the trustees of the Staff Scheme. Mr Rowe, Mr Wright and Mr Brundrett were in attendance. Mercer's 14 November 2005 paper, referred to above,[231] was considered at this meeting.[232]

231. Section 1 of the minutes considered the minutes of the previous meeting, which had taken place on 4 April 2005. The relevant item is Item 3. It is best to begin with the minutes of the 4 April 2005, which record as follows:

"**SECTION 1 – PREVIOUS MINUTES – 27 JANUARY 2004**

3. **INLAND REVENUE SIMPLICATION RULES**

3.1 [Mr Wright] presented to the Trustees an outline of the new Inland Revenue simplification rules and its was agreed that a detailed review of the individual cases would be carried out to allow the best options to be considered by the Trustees.

[Mr Wright] to check Inland Revenue rules for unapproved schemes and provide advice on how unapproved schemes operate in relation to the KeyMed Scheme.

Update 4/04/05:

[Mr Wright] provided a report to [Mr Woodford] and [Mr Hillman] in December 2004 explaining the changes in detail and explaining options for high earners. [Mr Wright] has agreed to carry out further work in this matter for the Directors."

232. The minutes for the meeting on 17 November 2005 approved the 4 April 2005 minutes. Item 3 was then augmented by two additional sub-items – Item 3.2 and Item 3.3. Item 3.3 is immaterial for present purposes. Item 3.2 reads as follows:

"**3.2 Update 17/11/05**

[Mr Wright] provided an update in relation to rules and requirements for high earners' pensions following 'A Day'. Trustees agreed that Mercers would manage the actions required to ensure the changes relating to 'A Day'.

[Mr Wright] to advise on the actions required to implement a separate Executive Scheme for existing members."

233. Both of these matters were recorded as being for action by Mr Wright. It is thus clear that there was a decision, at this meeting, that Mercer would advise on the actions required to implement a separate Executive Scheme for existing members. The inference, of course, is that the trustees considered that this was an appropriate course to pursue, although this was not a decision the trustees could, themselves, make. The decision to establish a new scheme was KeyMed's only.

[231] See paragraphs 228*ff* above.

[232] Woodford 1/§12.1.

234. Mr Woodford's witness statement elides the 14 November 2005 Mercer paper with the discussion at the meeting.[233] I do not find that particularly surprising, as it is very likely that the paper was discussed at the meeting. However, Mr Woodford's recollection of the position focusses more on the deleterious effect of the Executive Members on the non-Executive Members of the Staff Scheme, rather than on the PPF Risk creating an issue for the Executive Members if KeyMed became insolvent and the Scheme was not fully funded. In his witness statement, Mr Woodford said this:[234]

> "12.2 I recall that the situation, as it then was, created an issue for all the scheme members, because the liabilities of the higher paid members, principally the Executive Category, created a distortion in the [Staff] Scheme. The overall funding level was disproportionately affected by movements in the liabilities in respect of these members and my pension represented a significant percentage of the overall total. An example I recall that we discussed at this meeting was the impact on the funding level of the scheme of the recent increase in my salary, in recognition of being appointed Managing Director of the medical business for Europe, and the surgical business in the US, earlier that year. I recall that this had increased the scheme's liabilities by around £3 million and was one major factor in the current deficit.
>
> 12.3 I was conscious at the time that the liabilities for the Executive Category members would crystallise in the short to medium term, with Peter Virgo due to retire early the following year (2006), Paul three years later (2009), and my own retirement intended in 2015. If the trustees failed to ensure the scheme was sufficiently funded over this period, at the point of retirement (assuming annuities were purchased, which was the intention), if the scheme was not fully funded on a buy-out basis, this would lead to a drop in the proportionate level of the assets available to fund the liabilities of all the other members, and materially affect the security of their pensions.
>
> ...
>
> 12.5 I recall there was a discussion at this meeting as to how to address the deficit in the [Staff] Scheme and protect against this volatility created by the Executive Category, in particular due to the effects of my salary increases on the funding position. From looking at the minutes, I can see that we considered the possibility of making a special contribution against the existing shortfall, and asked [Mr Wright] to advise on the implications for [KeyMed's] P&L. This was also to include a review of mortality rates, the impact of which was a continuing cause for concern. I remember discussing how best to minimise the risk of a material funding deficit recurring, and that [Mr Wright] explained that the essential issue was to ensure the scheme's liabilities were fully funded on a continuing basis."

235. Mr Hillman, in his witness statement, considered the 14 November 2005 paper and the meeting separately. As regards the report, Mr Hillman summarised it in some detail,[235] noting the three options put forward by Mercer.[236] He noted that "the introduction of the PPF improved the security of members of the staff section, essentially by taking some of

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[233] See Woodford 1/§12.1*ff*.

[234] Woodford 1.

[235] Hillman 1/§12.

[236] Hillman 1/§12.4.

the security away from the executive members".[237] That, of course, is exactly what Mercer said.

236. Turning, then, to the discussion at the meeting, Mr Hillman's evidence was as follows as regards the establishment of a new Executive Scheme:[238]

> "13.3 I recall that, when we were discussing how to proceed, the Staff Scheme Trustees recognized that [Mr Virgo] was intending to take early retirement within the next year, I was due to retire in 2009 and that Michael's pension could be drawn from 2015. It was therefore important that there was a strategy in place which recognized these timings. Otherwise, it was possible that there would be a shortfall in assets to meet the liabilities of the other members when the liabilities of the executive members fell due, which would weaken the security of the other members. I recall [Mr Wright] explaining that the option to avoid such a shortfall were essentially those set out in the [14 November 2005 paper].
>
> 13.4 I remember that [Mr Wright] explained each of the proposed options in the [14 November 2005 paper] which were discussed by the attendees of the meeting. I also recollect that the Staff Scheme Trustees agreed with Mercer's view that funding of the Staff Scheme on a buy-out basis was not feasible due to cost and took the view that the best and least costly option was to set up a separate scheme for the executive members.
>
> 13.5 In light of this, I remember that it was agreed by the Staff Scheme Trustees that Mel would advise on the actions required to implement a separate executive scheme, which would enable the transfer out of those executive members with large pension benefits that were due to crystallise over the shorter term…"

237. Mr Hillman made some written notes either for or at this meeting. Numbered item 6 in these notes dealt with the creation of a separate scheme. Because these notes had only been discovered and disclosed by KeyMed shortly before trial, I permitted Mr Salzedo, QC, to take Mr Hillman through these notes as part of his evidence in-chief:[239]

Q (Mr Salzedo, QC)	Then could I ask you to turn on, please, two pages to page 3, and could you also then just explain the words and any particular comment you might have on item 6?
A (Mr Hillman)	Yes. This notebook, the whole concept, was to allow me to capture the points arising at meetings that I had. It's not a day book as such. It's basically a book – I mean, I had taken responsibility, had new responsibilities across Europe and America, and just to help me control that and to record what I was putting in the minutes of the various meetings I was having, I kept this book, and this was one of those meetings. And in general what I would do, I mean, you will see if you look through the books, that they are all very much a question of action points that come out, rather than a narrative of what was discussed, and this here is the output of a discussion that we had at this meeting about the creation of a separate pension scheme for the executive members.

[237] Hillman 1/§12.2.

[238] Hillman 1.

[239] Day 5/pp.83*ff* (Mr Hillman in-chief).

	What – I mean, if I could just go through this as – it says "Creation of separate executive members" as the heading, and that's "split out scheme based on the A-Day implications". Then, underneath that are the key points that came out of a discussion that had taken place between Hugh Craig, Michael, me and Mel Wright, that if we were going to set up a new scheme, these were the points we needed to consider. So it said "No cost implications for the company; company will not compensate for [increased] tax charges". This scheme is in the context of a comprehensive review of the pension arrangements, that there would be "no enhancement of existing benefits", we would have a "consistent funding approach", which was basically meaning that we would fund each of the two schemes to the same actuarial level, and on the far right, the one with the little question mark, it says – that's Michael and me and Peter Virgo to declare our membership as trustees and executive members, and I've clearly put a question mark by that. It didn't quite make sense and needed to be clarified. Then it says: "Key-point: member-nominated trustees (consistent with corporate governance rules)." And the action that flowed from that was for me to draft a minute incorporating those essential points and put that to the KeyMed board for discussion, and Mel Wright was asked to produce a project plan.
Q (Mr Salzedo, QC)	Just going back to the little bit by the question mark on the right?
A (Mr Hillman)	Mm-hm.
Q (Mr Salzedo, QC)	Could I just get you to say what the actual words say?
A (Mr Hillman)	The words I have written here…?
Q (Mr Salzedo, QC)	Yes.
A (Mr Hillman)	…say "[Mr Woodford] and [Mr Hillman] and [Mr Virgo] declared their membership…as trustees and executive…" I didn't mean executive meeting but executive members.

238. This confirms the point made above: that the trustees made an in-principle decision to look at the establishment of a new Scheme. There is no explicit reference in these notes to any kind of funding deficit, although Mr Hillman claimed to recollect such a discussion.[240]

239. Mr Rowe's first witness statement sheds no further light on this meeting. His statement notes his inability to recollect matters and is confined to a description of the documents.[241] When cross-examined, Mr Rowe frankly doubted whether he would have understood, at the time, the implications of the Pension Protection Fund on high earners

[240] Day 6/pp.108-110 (cross-examination of Mr Hillman).

[241] Rowe 1/§§63-65. See also Day 2/pp.163-164 (cross-examination of Mr Rowe), where Mr Rowe sought to paint his role as "just the secretariat".

under the Scheme. He was taken through the position with some care by Mr Salzedo, QC,[242] culminating in the following exchange:[243]

Q (Mr Salzedo, QC)	…that could have quite a big impact on a high earner with a big pension because instead of getting the same X per cent as everybody else, they might well end up with just £25,000 or £25,000 plus a percentage of whatever was left. Do you accept that's the effect of these changes?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	Yes. And that is something that you understood at this time when this report arrived in late 2005?
A (Mr Rowe)	In reading the letter now, I can see what you're saying. But at the time, would I have absorbed the point?, I don't know.
Q (Mr Salzedo, QC)	Yes, that's the question, that's what I was asking you. What's the answer?
A (Mr Rowe)	I cannot recall.

240. Having considered Mr Rowe's evidence – both his witness statements and that given before me – I have concluded that he did not have a sound understanding of the reason why the Pension Protection Fund could prejudice the interests of high earners. In his witness statement, Mr Rowe stated that "I later came to the view that the rationale for setting up the Executive Scheme was probably that Mr Woodford wanted to maximise the security and control he had over his pension".[244] I regard this evidence as valueless: not only is it explicitly an *ex post* reconstruction, but it takes no account of the contemporary documents and simply seeks to "spin" the reasons for the creation of the Executive Scheme.

The trustees' meeting of 27 March 2006

241. The minutes for this meeting record that the minutes of the previous meeting on 17 November 2005 were approved. Items 3.1 and 3.2 in those minutes were noted as "Actioned – remove from minutes".

(iii) No evidence of other reasons for the creation of the Executive Scheme

242. In cross-examination, it was suggested to Mr Rowe that there were various factors at play when the decision to establish the Executive Scheme was made. The starting point for the cross-examination was Mr Rowe's assertion that the "rationale for setting up the Executive Scheme was probably that Mr Woodford wanted to maximise the security and control he had over his pension".[245] The exchange in cross-examination went as follows:[246]

[242] Day 2/pp.159*ff* (cross-examination of Mr Rowe).

[243] Day 2/p.161 (cross-examination of Mr Rowe).

[244] Rowe 1/§68.

[245] Rowe 1/§68.

[246] Day 3/pp.18*ff* (cross-examination of Mr Rowe).

Q (Mr Salzedo, QC) So, at the moment, all I'm seeking to identify with you is when was it that you reached this view that the rationale was Mr Woodford wanting to maximise security and control?

A (Mr Rowe) I think it's just over time and the actions that were taken.

…

Q (Mr Salzedo, QC) …I'm going to put to you, I think, four matters which were put forward at the time as being reasons to set up the new scheme. I just want to ask you whether you still accept those were among the reasons. I understand the reason you say this, this reason that you give here?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) So, one point was that the effect of the new rules about the PPF was to reduce the security that high earners in the main scheme previously had, and we discussed that yesterday?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And do you accept that was a genuine reason why it might have been felt desirable to set up a new scheme?

A (Mr Rowe) Did I not answer that yesterday, in terms of…

Q (Mr Salzedo, QC) Well, just humour me if you will, please, Mr Rowe, by answering it again. I apologise to his Lordship if you have.

A (Mr Rowe) Yes. I think that's one of the, you know, there's a rationale for setting up, but I believe as an executive, who are working for the shareholders, that should be made transparent and clear.

Q (Mr Salzedo, QC) All right, I appreciate you say it should be made transparent and clear, and we'll look at that in due course as to how transparent and clear it was, but you accept that that was a genuine reason why Mr Woodford and Mr Hillman would have thought it was appropriate to set up a new scheme?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And also, as I think we've discussed, it was the fact that because of Mr Woodford's long service and high position, and the proportion that his pension represented, when he received a large promotion, as had started happening, that could create a sudden deficit in the main scheme?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And that was a reason why it might have been appropriate to split off the schemes?

A (Mr Rowe) When the scheme was split, I believe there was a deficit in the main scheme, as a result of the split as well. So…

Q (Mr Salzedo, QC) Yes, Mr Rowe, and that had to be dealt with, but it was a reason why the current situation was one which required change, or at least change was appropriate to consider?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) Thirdly, we have discussed the fact that the three existing members of the executive section who were still active, their

	retirements were all approaching in the foreseeable future, and that could affect investment policies that would be appropriate for their liabilities and I think you did answer that a few moments ago, that that was the case, and again that's another genuine reason why it might have been appropriate to split the schemes?
A (Mr Rowe)	Yes, that could be considered a reason, yes.
Q (Mr Salzedo, QC)	And we looked, yesterday, at the pensions options report from Mercer of 14 November, which set out the three options, and made it fairly clear that Mercer's view at that stage was that the separate scheme was the most appropriate way of dealing with those matters and, from the perspective of somebody who is not an actuary, Mercer's advice was another genuine reason why it might have been felt appropriate to adopt that course?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And is this right: you still accept now that those were among the reasons that Mr Woodford and Mr Hillman took into account in deciding to propose the new scheme?
A (Mr Rowe)	Yes.

243. Mr Salzedo, QC, was, quite properly, putting his clients' case that there were essentially two reasons why the Executive Section was split out of the Staff Scheme in the form of a new Executive Scheme:

(1) First, in order to protect high earners from the effects of Pension Protection Fund and the PPF Risk; and

(2) Secondly, in order to ensure that both the ordinary Members' and the Executive Members' future entitlements under the Staff Scheme were properly funded. As Mr Woodford explained, keeping these two sets of Members together in one scheme, given the very considerable entitlements of the Executive Members, risked prejudicing the position of the staff Members if and when the Executive Members retired and so created a distortion in the perception of the funding level of the Staff Scheme.[247]

244. I accept that this second reason may have been a legitimate reason for splitting off the Executive Members. However, there is a great difference between what might have been the reason for the establishment of the Executive Scheme and what in fact was the reason. In this case, I consider that the reason for the establishment of the Executive Scheme was the effect of the Pension Protection Fund on the Executive Members, *i.e.* the PPF Risk. There is simply no other reason, in the documentation, put forward for the establishment of the Executive Scheme.

(iv) The question of distortion

245. That said, the issue of the funding of the Staff Scheme was certainly being debated at the same time as the PPF Risk. That is, no doubt, because the A-Day reforms prompted

[247] See paragraphs 214 to 217 above, setting out the evidence of Mr Woodford: the relevant paragraph is Woodford 1/§13.5; and paragraphs 218 to 220 above, setting out the evidence of Mr Hillman: the relevant paragraph is Hillman 1/§14.5.

KeyMed and Mercer to review multiple aspects of the Staff Scheme. One of these, as has been described, was the PPF Risk. Another was funding. Thus:

(1) At the meeting of the Staff Scheme trustees on 17 November 2005 already referred to,[248] it is recorded that the trustees "agreed that it would be prudent to fund the scheme on an ongoing basis and for any deficiency to be made good as soon as practicable in a timescale to be agreed with [KeyMed]".[249] Mr Woodford is recorded as making various suggestions regarding funding, and it was agreed that the 2005/2006 annual contribution of £2.8 million was to be made with immediate effect.

(2) There was also a discussion regarding the making, by KeyMed, of a special contribution. In a "post-meeting note", the minutes record that a special contribution of £5 million was made on 8 December 2005. This contribution appears to have been made following advice from Mercer regarding the making of a £5 million to £10 million special contribution.[250] Mercers' view was that, so far as KeyMed's position was concerned, there would be no overall impact on KeyMed's balance sheet and a positive effect on KeyMed's "P&L for 2006/07 [of] £100,000 per annum".

(3) On 26 January 2006, there was a meeting between representatives of Mercer (Mr Wright and Mr Claisse) and KeyMed (Mr Hillman, Mr Rowe and Ms McBrearty).[251] The note records the desire "to establish a mirror image arrangement of the existing DB Scheme in relation to design and arrangements" and the fact that Mercer, Mr Hillman and Mr Woodford would be conflicted in calculating the transfer value of the interests being transferred. It was agreed that Mr Craig would be able to make this decision for the trustees of the Staff Scheme, but that an actuary different to Mercer would have to act on assessing the transfer value.

(4) On 27 March 2006, there was a meeting of the trustees of the Staff Scheme. Item 13 of the minutes updated on the steps being taken regarding the Executive Scheme. Separately, Item 14.1 of the minutes noted:

> "The Trustees, in consultation with the company, advised that a special contribution of £12,000,000 would be made into the Scheme's funds by 31 March 2006. This special contribution is based on the information provided by Mercers, as being the estimated funding shortfall in the Scheme at 31 March 2006."

The information provided by Mercer was a document, dated March 2006, entitled "Consideration of Transfer Value Basis for New Executive Scheme". This paper noted as follows:

> "6.4 Once all pensions are secured on the PPF basis, the KeyMed Scheme's winding up rule then dictates how the remaining assets are applied. Basically, the winding

[248] See paragraphs 230*ff* above.

[249] Item 5 of the minutes.

[250] See Mercer's letter of 28 November 2005.

[251] The meeting is recorded in a Mercer meeting note.

up rule will require the assets to be applied to secure the following benefits, in order of priority:

1. pensions in payments for members under NPA (level)

2. deferred pensions for other members (level)

3. increases on pensions under 1 and 2.

6.5 The issue here which the Trustees need to consider is whether paying a transfer value on the "Share of Fund" basis (c. £12.2 million) will result in a reduction to the security of benefits for those members who do not transfer.

6.6 Based on the estimated funding position of the KeyMed Scheme at 5 April 2005, I have estimated the following:

- If the KeyMed Scheme had wound up at 5 April 2005 then the PPF level of benefits could have been secured for all members. In addition, the remaining assets would have been sufficient to cover 100% of benefits under 1 above and on average 65% of the remaining non-PPF benefits for all members in 2.
- If a transfer had taken place to a new Executive Scheme on 5 April along the lines described above (*i.e.* with a Share of Fund transfer value of £12.2 million) and the Scheme had then wound up, then PPF level benefits would have been secured for all remaining members and the remaining assets would have been sufficient to cover on average 36% of non-PPF benefits in 2 for remaining members.

6.7 The reduction in cover for non-PPF benefits following the transfer reflects the fact that the payment of £12.2 million out of the KeyMed Scheme to a new Executive Scheme is far greater than value of PPF level benefits for the Executives."

246. Mercer's March 2006 paper shows very clearly the cost to the non-Executive Members of the benefit to the Executive Members of avoiding the PPF Risk. It also shows the nature of the "distortion" that the Executive Members caused in the Scheme. The "distortion", really, was that the Executive Members were providing security to the non-Executive Members in the event of a winding-up of the Scheme were KeyMed to become insolvent. The creation of the Executive Scheme would remove that security from the non-Executive Members, but so too would the retirement of Messrs Virgo, Hillman and Woodford.

247. I have no doubt that the work done in relation to the Executive Scheme exposed this "distortion" (if I can use that term) to KeyMed and underlined the importance of properly funding the Staff Scheme. Although the special contribution of £12 million to the Staff Scheme approved on 27 March 2005 was more than the amount Mercer considered necessary to eliminate the anticipated degradation to the security of the non-Executive Members caused by the future establishment of the Executive Scheme,[252] I have no doubt that Mercer's paper significantly influenced KeyMed's approach to funding going forward. That is a point I shall revert to when considering the funding of the Staff and Executive Schemes in Section H below.

[252] Mercer considered that a payment of about £ 4 million would put the Staff Scheme back into the position it would have been in had the Executive Members not left.

(g) Points made by Mr Williams

(i) The points

248. In his statements, Mr Williams made a number of further points:

(1) First, he commented on what he perceived to be as the oddity of the draft minutes – described above[253] – being circulated to persons who were not present at the meeting, whilst these drafts were not circulated to him or Mr Virgo:[254]

> "It has been drawn to my attention that the only people who were circulated with the draft pension minutes of the meeting of 14 and 20 December 2005 for approval, before the minutes were sent to the KeyMed Japanese Directors, were Mr Calcraft and two other people who did not attend the meeting, [Mr Craig] and [Mr Wright], but not me. Minutes would generally be circulated for approval at the next Board meeting and so I am surprised to see that an extract of the minutes should be circulated to people who did not attend for their approval and not to me nor it would appear Mr Virgo, who was also listed as attending the meetings of 14 and 20 December 2005…"

(2) Secondly, he noted that there was "a rush to get the unapproved minutes to Japan. So far as I am concerned this process was very unusual because generally there was a gap before minutes were approved at the next Board meeting".[255]

(3) Thirdly, he noted that an extract of these minutes was presented at the Directors' and ExCom meeting that took place on 9 and 30 March 2006, which he considered to be unusual:[256]

> "The minutes of the Directors' and ExCom Meeting of 9 and 30 March 2006 record that an extract of the minutes of the Directors' meeting on 14 and 20 December 2005 was approved and signed. Again, this was unusual in that I do not recollect an extract being tabled at any other meeting and I cannot recollect what was in that extract or any explanation given for only an extract being tabled. Section 1 of the March minutes sets out in italics minutes from the December meetings that had action points. The only action point that is not included is item 53 of the minutes of 14 and 20 December 2005 that deals with the setting up of the Executive Scheme and other pension related items. In item 53.1.3, both Mr Hillman and Mr Rowe had been actioned to liaise with Mercer to implement the pension changes with effect from 1 February 2006. Clearly, the changes were not implemented by that date and it is unusual for there not to have been an update at the March 2006 meetings and a minute about why the changes which had been approved had not been implemented so this action could be carried over to another meeting. As the action was lost from the minutes, the item never came up for discussion in any of the subsequent Directors' meetings or ExCom Meetings."

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[253] See paragraph 201 above.

[254] Williams 1/§14.

[255] Williams 1/§14.

[256] Williams 1/§15.

(4) Fourthly, he complains that he and Mr Calcraft were not made members of the Executive Scheme when it was created. In his second statement, Mr Williams says this:[257]

> "Both Defendants state in their witness statements that the purpose of establishing the Executive Scheme was to simplify the funding arrangements for the Staff Scheme by removing the members whose pensions constituted significant liabilities. If that is so, I do not understand why they apparently did not consider including Mr Calcraft and myself in the proposed Executive Scheme. Although Mr Calcraft and I were junior directors at the time the Board of KeyMed considered the establishment of the Executive Scheme in December 2005, this was not and would not always be the case. Not only were we younger than both Defendants, but I was running the surgical device business in the US having been promoted to the position of Senior Vice President of Olympus Surgical and Industrial America and Mr Calcraft was the Managing Director of the European Medical Business. Given the likely length of our further employment with KeyMed and the increases in our earnings that might be expected over that time, our benefits might have been expected to grow to a level where they were as substantial as those of Mr Hillman."

249. It is necessary to consider these points in turn, although they verge on advocacy on the part of Mr Williams, rather than evidence.

(ii) Draft minutes not being circulated to attendees

250. As I have described, the draft minutes were shown to Mr Craig and Mr Wright.[258] Mr Williams is correct in his assertion that neither was present on 20 December 2005. But, as I have described, both were intimately involved in the Executive Scheme proposal, prior to its presentation to the Board. As has been seen,[259] Mr Wright assisted Mr Hillman in framing the proposal to the Board. I see nothing unusual, given *(i)* the complexity of the subject-matter, *(ii)* the prior involvement of the trustees and Mercer and *(iii)* the personal involvement of Mr Woodford and Mr Hillman, in these persons being particularly consulted regarding the terms of Item 53 in the minutes.

251. I see nothing unusual in a draft minute being circulated shortly after the meeting, and nothing unusual in Mr Craig and Mr Wright being asked to comment on the draft, even though they were not present at the meeting.[260] To the extent that Mr Williams or KeyMed seek to suggest that these circumstances justify an inference of dishonesty or lack of probity, I consider that no such inference can properly be drawn. As I have said, I regard the circulation of draft minutes to these persons as entirely explicable by the circumstances.

252. The question does arise as to why Mr Williams and Mr Virgo were not circulated. In this context, it is worth noting that Mr Calcraft was sent a copy of the draft minute. On 22

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[257] Williams 2/§5.

[258] See paragraphs 207*ff* above.

[259] See paragraph 211*ff* above.

[260] Mr Hillman stated that he often had the benefit of Mr Craig's advice on matters of drafting, and this was why he sent to minutes to Mr Craig: Hillman 2/§6.12. When this was put to Mr Williams (Day 2/pp.136-137 (cross-examination of Mr Williams), Mr Williams accepted the explanation. See, to similar effect, Woodford 2/§§10-11.

December 2005, Mr Hillman emailed Mr Calcraft in the following (pretty informal[261]) terms:

"Luke,

You're obviously beginning to chill out and I hope the wine is equally well-chilled!

As discussed, the Yoda issues are up to date and we await further developments…

In relation to the points discussed at part 2 of the Directors' Meeting, please find attached minutes which are, I believe, clear but if you have any comments, then give me a call, otherwise please send me a one-line e-mail confirming your agreement, allowing these to be sent to Tokyo this evening.

Back to the barbie (or, with Civil Partnerships in mind, maybe that's Ken!)

Paul"

253. Mr Calcraft responded on the same day, stating:

"No worries, cobba – please proceed as discussed."

254. There were five directors, three of whom (Mr Woodford, Mr Hillman and Mr Virgo) were conflicted in relation to the decision recorded in this particular minute. I can see some sense in ensuring that the one unconflicted director who was present – Mr Calcraft, Mr Williams having been absent for the discussion, as I have found[262] – was happy with the content of the minute.[263]

255. I did not hear evidence from Mr Calcraft. I infer from the exchange of emails described above that Mr Calcraft would not have given his one-line assent to the minute without having considered it and, having considered it, taken the view that it was a proper record of the discussion at the Board meeting.[264] Mr Woodford was of the view that the informality of Mr Calcraft's response should not lead to the conclusion that Mr Calcraft did not consider the draft minutes carefully.[265]

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[261] Mr Hillman was cross-examined on this exchange at Day 6/pp.148*ff*.

[262] See paragraph 223 above.

[263] This is, I consider, an inference that is justified from all the circumstances. Mr Hillman's explanation – which Mr Williams accepted – was that "[Mr Calcraft] was particularly interested in pensions and understood the issues involved and I therefore sought his view on the wording prior to circulating the minutes more widely…": Hillman 2/§6.12; put to Mr Williams on Day 2/pp.136-137 (cross-examination of Mr Williams). See, to similar effect, Woodford 2/§10-11.

[264] Mr Williams did not dissent from this in cross-examination: Day 1/pp.137-139 (cross-examination of Mr Williams). In re-examination, it was put to Mr Williams that Mr Calcraft was not particularly interested in pensions, and Mr Williams' view was that he was not: Day 2/pp.99-100 (re-examination of Mr Williams). That may or may not be the case: I make no findings. However, I do not consider that I should attribute to Mr Calcraft Mr Williams' somewhat cavalier attitude to Board minutes that he (Mr Williams) considered did not concern him, particularly when Mr Calcraft had been asked to review the minutes and had positively responded that he was happy with them.

[265] Day 9/p.86 (cross-examination of Mr Woodford).

(iii) A rush to get the unapproved minutes to Japan

256. As Mr Hillman and Mr Williams describe,[266] the draft minutes were sent to Olympus in Japan. They were collected from KeyMed on 23 December 2006, and reached their addressees on 27 December 2005 (in the case of Mr Stecher) and 26 December 2005 (in the case of Mr Morishima and Mr Okubo).

257. Mr Williams regarded this haste as "very unusual".[267] Again, he and KeyMed appear to suggest that this justifies an inference of dishonesty. Mr Hillman's response to this was that "Jacqui Carter ([Mr Woodford's] Personal Assistant), who was responsible for drafting the minutes, was pressing to finalise these and I simply wanted to assist her in sending them out before the Christmas break".[268] Mr Williams, in cross-examination, did not dissent from this as a possible explanation.[269]

(iv) Extract of the December minutes presented to the Board and ExCom meetings in March 2006

258. There were meetings of the Board and other ExCom members on 9 and 30 March 2006. As was the case with the December Board meetings, the determinations of both meetings were recorded in a single document.

259. The directors recorded as being present – as with the December minutes, it is not possible to discern whether all were present all of the time – were Mr Woodford, Mr Hillman, Mr Virgo, Mr Williams and Mr Calcraft. Mr Rowe – as an ExCom member – was also present.

260. Mr Williams makes two points in relation to these minutes:

(1) First, that an extract of the December minutes was presented to the meeting and "approved and signed". Mr Williams had, himself, no recollection of this, nor of what the extract might have been.[270]

(2) Secondly, and perhaps relatedly, the review of the December 2005 minutes that took place at this meeting did not contain a reference to Item 53 or to the Executive Scheme decision.

261. Mr Hillman and Mr Woodford both expressed the view that this was because of the transition from Board meetings to Board plus ExCom meetings, which required certain items to be kept confidential to Board members. Mr Woodford said this:[271]

"I note that [Mr Williams] states that the minutes of the Directors' and ExCom Meeting of 9 and 30 March 2006 record that an extract of the minutes of the Directors' meeting on 14 and 20 December 2005 was approved and signed. I cannot be certain what that extract contained, but

[266] See paragraphs 201 and 248(2) above.

[267] Williams 1/§14. Mr Woodford did not agree with this: Day 9/pp.88-89 (cross-examination of Mr Woodford).

[268] Hillman 2/§6.12. See also Woodford 2/§11.

[269] Day 2/pp.136-137 (cross-examination of Mr Williams).

[270] Williams 1/§15.

[271] Woodford 2/§13.

from reviewing the documents I believe it would have been items 53 and 54 from the minutes of the meeting on 14 and 20 December 2005. I believe this is explained by the fact that, at the time, KeyMed was making a transition between holding meetings for the directors only (December 2005) to holding them for the wider ExCom group (March 2006). Under the new arrangement, there would have been some subjects that were confidential to the director group and would have been discussed only by the directors and not the ExCom. Items 53 and 54[272] were both issues that, at that time, would have been confidential to the director group. I believe this is why these items were not carried forward from the December 2005 meeting. I recall they were dealt with by way of a separate discussion involving only the directors at the start of the March 2006 ExCom meeting. It would appear that the relevant extract of the minutes of the December 2005 meeting was presented for approval and recorded as approved and signed in the ExCom minutes. I do not know why this signed extract is not held on the file of signed minutes."[273]

262. When cross-examined, Mr Williams did not dissent from this possible explanation; indeed, he considered it "logical".[274] Obviously, matters would be clearer if the extract from the minutes had survived for examination at trial. But Mr Hillman's explanation would explain why the issue of the Executive Scheme was not mentioned in these minutes: it had already been dealt with separately.

(v) Mr Williams and Mr Calcraft were not made members of the Executive Scheme

263. Mr Williams and Mr Calcraft were not Executive Members of the Staff Scheme. They were non-Executive Members and, as I have described, the differences in terms of their rights compared to the rights of Executives were considerable.[275]

264. Of course, these greater benefits gave rise to different risks in relation to the Executive Members, notably the PPF Risk. The creation of the Executive Scheme was intended to deal with this risk so far as Mr Woodford, Mr Hillman and Mr Virgo were concerned.

265. Mr Williams' point appears to be that he was in some way wronged by not being treated as an Executive Member. The point is a remarkable one, since Mr Williams was <u>not</u> an Executive Member and his benefits were by definition different. The *raison d'être* for the Executive Scheme arose out of Mercer's advice to KeyMed as to the effect of the PPF Risk on the Executive Members. I find it remarkable that Mr Williams should raise this point in his statement, and I regard the point as fundamentally irrelevant. At most it

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[272] It was accepted by all that there was nothing particularly confidential about Item 54: see the evidence of Mr Woodford at Day 9/p.128. On the other hand, it is difficult to see the sensitivity in discussing Item 53 before the whole of ExCom. The suggestion that these Items needed to be considered by the Board only, without ExCom members, is at best an attempt at reconstruction.

[273] See, to similar effect, Hillman 2/§6.13.

[274] Day 1/p.139-141 (cross-examination of Mr Williams). In re-examination, the need for subsequent approval of the minutes at the March 2006 meeting was questioned by Mr Wardell, QC, on the grounds that the minutes had "gone off in approved form to the Japanese directors some months earlier": Day 2/pp.100-101 (re-examination of Mr Williams). The sending of the minutes is considered in paragraphs 201, 248(2) and 256 above. However, I consider that Mr Wardell, QC's question proceeds on the false premiss that the minutes had been sent to Japan <u>as approved</u>. That I do not consider was the case. Certainly, Mr Hillman had sought the views of Messrs Craig, Wright and Calcraft on the drafting of Item 53: but that Item had <u>not</u> been approved by the Board, and the minutes were circulated for information and <u>later</u> approval. Mr Hillman certainly drew a distinction between circulating draft minutes in order to see whether they reflected the general view and formally approving those minutes at the next meeting: Day 6/pp.165-166 (cross-examination of Mr Hillman).

[275] See paragraphs 39 to 48 above.

shows a failure to consider other classes of Member within the Staff Scheme. That would amount to a failure on the part of the trustees of the Staff Scheme (including Mr Craig) rather than a breach of director's duty to KeyMed.[276]

(h) Findings regarding the Board's decision to establish the Executive Scheme

266. In light of the foregoing, I make the following findings:

(1) The advent of A-Day required a fundamental review by KeyMed and the trustees of the Staff Scheme. One of the conclusions of this review was that the creation of the Pensions Protection Fund, with the allocation of assets in the case of a winding up that this implied, created a risk (the PPF Risk) for the more highly entitled Members of the Staff Scheme. These Members were, essentially, the Members of the Executive part of the Staff Scheme, whose rights under the Scheme were considerably better than the rights of non-Executive Members.[277]

(2) The trustees came to the conclusion that the PPF Risk was one that needed to be addressed, and Mercer was instructed to consider how that risk might be ameliorated. Mercer came up with a series of proposals, the most cost-effective of which was the creation of a new Executive Scheme solely for the Executive Members.[278]

(3) In the course of cross-examination, it was suggested that the Defendants had, in some way, behaved improperly in failing to have the cost of establishing the Executive Scheme identified and placed before the Board.[279] I reject that criticism for the following reasons:

(a) The transfer of the Executive Members' interests to the new Executive Scheme was explicitly on the basis that there would be no enhancement of the Executive Members' benefits.[280]

(b) The sole purpose of the creation of the Executive Scheme was to eliminate the PPF Risk. It was suggested that this elimination of the PPF Risk might constitute a "benefit". I do not accept this: the "enhancement of benefits" referenced in Item 53 referred to the rights of Members under the Staff Scheme, not to any lack of security that might arise were KeyMed to become insolvent and the Staff Scheme would up.

(c) Given that the rights of the Executive Members under the Staff Scheme were Defined Benefits, the transfer of these interests from one pension scheme to another would not involve KeyMed in any additional costs beyond the transaction costs implied in setting up a new scheme. The fact is that KeyMed was <u>obliged</u> to provide the Defined Benefits to the

[276] Mr Williams was cross-examined on this point at Day 1/pp.162*ff* (cross-examination of Mr Williams). He accepted at the end of this passage of cross-examination that this point was not a valid one: Day 1/p.164 (cross-examination of Mr Williams).

[277] See paragraphs 39 to 48 above.

[278] See paragraphs 216 and 236 above.

[279] See, for example, the cross-examination of Mr Hillman at Day 5/p.120.

[280] See paragraph 199(4) above.

Executive Members, meant that the cost implications of the proposal were essentially nil – leaving the transaction costs to one side.

(d) Obviously, setting up a new scheme would involve some cost (so-called "transaction" costs). I do not consider that the Defendants – or, for that matter, anyone else – are to be criticized for failing to obtain estimates of such costs. Mercer had identified a significant risk to the security of the Executive Members' benefits (the PPF Risk) and had identified the most cost-effective way of resolving that risk. The transaction costs were an inevitable concomitant of resolving the PPF Risk by way of establishing the Executive Scheme. The real question was whether the company considered that this risk should be resolved.

(4) In parallel to the consideration of the PPF Risk, the trustees were concerned about the level of funding of the Staff Scheme. Indeed, questions of funding were actually considered by the trustees on 17 November 2005:[281] it was at this meeting that the trustees took the view that setting up a separate Executive Scheme was an appropriate course to pursue.[282]

(5) Moreover, the steps that were taken after the decision to establish the Executive Scheme was made – notably, in relation to establishing a transfer value for the interests of the Executive Members[283] – underlined the extent to which, in the event of an insolvency of KeyMed and a winding up of the Staff Scheme, the assets that had been accumulated to discharge the liabilities to both the Executive and non-Executive Members would be insufficient to meet those liabilities. In the very short term, the creation of the Executive Scheme emphasized the extent to which the security of the non-Executive Members depended upon the presence, in the Scheme, of the Executive Members.

(6) Mr Woodford and Mr Hillman referred to this as a "distortion" caused by the presence of the Executive Members in the Staff Scheme,[284] and I am content to adopt their terminology.

(7) Although the transfer of the Executive Members out of the Staff Scheme and into the new proposed scheme would expose the extent to which the funding of Executive Member liabilities was disguising a shortfall in the funding of non-Executive Member liabilities, I find that this was not a reason for the creation of the Executive Scheme. I find that the sole reason for the promulgation of the Executive Scheme proposal was the avoidance or elimination of the PPF Risk.

(8) To this extent, therefore, I do not accept the evidence of Mr Woodford and Mr Hillman that the "distortion" was the, or even a, reason for the proposal that an Executive Scheme be established. However, I do not consider their (mis)recollection to be anything other than an honest one and an understandable one. As I have described, the funding of the Staff Scheme was an issue that was

[281] See paragraphs 245(1) and 245(2) above.

[282] See paragraph 233 above.

[283] See paragraphs 245(3) and 245(4) above.

[284] See paragraphs 214, 216 and 219 above.

being considered at the same time as the Executive Scheme proposal; and the exposure of the shortfall in the Staff Scheme funding caused by the decision to establish the Executive Scheme followed very shortly after the decision to establish the Executive Scheme. I can, therefore, readily understand why the "distortion" caused by the Executive Members to the Staff Scheme and the decision to establish the Executive Scheme became conflated in the minds of the Defendants.

(9) The issue of the establishment of the Executive Scheme was not on the agenda for these meetings of the Board, but I draw no inference – one way or the other – from this fact. KeyMed did not necessarily circulate agendas before Board meetings,[285] and the December Board meetings appear to have been the exception, rather than the rule, in having an agenda. The agenda is extremely short and staccato in nature, particularly when compared to the length of the minutes of the December Board meetings and the number of issues before the Board. It is obvious that the agenda was highly selective in the items it listed, and that is why it would be unsafe to draw any inference from the omission of the proposal to establish the Executive Scheme from the agenda.

(10) Mr Woodford and Mr Hillman – and, no doubt, Mr Virgo – took the proposal to establish the Executive Scheme extremely seriously. That is evidenced by the discussions that took place between the trustees before the December Board meetings. As I have noted, Mr Hillman was tasked with preparing a draft board minute,[286] which task I accept was imposed upon him because of the importance and sensitivity of the proposal. The proposal was important because the PPF Risk was a material one adversely affecting the interests of Mr Woodford, Mr Hillman and Mr Virgo. It was a sensitive one for exactly the same reason: the proposal involved eliminating the PPF Risk to the benefit of these three persons. Each of them clearly had a quite fundamental interest in the proposal and in wanting it to be carried by the Board. Although, in the event, I have found that no draft minute was produced before the Board meetings,[287] the extent of Mr Hillman's preparations can be gauged by his file note, recording his conversation with Mr Wright regarding the various ways in which the PPF Risk might be ameliorated.[288]

(11) The proposal to establish the Executive Scheme came before the Board on 20 December 2005. The directors present for the discussion of the Executive Scheme proposal were Mr Woodford, Mr Hillman, Mr Virgo and Mr Calcraft.[289] Although Mr Williams was present for part of this meeting, he was not present for the discussion regarding the proposal to establish the Executive Scheme.[290] The outcome of the meeting was minuted in Item 53. Item 53 does not record the detail of the discussion that took place, nor the exact reason for the proposal. It does not record the papers that were before the Board regarding this proposal. I do not regard

[285] See paragraph 165(3)(c) above.

[286] See paragraphs 206 to 209 above.

[287] See paragraph 206 above.

[288] See paragraph 211 above.

[289] See paragraph 195 above.

[290] See paragraph 222 above

any of these matters as suspicious. The minutes record – as minutes do – the outcome of discussions and the actions taken. Item 53 looks no different from any of the other items in the December minutes, and the December minutes themselves are entirely typical of the sort of minutes that were produced of KeyMed Board meetings.

(12) Item 53 was the product of a careful drafting process that involved Mr Craig and Mr Wright, who both had input into the draft minute.[291] Again, I do not regard that as suspicious: the subject matter was technical, and Mr Hillman (and Mr Woodford, who was also involved) were concerned to ensure that the minute was accurate in light of the technical nature of the proposal and its sensitivity (given their personal interest in the transaction).

(13) The fact that KeyMed did not use "board packs"[292] means that it is not possible to say what documents, if any, were before the Board concerning the proposal to establish the Executive Scheme. I am prepared to accept that, if questions had been asked by members of the Board, Mr Hillman would have been ready and prepared to answer them, with supporting documentation if necessary. But that is the problem: no-one was able to give detailed evidence of what, exactly was said, and so it cannot be inferred what (if any) documentation was produced to the meeting. More importantly, because it is impossible to know what materials were before the Board, it is impossible to make inferences from these documents as to the nature of the discussion that took place.

(14) There is, in short, remarkably very little evidence as to what was actually said at the Board meeting: there are no documents that can shed light on what discussions took place; and of those present at the Board meeting, only Mr Woodford and Mr Hillman – who are, of course, *parti pris* – gave evidence. None of the other witnesses (including Mr Williams) had any relevant evidence to give: they were not, as I have found, present at the meeting. It is for this reason that the background to the meeting – which I have described in paragraphs 267(1) to 267(10) – is so critical. In light of all the circumstances, I make the following findings as to what was said in relation to the Executive Scheme proposal at the meeting on 20 December 2005:

(a) Mr Woodford, Mr Hillman and Mr Virgo made it clear that they were personally interested in the proposal being brought before the Board. Whilst I strongly suspect that a declaration of interest in precisely the form stated in the minutes was <u>not</u> made, I am satisfied that the directors would have been told, in clear terms, by one or more of Mr Woodford, Mr Hillman and/or Mr Virgo that they were each directly interested in the establishment of the Executive Scheme. I have reached this conclusion for the following reasons:

(i) Mr Woodford and Mr Hillman (and probably Mr Virgo) would have known that some kind of explanation for the establishment of the Executive Scheme would have to be given to the Board, and that this

[291] See paragraphs 207 to 212 above.

[292] See paragraph 165(3)(c) above.

would inevitably involve a discussion of who was moving to the new Scheme and why. That, inevitably, would flush out the interest of Mr Hillman and Mr Woodford and Mr Virgo. In other words, a declaration of interest was, in this case, no more than a statement of what would become blindingly obvious the moment the discussion began. Mr Woodford and Mr Hillman would have been ready to offer this explanation.

(ii) Neither the minutes nor Mr Hillman's file note recording his conversation with Mr Wright actually explained why a new pension scheme needed to be established. This would, I find, have been the first and very obvious question anyone considering the proposal would have asked. Why, given the fact that the Staff Scheme had been operating (apparently successfully) for many years, was it now necessary to establish a new scheme for the Executive Members?

(iii) The answer to that question would have been that the establishment of the Executive Scheme was necessary to avoid the PPF Risk. I find that this is the only answer that could have been given to this question, because I have found that the only reason for the Executive Scheme proposal was to avoid the PPF Risk.[293] There would have been no discussion of the risk of "distortion" because, as I have found, that was not a matter in the minds of the trustees at this time. Both Mr Woodford and Mr Hillman would have been well able to answer this obvious question, and that is what I find they did. Answering the question would, inevitably, have identified the interest of all the Executive Members in the establishment of the new scheme.

(iv) It is thus my conclusion that the interest of Mr Woodford, Mr Hillman and Mr Virgo would have become apparent in the very explanation of the transaction that was being proposed. That, as I find, is the reason why the formal wording being proposed by Mr Craig was necessary: Mr Craig was not seeking to rectify an omission on the part of Mr Woodford or Mr Hillman in explaining their (and Mr Virgo's) interest in the transaction, but rather was seeking to capture in short and formal language what Mr Woodford and/or Mr Hillman would have expressed more discursively.

(v) Furthermore, I consider it most improbable that Mr Woodford and Mr Hillman would have caused to have circulated minutes recording a conflict of interest, when no such conflict had in fact been declared at the meeting. That would have been inviting correction (in particular from Mr Calcraft, whose views on the draft minute were sought) and would have been both dishonest and foolish. I will reserve my judgment on the general honesty or otherwise of Mr Woodford and Mr Hillman; but neither of them were fools.

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[293] See paragraph 244 above.

(b) The discussion at the Board meeting would have focussed on the two key points identified by Mr Woodford during the course of his cross-examination:[294] *(i)* security; and *(ii)* no enhancement of benefits. The discussion of the first point – security – would have entailed, at a minimum, an explanation of the PPF Risk and how it might be avoided. That explanation would, no doubt, have brought into play the various technical solutions that Mercer had come up with, as per the file note referenced at paragraph 212 above. The discussion of the second point – no enhancement of benefits – would have involved an explanation that the only reason for the new scheme was to avoid the PPF Risk.

(15) The Board acceded to the creation of the Executive Scheme on this basis. The minutes of the meeting were then circulated as in the ordinary course, and Item 53 was approved at the next meeting, which was a Board/ExCom meeting. The approved minute has not survived, but that is what I find the content of the minute was.[295]

267. I appreciate that the evidence – or perhaps the dearth of evidence – has obliged me to make a considerable number of inferences. I am satisfied, on the totality of the evidence, that these inferences are well-founded. There is, however, a further reason why I consider these inferences to be well founded. That reason lies in the unique position of Mr Virgo:

(1) According to KeyMed, getting the Board's approval to the establishment of the Executive Scheme was the first step in the Conspiracy to which Mr Woodford and Mr Hillman were allegedly party.

(2) The problem with that contention is that Mr Virgo was in exactly the same position as Mr Woodford and Mr Hillman. True it is that Mr Virgo was not a trustee of the Staff Scheme, and so would have been less involved in the detail concerning the PPF Risk. But that does not alter the essential nature of the interest that all three Executive Members had in the establishment of the Executive Scheme. This was not a case of a conflict of duty between the duties of a director of KeyMed and the duties of a trustee of the Staff Scheme.[296] This was a case of a potential conflict of interest between a Member of the Staff Scheme and KeyMed,[297] to which Mr Virgo was as much exposed as both Mr Woodford and Mr Hillman. KeyMed's case requires me to find that Mr Virgo – a Board director since 30 March 1988 – was either sufficiently foolish not to appreciate his own conflict of interest and ensure that this was declared or as dishonest as KeyMed allege Mr Woodford and Mr Hillman to have been. I have heard no evidence from or about Mr Virgo. Absent evidence, it seems to me that I cannot properly conclude that Mr Virgo was either a knave or a fool: and that confirms me in the findings (set out in paragraph 267 above) that I would, in any event, have reached, even absent the special case of Mr Virgo.

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[294] See paragraph 218(2) above.

[295] See paragraphs 197 above.

[296] As described in paragraph 142(2) above.

[297] See paragraph 141(3) above.

(3) The decision voluntarily to apply the PIP Limit

(a) Introduction

268. One of the effects of A-Day was to remove from compulsory application the Revenue Limits that, prior to A-Day, were compulsorily applicable. These limits could, of course, voluntarily be retained by a scheme and could – on that basis – continue to apply. That, indeed, is what happened in this case.

269. On 5 April 2006, members of the Staff Scheme were informed of the A-Day changes. The information sheet sent to defined benefit active members of the Staff Scheme was five pages long and contained the following passages:[298]

> "9 **Earnings cap**
>
> Under current requirements your earnings for contributions and benefits may be subject to an earnings cap, set by the Government. For the tax year 2005/2006 the earnings cap is set at £105,600. Normally this only applies if you joined the Scheme on or after 1 June 1989.
>
> As a result of replacement of the earnings cap (and other Revenue limits – see below) with the Lifetime Allowance, schemes are no longer required to limit contributions and benefits by reference to the earnings cap. This could result in the costs of the Scheme increasing considerably. However, we have decided that the earnings cap will continue to apply under the Scheme as if it was still in force except where you are notified otherwise. The Scheme earnings cap will be increased each year under the scheme rules, roughly in line with inflation.
>
> 10 **Revenue limits**
>
> The Scheme is designed to stay within current Revenue limits and so normally benefits can be paid without the Revenue's restrictions. However, some limits, for example the maximum pension of 2/3^{rds} of final remuneration, are sometimes triggered.
>
> The Government's new "simplified" approach will allow pension arrangements that are registered with HM revenue & Customs to pay any level of benefits. There will be very few benefit limits. Where the value of benefits is in excess of the Lifetime Allowance (see above) additional tax will be payable. In reality, the Lifetime Allowance has been set so that very few people will be affected by it. The tax treatment of benefits will be much as it is now as long as the benefits meet certain criteria and the overall value of them does not exceed the Lifetime Allowance.
>
> As a result of the removal of Revenue limits, some members whose benefits would currently be restricted could receive higher benefits from the Scheme. However, the cost of this and the complicated changes to the administration systems of the Scheme could be high. To control these costs and therefore help to protect its long-term funding and security, we have decided to retain the current Revenue restrictions as well as the earnings cap (see above) except where you are notified otherwise. This will enable the Trustees to continue to run the Scheme as it had been designed. However, where you pay AVCs you may potentially build up benefits higher than allowed under current Revenue limits."

[298] Emphasis added.

At the end, the information sheet stated that it was "[i]ssued for and on behalf of the Trustees of the [Staff Scheme] and KeyMed". Importantly, this information sheet pre-dated the creation of the Executive Scheme.

270. Self-evidently, the decision to retain – on a voluntary basis – the Revenue Limits in general and the PIP Limit in particular must have been made both by KeyMed and the trustees of the Staff Scheme. It is necessary to consider how this decision came to be made. In particular, it is necessary to consider the involvement of Mr Woodford and Mr Hillman. Mr Woodford and Mr Hillman were, of course, involved both with KeyMed (as directors) and with the Staff Scheme (as Members and Trustees).

(b) How the decision came to be made: the evidence

(i) The documentary evidence

271. KeyMed was aware – from an extremely early stage – that the Revenue Limits would cease to apply from A-Day and that this could have significant adverse cost consequences for KeyMed. In a letter dated 27 July 2004, Mercer considered the implications of A-Day for KeyMed and for the Staff Scheme. In particular, the following points were noted:

(1) That provision of pension benefits in excess of the Lifetime Allowance were tax inefficient.

(2) That the cessation of the application of the Revenue Limits might have implications for Members' benefits and for KeyMed's contributions to the Scheme:

> "Currently the benefits provided under the Scheme are subject to [the Revenue Limits] and the definition of Final Pensionable Earnings for post '89 employees is subject to the Earnings Cap. Under the [A-Day] proposals, these limits will cease to apply. Further…the new Lifetime Allowance will not restrict the benefits payable under the Scheme, merely the amount that can be paid with no tax charge applying. Therefore, if no action is taken, the benefits payable to post '89 employees, who are currently subject to the Earnings Cap, may well increase since this cap will no longer exist and benefits will be based on full salary (although this will depend on exactly how the legislation is effected). This would result in an immediate increase in the value of the benefits accrued by these members, placing further strain on the funding of the Scheme.
>
> ***[Keymed] will need to consider whether it wishes to [sic] such members' benefits to increase to be calculated in line with their actual (uncapped) salary. If so, the Trustees are likely to require [KeyMed] to increase its contribution and possible [sic] make an immediate cash injection. At this stage I have not investigated the potential amounts involved. Otherwise, an appropriate amendment will need to be made to the Rules to restrict these members' benefits to the level currently envisaged, so ensuring no strain is placed on the Scheme's funding position.***"

In other words, abandonment of the Revenue Limits would seriously impact KeyMed financially.

272. On 5 April 2006, Members were informed of the decision to retain the Revenue Limits, in the manner described in paragraph 70 above. It ought, therefore, to be the case that at some point between July 2004 and April 2006 a decision to this effect was made both by KeyMed and the trustees of the Staff Scheme.

273. Between July 2004 and the end of July 2006,[299] the trustees of the Staff Scheme held meetings on:

(1) 4 April 2005.

(2) 17 November 2005.

(3) 27 March 2006.

I have reviewed the minutes for each of these meetings. Although there was – entirely unsurprisingly – considerable discussion of A-Day and its implications, there is no minuted decision of the trustees relating to the retention or voluntary re-imposition of the Revenue Limits.

274. In the same period – between July 2004 and the end of July 2006 – there were the following meetings of the Board and/or ExCom:

(1) 15 July 2004.

(2) 15 September 2004 and 5 October 2004.

(3) 17 December 2004.

(4) 10 January 2005.

(5) 13 January 2005.

(6) 9 June 2005.

(7) 15 September 2005.

(8) 14 and 20 December 2005.

(9) 9 and 30 March 2006.

(10) 23 March 2006.

(11) 8 May 2006 and 30 May 2006.

(12) 6 July 2006 and 7 August 2006.

Again, I have reviewed the minutes for each of these meetings. Some of the meetings have already been considered: for example, the December meetings at which the establishment of the Executive Scheme was considered. As in the case of the meetings of the trustees, there is no minuted decision of the directors relating to the retention or voluntary re-imposition of the Revenue Limits.

275. On 25 May 2006, Mr Wright wrote to Mr Rowe regarding changes consequent upon the new A-Day regime. The letter contained "our definitive list of changes to the administration systems and processes which are proposed in order to implement the new

[299] I have taken this longer date range because Mr Rowe signed a letter approving the re-imposition of the Revenue Limits on 16 June 2005.

legislation. The trustees need to agree this list for implementation to proceed and to meet our change control requirements. This is also a useful process for trustees, in that it provides evidence that they have followed a robust internal control procedure consistent with the requirements to establish such procedures under the Pensions Act 2004.

276. The letter set out, at Appendix B, a list of the changes that Mercer was proposing. The letter made clear that "[t]hese changes now need to be reconfirmed on behalf of the Trustees prior to implementation. I can confirm that they are consistent with my understanding of your intentions where you have made an active decision, but ultimately the responsibility is yours. In some cases they are our "default" choices, as discussed below." The default choices were set out at Appendix A, and the letter stressed that a default choice might not automatically be appropriate for every scheme and that adoption of defaults was at the trustees' own risk.

277. The changes proposed in Appendix B were listed in tabular form. Part of the table (that relating to the Defined Benefit elements of the Staff Scheme) is set out below:

Change	Selection	Option	Additional Information
STAFF SCHEME – DEFINED BENEFITS			
…			
Maximum Benefits – Removal of Existing IR Limits	All members	Maintain all current revenue limits	But AVCs on top of 2/3 limit
…			
Maximum Benefits – Removal of Earnings Cap	All members	Keep existing Earnings Cap	
Maximum Benefits – If Earnings Cap kept	All members	2005/6 Cap increased in line with RPI	
Maximum Benefits – If Earnings Cap is removed	All members	Not Applicable	
If you have decided to remove some 'Revenue Limits', how are you dealing with 2/3 or 40 year service rules?	All members	Retain 2/3rds check & 40 year service restriction	Maintain all limits

The details in Appendix B were voluminous – I have only set out parts. What is quite clear from these parts is that Mercer were proposing the maintenance of all Revenue Limits, including (although this is not expressly mentioned) the PIP Limit.

278. Mr Rowe signed the following confirmation, at the end of the letter, on 16 June 2006:

"I confirm that the changes set out on Appendix B to this letter and dated 05/05/06 for identification are in line with our requirements and that Mercer should implement them with effect from 6 April.

I understand and accept the points made in this letter regarding the residual risks to Trustees from the approach to provision of administrative services being adopted."

279. Given the terms of this letter – with its explicit references to the trustees' consideration and agreement – one would have expected Mr Rowe to have referred the issues raised by Mercer to both the trustees of the Staff Scheme and, indeed, to the KeyMed Board. However, as I have described, this matter was not considered at any meeting of the Board or of the trustees. Nor was I taken to any other document evidencing such consideration. The letter may, of course, have been shown by Mr Rowe to Mr Hillman or Mr Woodford. But there is no paper-trail to suggest that this occurred, and I am afraid that I do not consider that I can rely – in the absence of such a paper trail – on the unassisted recollections of the witnesses as to what Mr Rowe would have done with this letter, when he received it.

(ii) The evidence of the factual witnesses

The evidence of Mr Hillman

280. Mr Hillman's evidence was as follows:[300]

> "16.1 As I have said, prior to the summer/autumn of 2006, I understood that the Definitive Deed granted members joining the Staff Scheme prior to 21 July 1997 fixed 5% per annum increases to pensions in payment. All of the executive members had joined the Staff Scheme prior to this date and I therefore believed that they would all benefit from these increases. At the time, I was aware that certain limits existed in relation to maximum pensions but I did not realise that there were any limits applicable to me in relation to increases to pensions in payment.
>
> 16.2 I recall having a discussion with John during which he raised the subject of whether the Earnings Cap should be retained in relation to the Staff Scheme following A-Day. My recollection is that the Staff Scheme Trustees discussed the Earnings Cap and agreed in principle that they should recommend to the company that the Earnings Cap should be retained. However, I cannot remember exactly when these discussions took place or when this decision was made. I believe that it is likely that it would have been at or around the Staff Scheme Trustee meeting on 04 April 2005. This is because that was the first Staff Scheme Trustee meeting after which Mercer had issued its letter dated 27 July 2004 (which discussed the removal of the Earnings Cap) and the IR Report (which referred back to the July letter and gave further detail regarding the A-Day changes). The 27 July 2004 letter in particular placed considerable emphasis on whether or not to retain the Earnings Cap.
>
> 16.3 In the event, the Staff Scheme retained not only the Earnings Cap but also the other Revenue Limits, which included the PIP Limits. However, I cannot remember discussing the removal of the Revenue Limits (including the PIP Limits) with John, the Staff Scheme Trustees or the directors, nor can I recall a decision to this effect being made.
>
> 16.4 I remember that John took the lead in managing the changes to the Staff Scheme in relation to A-Day and Mercer correspondence with John directly on this subject without copying me or Michael. This is demonstrated by the fact that John signed a declaration on 16 June 2005 on behalf of the Trustees of the Staff Scheme confirming that the changes to be made to the Staff Scheme as proposed by Mercer should be implemented.
>
> 16.5 I note from my review of the documents that Mercer sent draft member communications to Sally for review in March 2006, who then forwarded them to John. I note that these communications were ultimately issued to members of the Staff Scheme on 05 April

[300] Hillman 1.

2006. I do not remember reviewing those member communications prior to them being issued. I note that those communications explain that new legislation would remove the Revenue Limits but that the Staff Scheme Trustees and KeyMed had decided to retain those limits in order to control costs and to protect the long term funding and security of the Staff Scheme. Members were also informed that the Earning Cap would be retained for pre-1989 joiners."

281. Mr Hillman was cross-examined on this, and it was put to him that he must have known of the PIP Limit.[301] Mr Hillman was firm in his denial of his understanding of the PIP Limit (as opposed to the Revenue Limits in general, which he knew of, albeit not in great detail).

282. But it is the knowledge of the PIP Limit – and, specifically, its voluntary adoption for the Staff Scheme – that is at issue here. On this point, as I say, Mr Hillman was consistent with his witness statement in his denial of knowledge. Mr Hillman's evidence is also consistent with the documentary evidence.[302] Indeed, he could not even identify any specific point at which it was agreed that the Revenue Limits in general should be retained. He attributed the decision to a particular meeting in 2005. However, as I have described, the minutes do not reflect that a decision was in fact made.

The evidence of Mr Woodford

283. In his witness statements, Mr Woodford does not specifically discuss the work that was done in relation to the A-Day proposals. This was because he was not involved in this work. Matters were handled by Mr Hillman and Mr Rowe. Nevertheless, Mr Woodford was pressed in cross-examination as to his knowledge of the PIP Limit. His evidence was that he only became aware of the PIP Limit after it had been adopted:[303]

Q (Mr Wardell, QC)	And do you recall the trustees of the Staff Scheme considering whether to retain the [Revenue Limits] after A-Day?
A (Mr Woodford)	Sorry, I'm just digesting the words again. The first time I was conscious was when Paul Hillman came to see me, telling me that a decision had been made to retain the limits, and that it affected me and him.

284. It was suggested to Mr Woodford that it was inconceivable that a decision of this sort could have been made without his (Mr Woodford's) involvement:[304]

Q (Mr Wardell, QC)	And it's inconceivable you wouldn't have been party to this decision, isn't it?
A (Mr Rowe)	Again, this whole issue of how this went out, there were no discussions as far as I am aware with the directors, and with the

[301] This point was raised with Mr Hillman on a number of occasions throughout Day 6, notably Day 6/pp.15*ff*, 39-42 and 66-67 (cross-examination of Mr Hillman).

[302] The closest to a document explaining the PIP Limit is that to Mr Rowe described in paragraph 56 above. Mr Hillman may very well have seen it and considered it: but that letter is dated 18 September 2002, years in advance of A-Day and the question of the voluntary retention of the Revenue Limits. To suggest that Mr Hillman should have had this 2002 document in mind in 2005 is unreasonable.

[303] Day 8/p.196 (cross-examination of Mr Woodford).

[304] Day 8/pp.198-199.

trustees. It seems to have taken place in a dialogue between John Rowe and Mercer.

Q (Mr Wardell, QC) So you're saying John Rowe and Mercer took a decision to retain the [Revenue Limits] even though under the new legislation they were going to fall away?

A (Mr Woodford) And as far as I'm aware, no-one asked me or any of the directors for approval to do that. It wasn't discussed at a trustees meeting.

Q (Mr Wardell, QC) You were the only people – the trustees are the only people who can make that decision in consultation with the company?

A (Mr Woodford) I agree with you, and that's where the frustration – if this had been dealt with as it should have been at that point in time, I don't think we would be here now. It just seems to have happened. I don't know how that's happened, I don't know why [Mr Rowe] didn't seek approval, but no knowledge of it.

Q (Mr Wardell, QC) Well, I suggest it's obvious that it wasn't him who made the decision, but the trustees made the decision.

A (Mr Woodford) And I disagree with you.

285. Mr Woodford was extremely clear that until he was told of the problem of the PIP Limit affecting him, he had not heard of the PIP Limit and did not know of it. He was taken to documents – which, in 2005/2006, would have been historical – referencing the PIP Limit, notably the document quoted at paragraph 57 above.[305] Mr Woodford's evidence was – notwithstanding such communications – he had no understanding of the PIP Limit:[306]

Q (Mr Wardell, QC) Can you think of any reason why, having got this letter,[307] Mr Rowe wouldn't have ensured it was passed on to the trustees?

A (Mr Woodford) I mean, I'm financially literate, and I have not taken on board this point.

Q (Mr Wardell, QC) Well, you may have just forgotten it, mightn't you?

A (Mr Woodford) I don't think I've ever forgotten it: I never thought a HMRC limit applied. I got my annual statement, which said 5%. There were no caveats, there were no references to any limit. I always felt, until these – you know, the events of 2006, that I was entitled to 5% for pensions in payment.

Q (Mr Wardell, QC) But it came up on a number of occasions, didn't it?

A (Mr Woodford) You are showing me these letters. I – again, as you say, I – 20 years ago, 18 years ago, you can't remember, but I would have hoped I would have taken on board a point which was salient to me, and salient to the understanding as a trustee, but I didn't.

[305] Day 8/pp.185-186 (cross-examination of Mr Woodford).

[306] Day 8/pp.187-188 (cross-examination of Mr Woodford).

[307] This was the letter quoted at paragraph 56 above.

The evidence of Mr Rowe

286. Mr Rowe's first witness statement says very little about the decision to retain the Revenue Limits. Mr Rowe does not even discuss the 25 May 2006 letter from Mercer,[308] which he signed on 16 June 2006[309] in his first witness statement.[310] Mr Rowe's second statement is, essentially, responsive to the witness statements of the Defendants. Paragraph 6.12 responds to specific paragraphs of Mr Hillman's statement (which I have set out above[311]):

"**Paragraph 16.2 to 16.5** I would have had discussions with Mr Hillman about retaining the earnings cap in the Staff Scheme. This was an important issue of benefit design with cost implications arising out of the changes being introduced from A Day in April 2006 (over which I was liaising generally with Mercer in conjunction with Mrs McBrearty) so I would have referred it to Mr Hillman for a decision. I would not have decided the point myself. I would have adopted the same approach with all benefit design issues arising out of A Day changes, including the retention of Inland Revenue limits. It was Mr Hillman and Mr Woodford who took the substantive decisions in relation to pensions on behalf of KeyMed."

287. Mr Rowe was cross-examined about this document at some length:[312]

Q (Mr Salzedo, QC)	…I'm going to move on to 16 June 2006…this is in fact a letter to you of 25 May 2006, from Mercer, and it encloses a list of changes which are to be made to and by the scheme in relation to the new legislation. Yes? Are you familiar that that is basically what it is about?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And, in particular, Appendix B was a list of the detailed changes. You can see it referred to just under "Changes being implemented"? But Appendix B was a list of the detailed changes which Mr Wright thought were consistent with the trustees' intentions? You can see that, I think, from the last two paragraphs of the letter?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And if we go to page 2 [of the letter], the first two paragraphs explain what Appendix A is. Do you just want to remind yourself of the first two paragraphs? So Appendix A was sort of defaults where they felt they didn't know what the trustees wanted, but they were willing to just – they'll go with their defaults if you don't tell them otherwise?
A (Mr Rowe)	Mm-hm.

[308] See paragraph 275 above.

[309] See paragraph 278 above.

[310] Mr Rowe follows a largely chronological approach. A discussion of the 26 May 2006 letter and his counter-signature on 16 June 2006 ought to have appeared in Rowe 1/§§79-81.

[311] See paragraph 280 above.

[312] Day 3/pp.61*ff*.

Q (Mr Salzedo, QC) If we then go to [the last page of the letter], you will see that this letter was copied to Ms McBrearty, but not to anybody else within KeyMed?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) For this kind of communication, you were Mercer's primary point of contact, weren't you?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And if we then just go to [the last page of the document], we can see that you signed this letter on 16 June to say that the changes set out were in line with the requirements of the trustees?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And so, by this letter, Mercer in effect were advising that the particular decisions in this letter were decisions for the trustees, weren't they?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And if we go to…Appendix A, and in the second paragraph they say:

"If accrued benefits have previously been restricted by the Inland Revenue Limits, there may be potential for [those] restrictions to be removed and the benefits increased. The default is to assume the restrictions remain in place, on the basis that they were part of the original contract with the member. There is a risk that the member complains on the basis that the restriction was either inadvertent or not disclosed, and hence should be relaxed given the change in legislation."[313]

Is it right, that at this time, i.e. up to the time you signed this on 16 June, you were not conscious that the effect of the revenue limits could have been to restrict the 5% fixed increases on executives' payments?

A (Mr Rowe) No.

Q (Mr Salzedo, QC) So it is correct, is it, that you were not conscious of that?

A (Mr Rowe) I was not conscious of that.

Q (Mr Salzedo, QC) …we have the start of Appendix B, and I think just over halfway down, you can see…"Maximum benefits – removal of existing IR Limits". Then, as they say, their default is:

"Maintain all current revenue limits."

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) Now, as far as I'm aware, there's no document that evidences any involvement of Mr Hillman or Mr Woodford in this exchange or in your eventual signature of this letter? First of all, do you accept there's no document evidencing that?

Q (Marcus Smith J) Well, so far as you are aware?

[313] As I come to consider, this advice is not altogether correct. The Revenue Limits ceased to apply unless they were re-imposed by a scheme. In other words, a pension scheme had to opt-in to the Revenue Limits, and not opt-out.

Q (Mr Salzedo, QC)	So far as you are aware. Yes, exactly, so far as you are aware?
A (Mr Rowe)	So far as I'm aware, there's no documents, but I think, as with all this, I would have discussed it with Mr Hillman.
Q (Mr Salzedo, QC)	But you've not suggested, you have certainly not suggested in your witness statement, that you have any actual recollection of discussing this with Mr Hillman? Is that fair?
A (Mr Rowe)	No, as I explained yesterday, it could have happened in the office, when I received it. That's…
Q (Mr Salzedo, QC)	Yes, and you…the reality, I suggest to you, is that you raised important matters for discussion with Mr Hillman?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	But that on what you understood to be routine or detailed matters, you would carry out the liaison with Mercer as you felt appropriate?
A (Mr Rowe)	In terms of administration and things like that, yes.
Q (Mr Salzedo, QC)	And certainly you are not suggesting, I think, that Mr Hillman sought to restrict the way that you interacted with Mercer?
A (Mr Rowe)	No.
Q (Mr Salzedo, QC)	And I think you would also accept that you would never have blindly accepted an instruction from Mr Hillman that seemed to you at the time to be improper or irrational?
A (Mr Rowe)	No.

288. Mr Rowe, by this time, had been KeyMed's UK Group Financial Control for more than two years; since 2000, he had been the Staff Scheme's Administrator. His role was a responsible one, which (throughout his evidence) Mr Rowe sought to underplay. Any decision of any moment, he claimed, would not have been taken by him without consultation with Mr Hillman, if not Mr Woodford. This exchange constitutes one such example of Mr Rowe seeking to pass responsibility upwards.

289. I can quite understand why Mr Rowe would now, in these proceedings, be extremely keen to ensure that all material decisions were laid at the door of Mr Hillman or Mr Woodford. But the documentary record suggests that Mr Rowe was mistaken. It is not just that Mr Woodford and Mr Hillman were cogent in their denial of any involvement in this decision, but their denials are buttressed by the documents. It is, of course, quite possible that the documents simply fail to record a decision that was made: but, having considered the evidence in the round, I have concluded that, in this case at least, Mr Rowe signed the Mercer letter without reference to anyone. Doubtless he did so because Mercer had made clear in the past that retaining the Revenue Limits was important for KeyMed, and I have little doubt that had he run the letter past Mr Hillman, Mr Hillman would have agreed. But I find that this did not occur.

290. It is also the case that neither Mr Rowe, nor indeed Mr Hillman (had he seen the letter), would have appreciated that Mercer were proposing to retain or reimpose the PIP Limit as part of this process.

The evidence of other witnesses

291. Neither Mr Williams nor Ms McBrearty had anything to say on this point. I am not surprised by this, given their respective roles within KeyMed.

(c) Findings as regards the decision to voluntarily impose the PIP Limit

292. In light of the foregoing, I make the following findings of fact:

(1) Schemes like the Staff Scheme had been established on the basis that the Revenue Limits applied.[314] That is unsurprising, given their mandatory application. However, the consequence of the removal of the Revenue Limits as mandatory requirements exposed schemes like the Staff Scheme to potentially considerable additional costs, which an employer (like KeyMed) would have been well-advised (looking solely at its own interests) to avoid.

(2) That is precisely the advice that KeyMed received in this case.[315] Mercer's advice was unequivocal: the Staff Scheme should continue to apply the Revenue Limits voluntarily, even though they fell away on A-Day.[316] One can readily understand why such advice was given. The costs to KeyMed of not continuing to apply the Revenue Limits were material and entirely adverse. Furthermore, it could plausibly be argued that Members would not suffer if the Revenue Limits were continued: their entitlements would remain the same pre- and post- A-Day. Whilst I regard that argument as specious – Members rights did change post-A-Day, for the better, unless the Scheme rules were changed so as to maintain the IR Limits –, it was clearly an argument that Mercer considered to be valid. In this regard, Mercer's approach was to favour the interests of KeyMed over those of the Members of the Staff Scheme.

(3) Of course, the decision in relation to the retention or otherwise of the Revenue Limits was not for Mercer, but for the trustees of the Staff Scheme and for the Board of KeyMed. However, although the decision was made to retain the Revenue Limits – as evidenced by the 5 April 2006 letter to Members[317] and by Mr Rowe's signature of the 25 May 2006 letter[318] – neither the trustees nor the Board actually made that decision. It is not possible to identify a meeting of the Staff Scheme Trustees at which it was decided to maintain the Revenue Limits; nor is it possible to identify any meeting of the Board – or of ExCom – at which this point was considered. Nor is there any other documentation suggesting that a decision was made either by the trustees or by the Board.

(4) It is entirely possible that the point was determined below Board level and without trustee involvement between Mr Rowe and Mercer, and that is what I find happened. Mr Rowe took the decision to retain the Revenue Limits on his own initiative and without involvement of others within KeyMed. I do not find that a

[314] See paragraphs 52 to 53 above.

[315] See paragraph 277 above.

[316] See paragraph 277 above.

[317] See paragraph 268 above.

[318] See paragraphs 275 to 278 above.

surprising state of affairs. The issue of the retention of the Revenue Limits was presented in so unequivocal a way by Mercer that Mr Rowe no doubt regarded the question as a straightforward administrative one, that he could take on his own.

(5) Of course, this meant that the decision did not receive proper scrutiny. In particular, there was no attempt to consider the Revenue Limits and their retention or otherwise on a limit by limit basis. Mercer did not disaggregate the various Revenue Limits and provide advice regarding the pros and cons of retaining or eliminating each. The decision regarding the retention of the Revenue Limits was made, as I find, in relation to the Revenue Limits generally, and there was no specific consideration at all – whether by Mercer, Mr Rowe or the Defendants – of the PIP Limit. The PIP Limit was retained unconsciously, by default. There was no discussion or consideration of the PIP Limit, and I do not consider that Mr Rowe was (or, indeed, should have been) aware of the effect of the continued imposition of this limit on the Defendants or on any other Member.

(6) So far as the Defendants are concerned, I find that, up to 16 June 2006 (the date on which Mr Rowe signed Mercer's letter of 25 May 2006), the Defendants were subjectively unaware of:

(a) The PIP Limit;

(b) How the PIP Limit affected their interests;

(c) The fact that mandatory application of the PIP Limit was being lifted by virtue of the A-Day changes;

(d) The fact that, in deciding to continue to maintain the Revenue Limits, KeyMed had decided[319] to retain the PIP Limit when that limit would otherwise have fallen away.

I consider how the Defendants came to know of the decision to retain the PIP Limit in Section F(4) below.

(7) It may be that the Defendants were aware – in general terms – that it had been decided to retain the Revenue Limits.[320] The Defendants would, after all, as Members of the Staff Scheme, have received the letter to Members notifying them of this decision.[321] If so, then they did not regard the point as material; nor, even if they knew of this decision, are my conclusions at paragraph 293(6) in any way changed.

[319] I am not going to go into the question of whether Mr Rowe had authority to make the decision that he did: that point was never canvassed before me.

[320] See, for example, Day 8/pp.202*ff* (cross-examination of Mr Woodford).

[321] See paragraph 70 above.

(4) The circumstances in which the Defendants came to know of the decision to retain the PIP Limit

(a) Introduction

293. I have concluded that the decision to retain the PIP Limit was made by KeyMed as part of the broader decision to retain the Revenue Limits generally, and that that decision was made essentially unconsciously, without the involvement of either the Board or the trustees of the Staff Scheme. No-one in KeyMed was aware of the implications of this decision, including most relevantly Mr Woodford and Mr Hillman.

294. I now proceed to consider how the fact that this decision had been made, unconsciously, by KeyMed came to the attention of the Defendants. I consider, first, the relevant documents and then the evidence from the witnesses.

(b) The relevant documents

295. In July 2006, Mercer was seeking to make an actuarial valuation (as at 5 April 2006) of the Staff Scheme. The last time such a valuation had been carried out was as at 5 April 2003. Under the provisions of the 2000 Staff Scheme Definitive Deed and Rules and the applicable legislation, a further actuarial valuation of the Staff Scheme fell due as at 5 April 2006.[322] To this end, Mercer sent an email to Mr Rowe (copying in, amongst others, Mr Hillman and Mr Craig) on 6 July 2006 attaching a paper, entitled *KeyMed Pension & Assurance Scheme – Method and Assumptions* and addressed to the Trustees, intended to provide a starting point for this process of valuation.[323]

296. Section 7 of this paper considered the position of the Executive Members, noting that this group required specific consideration. Essentially, this was because, although the Executives comprised only two active members (i.e., Mr Woodford and Mr Hillman, Mr Virgo having retired), the liabilities of the Scheme to these members represented "about 20% of the Scheme's total liabilities". Furthermore, KeyMed had (by way of its decision in relation to the Executive Scheme) given the Executives (including one retired Executive) "the option to transfer out of the Scheme into their own arrangement. A transfer value will, therefore, have to properly take into account the value of the benefits for those Executives and the assumptions specific to these members will need to be used to decide this value".

297. Paragraph 7.9 of this paper stated:[324]

> "Under the pre-6 April 2006 regime of Inland Revenue Limits, Executives may have had their fixed 5% p.a. pension increases restricted at some point during retirement. Under the post-6 April 2006 regime such restrictions have fallen away and, based on discussions with [KeyMed], it is assumed that these restrictions will not apply to Executives in future."

298. It is thus clear that within about three weeks of Mr Rowe signing Mercer's letter of 25 May 2006, the question of the applicability of the Revenue Limits to the Executive

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[322] See para. 1.1 of Mercer's *KeyMed Pension & Assurance Scheme – Method and Assumptions*.

[323] As the covering email makes clear, this was in fact a revised version of a paper that had been considered at a recent meeting. Nothing, however, turns on this.

[324] Emphasis added.

Scheme – and the application of the PIP Limit in particular – had been raised with Mercer by KeyMed and a clear indication given that these restrictions would not apply. There is no other documentation suggesting the nature of these discussions with Mercer, and I rely upon this paper simply for the purposes of establishing a chronology. I find that by 6 July 2006, at the latest, the issue of the application of the PIP Limit was "live" within KeyMed.

(c) The evidence of the witnesses

(i) Mr Woodford

299. In his witness statement,[325] Mr Woodford provided his explanation of what had happened. This was – I should say at the outset – not accepted by KeyMed, and was the subject of sustained challenge in cross-examination of both Mr Woodford and Mr Hillman, whose evidence was similar. Mr Woodford's story is also, unfortunately, but understandably, quite broad-brush. It is set out below, as a starting point:

> "15.1 It had always been my understanding that my pension, and that of all the Executive Category members, would increase by a fixed 5% once the member was drawing their pension. My annual pension "benefit statement" and the pension booklet, in their various iterations, had always explicitly stated a 5% increase for pensions in payment, with no mention whatsoever of any HMRC limit.
>
> 15.2 In the summer of 2006, [Mr Hillman] brought to my attention that a HMRC limit to pension increases applied to the Executive Category, a point that he had only been made aware of by Mercer during the preparations for the new scheme.
>
> 15.3 I now understood, for the first time, that the tax rules governing pensions until A Day had meant that, although the scheme provided for a fixed 5% annual increase for pensions in payment, if the pensions received exceeded the permitted HMRC limit, the increases applied to pensions over that limit would revert to the higher of 3% or RPI inflation, up to a maximum of 5%. I do not recall having been involved in any discussions of the issue up to this point.
>
> 15.4 [Mr Hillman] explained to me that this restriction, which I hadn't known affected me, was no longer a requirement following the A-Day changes, and that companies could now elect whether to retain or disapply the limit. However, Paul explained that a decision had already been made earlier in the year to retain, rather than disapply, these limits, without an appreciation of the implications. At this point, having learnt that the limit actually did apply, I was annoyed that this decision had been implemented without, it seemed to me, proper consideration being given to the consequences for the members affected, or it having been discussed with the directors.
>
> 15.5 I recall, for a period of approximately 2 weeks after this discovery, discussing my frustration collectively with [Mr Hillman], [Mr Williams], [Mr Calcraft] and [Mr Rowe]. I cannot recall the exact number of times that we met, but I do remember discussing this issue more than once, and that [Mr Hillman], [Mr Williams], [Mr Calcraft] and [Mr Rowe] were present. I can picture, in particular, a meeting at which John was extremely sheepish about how he had managed the issue. I recall stating my view that, in the spirit of fairness, the rules of the Executive Scheme (once set up) should include the 5% increase for pensions in payment, as had always been intended. I referred to the fact that the 5% increase had been repeatedly confirmed over 2 decades in writing to me in my

[325] Woodford 1.

personalised annual benefit statement as, I was told, had also been the case for [Mr Hillman].

15.6 I felt that there was a clear onus of responsibility upon the company to respect what Paul and I had been repeatedly informed in writing, and now the previous legislation had fallen away, I could see no justification for the company to refuse to provide the benefits promised. Once I had explained to the group the background of the A day changes, including the fact that we would be personally responsible for the recovery charge and the effective 55% tax rate, Luke and Nick readily agreed that the company should honour what was specified in the member benefit statements and scheme booklets. I remember they were both empathetic, and supportive of the need to remedy the situation. I recall that this was not a controversial issue and we agreed that it would be addressed in the documentation relating to the new scheme.

15.7 Whilst the 5% increase for pensions in payment was written into the rules for all pre-1997 members of the scheme, I recall being told at this time by [Mr Hillman] that only he and I were potentially affected by the impact of this particular HMRC limit on this element of the benefits. Paul explained this was due to our length of service and rate of accrual, which by virtue of our membership of the Executive Category was set by 1/45ths and not 1/60ths."

300. I have, of course, found that up to 16 June 2006, Mr Woodford was subjectively unaware of the PIP Limit and its retention.[326] Mr Woodford explained his frustration and anger when the fact that the company's unconscious decision was brought to his attention:[327]

"Well, I do remember because, and we've touched upon it in your earlier questions, Mr Wardell, when [Mr Hillman] came to see me, I was frustrated, I was angry, of how could this decision be made. How did we make this decision without at least considering who was affected and how it would affect people, and there were no discussions at the trustees' meeting, according to what Mr Hillman said, no discussions with the directors, from what Mr Hillman had told me. The decision had been made with John Rowe liaising with Mercer, and my concern – and I'm accused of being obsessional, I'm a control freak, and whatever else – is that how can a company like KeyMed make decisions like this. It's like the *Marie Celeste*. How could we make such an important decision without anyone telling us? That's what I remember the most."

301. Mr Woodford repeated his evidence that Mr Rowe was "sheepish" about the manner in which this decision had been made,[328] but more fundamentally he blamed Mercer for the failure to consider the Revenue Limits and their retention properly:[329]

"[Mr Hillman] was communicating with Mercer, you know, that's the people I was annoyed with. I didn't shout at [Mr Rowe]. I looked at [Mr Rowe] when [Mr Hillman] was telling the group what had happened, and he looked sheepish, and I can remember him looking sheepish, and I think he was thinking I was going to chastise him, blame him. But Mercer should have handled this, been responsible for – normally they were, I think, very competent, very thorough, but this seems to have just gone through by default."

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[326] See paragraph 292(6) above.

[327] Day 8/p.211 (cross-examination of Mr Woodford).

[328] Day 8/pp.215-216 (cross-examination of Mr Woodford).

[329] Day 8/p.216 (cross-examination of Mr Woodford). See also Day 8/pp.219 and 222 (cross-examination of Mr Woodford) and Day 9/p.2 (cross-examination of Mr Woodford).

(ii) Mr Hillman

302. Mr Hillman said this in his witness statement:[330]

> "18.1 Although I cannot recall precisely when I first became aware of the application of the PIP Limits to executive member pensions, I believe that this was in the summer or autumn of 2006. Following my recent review of the Assumptions and Methodology Paper, I note that it included a paragraph indicating that members of the executive category might have had their fixed 5% per annum pension increases limited at some point in the past, that these restrictions fell away at A-Day and that it would be assumed that the restrictions would not be applied to the Executive Scheme. I do not remember noting that at the time.
>
> 18.2 I recall a discussion with [Mr Wright] around summer or autumn 2006 during which the application of the PIP Limits to the members of the Staff Scheme came up. I cannot recall precisely what prompted it. [Mr Wright] explained that although the A-Day rules had changed so as to remove this limit, the Staff Scheme Trustees had taken a decision earlier in the year to retain the old PIP Limits. [Mr Wright] said that this decision would have the effect of limiting the rate of pension increases for [Mr Woodford] and me.
>
> 18.3 I explained my frustration to [Mr Wright] that this point had never been made clear to the Staff Scheme Trustees at the time that the A-Day changes were being implemented in early 2006. I went on to explain that I had understood from documents previously received from Mercer over many years (including, in particular, the benefit statement as at 06 April 2006) that Michael and I were entitled to, and would receive, fixed 5% per annum increases to pensions in payment without any restriction.
>
> 18.4 [Mr Wright] immediately appreciated the problem that had been created and explained to me that this misunderstanding could be addressed by not applying the PIP Limits in the documentation for the Executive Scheme, if the Trustees and the company agreed.
>
> 18.5 My understanding was that as pre-1997 joiners [Mr Woodford] and I were always entitled to fixed 5% per annum increases to pensions in payment. However, without our being aware, these increases were in fact restricted by the PIP Limits in the previous legislation. Although the government's changes after A-Day had removed this restriction, the Staff Scheme Trustees had unwittingly retained the PIP limits without realizing the full effect of that decision.
>
> 18.6 I recall raising this issue with Michael at the time. He was extremely concerned that the point regarding the PIP Limits had not been flagged previously. I was also annoyed by this revelation as it was the sort of issue that I would have expected Mercer to have briefed the Staff Scheme Trustees on, so that they were able to consult KeyMed, explain the implications of the change, and enable a clear decision to be made. I was disappointed with myself that I had not supervised matters closely enough to prevent a situation occurring where such an important issue had not been understood, that no explanatory papers had been prepared and there had been no discussion whatsoever by the board.
>
> 18.7 [Mr Woodford] and I agreed that the issue needed to be discussed with our fellow directors to explain what had taken place. Although I cannot recall the precise dates, I recollect discussing the PIP Limits with John, Nick, Luke and Michael on more than one occasion during the summer/autumn of 2006. I remember explaining the effect of the removal of the PIP Limits to the other directors and discussing whether those limits should be retained for the Executive Scheme. I was surprised that Michael was not as

[330] Hillman 1.

critical of John and the pensions team as he might have been, given their failure to manage this issue effectively. Nick and Luke were sympathetic and understanding in their response and recognized the fairness of removing the PIP Limits in the context of the repeated commitments made in our benefit statements and the change in the pension regime following A-Day. It was agreed that the removal of the PIP Limits would be incorporated into the documentation to establish the Executive Scheme in such a way that the position was clearly set out.

18.8 I recall that the directors and John also discussed whether there would be any likely impact on those members of the staff category of the Staff Scheme if the PIP Limits were removed in respect of that scheme. The conclusion reached by the directors was that the removal of the PIP Limits would be unlikely to have any such effect. My understanding was that, in practice, none of the members of the staff category would be likely to earn more than a maximum 2/3 pension under the rules of the Staff Scheme and, accordingly, the PIP Limits would have no effect. This was because members of the staff category would only achieve a maximum of 2/3rds pension after 40 years'service (compared with 30 years for executive members). We asked John to consider this further and to let us know whether there were, in fact, staff members who would be affected. John never reverted and, therefore, my understanding was that the removal of the PIP Limits would affect any staff members.[331]

18.9 No objections or concerns were raised by the other directors (either during or after those discussions) to the proposal that the PIP Limits should not apply to the Executive Scheme."

303. Mr Hillman was cross-examined about this, and stood by his witness statement:[332]

Q (Mr Wardell, QC)	What problem had been created?
A (Mr Hillman)	That the limits had been retained without any proper discussion between the directors and the trustees. The limits had – somehow, a decision had taken itself, in effect.
Q (Mr Wardell, QC)	But there had been no amending deed, yet, had there? So, if an announcement had gone out – we'll look at the announcement later – if that announcement had gone out saying that the IR Limits would be retained, you could easily have changed that, just by a further announcement.
A (Mr Hillman)	Well, the problem I'm referring to here is the fact that [Mr Wright] explained to me that the trustees had made this decision, and I said, well, you know, "What do you mean, the trustees had made this decision?" He said, "Well, we've been through this process, we've exchanged – worked through the detail, you know, Sally McBrearty, John Rowe have been working through with Glenn Claisse and the team, and you've agreed to retain these limits." I said: "Well, I don't recall any discussion between the directors or the trustees about this issue"…He says, "Okay, well we can correct this by making sure we address it in the right way in the

[331] Mr Hillman was cross-examined on this – and on the absence of documentary evidence in support. He stood by his witness statement: Day 6/p.28 (cross-examination of Mr Hillman).

[332] Day 6/pp.18*ff* (cross-examination of Mr Hillman).

documentation of the Executive Scheme as part of the set-up of that scheme".

Q (Mr Wardell, QC)	But, so far as the existing scheme is concerned, what's the problem?
A (Mr Hillman)	Well, [Mr Wright] led me to assume that the existing scheme had actually retained the limits.
Q (Mr Wardell, QC)	Well- you could easily change that, couldn't you?
A (Mr Hillman)	Yes, if it were necessary to change it.
Q (Mr Wardell, QC)	But you didn't, did you?
A (Mr Hillman)	No, because we had – my understanding is when we discussed this issue, we asked John to check with – to go away and check the records, check with Mercer, if necessary, and to – for him to work out would this apply to anyone else other than Michael and me, because I had got the impression from [Mr Wright] , he said, well, it is really only likely to apply to you two.
Q (Mr Wardell, QC)	That's not what it says in the letter we've just been looking at, does it? He says it's likely to apply more generally than that?
A (Mr Hillman)	Well, that was what he…sorry, this letter was dated when? 2000 and?
Q (Mr Wardell, QC)	2001.
A (Mr Hillman)	And this conversation is taking place five years later.
Q (Mr Wardell, QC)	Well, you've made it up, that's the problem, Mr Hillman?
A (Mr Hillman)	Sorry?
Q (Mr Wardell, QC)	You've made this conversation up?
A (Mr Hillman)	I haven't made this conversation up at all.

(iii) Mr Rowe

304. Mr Rowe's first witness statement says nothing about the discovery of the continued application of the PIP Limit. Mr Rowe's second witness statement responds to the points made by Mr Woodford and Mr Hillman. In response to Mr Woodford's statement, Mr Rowe said this:[333]

"**Paragraphs 15.4 to 15.6** I cannot recall any discussions involving me regarding the fact that the decision to continue Inland Revenue limits affected Mr Woodford and Mr Hillman along with all the other members of the Staff Scheme. If Mr Woodford was annoyed by this decision, as he states, I would expect to remember the meeting which Mr Woodford states took place at which he says I was "extremely sheepish" about how I had managed the issue. Mr Woodford had a short temper and was always liable to reprimand anyone in forceful terms for a perceived failure in front of their colleagues. My apprehension of such a reprimand, whether or not it actually materialized or was justified, would have made any such meeting memorable; but I have no recollection of it and therefore do not believe that it took place."

305. This is an extremely tortuous response. Essentially, Mr Rowe has no recollection of the decision regarding the PIP Limit or the Revenue Limits generally, and bases his

[333] Rowe 2/§5.7.

suggestion that events did not occur in this way on the fact that, had they done so, he would have remembered them. I am afraid that I can attach very little weight to this evidence. Not only does it fly in the face of the documentary evidence – Mr Rowe, like it or not, signed the Mercer letter approving the continuation of the Revenue Limits – but it is contradicted by the clear evidence of Mr Woodford and Mr Hillman, which evidence at least has the virtue of being consistent with the documents and (as significantly) the fact that the documents disclose no consideration by the Defendants of the Revenue Limits before July 2006.

306. As regards Mr Hillman's statement, Mr Rowe said this:[334]

"**Paragraph 18.8** If I had been asked by the Directors to identify with Mercer whether there were any members of the Staff Scheme, apart from members of the executive section, who would be affected by the removal of the limits on increases to pensions in payment, I would have done so and reported back to Mr Hillman. As Mr Williams and Mr Calcraft had a personal interest in the issue, I would expect them to have followed it up with me if they were aware I was raising the point and did not hear back. I understand that there is no evidence of me raising the question with Mercer in the documents reviewed in connection with these proceedings and I cannot remember being asked to look into the point and, indeed, have no recollection of meetings with the Directors discussing the limits applicable to pensions in payment…"

307. Mr Rowe was asked about para. 7.9 of Mercer's 6 July 2006 paper,[335] which clearly suggested both an awareness – at the time of this paper – of the PIP Limit, and a decision – albeit perhaps provisional and not final – that the PIP Limit would not apply to the Executive Scheme:[336]

Q (Mr Salzedo, QC)	…Now, it seems, then, that by 6 July 2006, Mr Wright had become conscious of the possibility that Inland Revenue Limits might result in a restriction of the fixed 5% increases at some point. You agree that that seems to be what's happening?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And Mr Wright is saying here that he or Mercer have had some discussions with the company, isn't he?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	Now, I suggest to you that in the first instance, at least, those discussions are likely to have been with you. Do you agree?
A (Mr Rowe)	No.
Q (Mr Salzedo, QC)	No?
A (Mr Rowe)	No, they would have been with Mr Hillman and Mr Woodford.
Q (Mr Salzedo, QC)	You were the main – the first point of contact for Mercer on points such as whether Inland Revenue limits were going to be retained, weren't you?
A (Mr Rowe)	Yes.

[334] Rowe 2/§6.15.

[335] See paragraphs 295 to 297 above.

[336] Day 3/pp.72*ff* (cross-examination of Mr Rowe).

Q (Mr Salzedo, QC) So if – at the point where an issue arose, the first thing Mercer would have done would have been to raise it with you, wouldn't it?

A (Mr Rowe) Well, I think the letter was sent to me, so yes, as a point of contact, as part of the project, but in terms of discussing these points, particularly affecting pensions for the executive team – or scheme – would have been for – with – Mr Hillman.

Q (Mr Salzedo, QC) You would have recognized it was a point that…

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) …needed to come to the attention of Mr Hillman and Mr Woodford?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) Yes, and so you would have ensured it did?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And do you have any recollection now of this point coming to light shortly before this document and the discussion of it?

A (Mr Rowe) Only if it was discussed in a trustees meeting.

Q (Mr Salzedo, QC) …This appears to be the first indication in a document that this issue has risen to the level of being discussed, and I just want to know do you have any actual recollection of it being raised by Mercer, or between you and Mercer, or between you and Mr Hillman?

A (Mr Rowe) No.

Q (Mr Salzedo, QC) But you would accept on the basis of the document that it clearly did arise in the summer of 2006, and certainly if it had arisen with you, you would have brought it to the attention of Mr Hillman and Mr Woodford?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And what I suggest is that that did happen, and that Mr Woodford was concerned when he heard that there was a risk that his 5% fixed increases might be restricted in the future by the Revenue limits. Do you have any recollection of knowing that?

A (Mr Rowe) Mr Wright raised it and I think it was a surprise.

Q (Mr Salzedo, QC) Yes. And Mr Woodford was not happy that a decision had been made to retain the limits for the main scheme without anybody raising with him that if it was retained for him, then it would result in a reduction. Do you accept that that's right?

A (Mr Rowe) Yes.

Q (Mr Salzedo, QC) And Mr Hillman asked you at some point – I don't know the exact date – but he asked you to consider whether anybody other than the executive members of the scheme were likely to be impacted by this?

A (Mr Rowe) I think, I believe, in summary it said that that may have been given action to get – to work with Mercers to evaluate that.

Q (Mr Salzedo, QC)	And I think you don't suggest that you ever identified that anybody else would be affected?
A (Mr Rowe)	No.

(iv) Mr Williams

308. There is no mention of any discussions regarding the PIP Limit in Mr Williams' first witness statement. That, of course, is entirely consistent with his lack of recollection of such discussions. In his second witness statement, Mr Williams confirmed this lack of recollection:[337]

> "Both Defendants also contend that they were open with the other Directors about the establishment of the Executive Scheme and that discussions took place at various stages with the other Directors. In particular, they assert that Luke Calcraft and I readily agreed that it was fair than Inland Revenue limits should not apply to them in the Executive Scheme (thereby avoiding any restrictions on the 5% per annum compound increases in their pensions when in payment) because of the way the increases were described in the Staff Scheme explanatory booklet and on their benefit statements. I cannot recall discussing this issue with Mr Woodford and Mr Hillman and I am convinced that I would remember any such discussion. The increases on pensions in payment for Mr Calcraft and myself (and all other members who joined the Staff Scheme before July 1997) had been reduced from 5% per annum compound to inflation capped at 2.5% for pension accruing after 5 April 2005. I am in no doubt that had any discussions along the lines suggested by the Defendants taken place, even if we felt powerless to oppose the change, Mr Calcraft and I would have discussed the unfairness of Mr Woodford and Mr Hillman retaining the 5% per annum increases for themselves alone and I would have remembered any such discussions with Mr Calcraft quite clearly on account of the resentment I am sure I would have felt about such an unfair situation."

309. I can entirely accept that – given the distance in time – that Mr Williams might have failed to recollect discussions regarding these rather technical matters. What I do not accept is Mr Williams' assertion that he would have remembered such discussions because of the unfairness to himself and Mr Calcraft. Mr Williams' evidence appears to wrongly conflate *(i)* the fact that his (and Mr Calcraft's) pensions when in payment increased by significantly less than the pensions in payment of Mr Woodford and Mr Hillman (and Mr Virgo) with *(ii)* the effect of the PIP Limit (which might, in certain circumstances, operate to limit increases on pensions in payment). The underlined parts of Mr Williams' evidence show a clear conflation of what were two very different matters. In short, I do not believe that Mr Williams would have had any sense of unfairness and that he would have regarded the matter in an altogether less emotional way. I consider that the recollection set out in Williams 2 and quoted in paragraph 309 above represents an attempt at reconstruction on the part of Mr Williams that has gone badly wrong.

310. This conclusion – that Mr Williams' evidence is confused and not to be relied upon – is supported by the following points:

(1) First, it is noteworthy that Mr Williams' negative recollection is not mentioned in his first witness statement. Of course, what is said in his second statement was in response to the Defendants' own (first) statements. Nevertheless, there is all the

[337] Williams 2/§6. Emphasis added.

difference in the world between simply not recollecting a discussion and saying that a discussion could not have taken place because – had it done so – it would have been remembered. The Defendants' case about the PIP Limits has always been clear, and this is a matter which should have been raised by Mr Williams in his first statement.[338]

(2) Secondly, Mr Williams accepted that he knew – at the time – that the Executive Members had different and better benefits, and this did not trouble him at the time.[339] Furthermore, he had – for some time prior to the summer of 2006 – either appreciated or had the opportunity of appreciating the different accrual rates of pensions in payment. This was put to him in cross-examination:[340]

Q (Mr Salzedo, QC)	…Let's just say there had been a conversation in which the – in which the discussion – there was no discussion about the rate of increase being reduced for the staff scheme, but instead there was just a discussion about the revenue limits and the – and the fact that they no longer needed to apply and so they were not going to be applied to the executive scheme. Is that something, then, that would have been less memorable because it wouldn't have involved the cutting of your own benefits and your own increase rate in half?
A (Mr Williams)	I don't, I can't say whether it would be less memorable or more memorable, I'm just really referring to this point, and clearly not getting my point over, that I believe had such discussions taken place, I would have recalled them, and I didn't recall them.
Q (Mr Salzedo, QC)	What I need to ask you about, Mr Williams, is what you mean by "such discussions" and, at the moment, as I understand your evidence, tell me if this is wrong, what you say would have been memorable about the discussion is that it would then have dawned on you that you had had this – the cut of your future rates of increase from 5% to 2.5% LPI?
A (Mr Williams)	Yes.
Q (Mr Salzedo, QC)	Yes. That's the point which you accepted yesterday you had seen in the minutes and you had seen again in a letter addressed to you that was quite short and clear and you hadn't spotted it there?[341]
A (Mr Williams)	Correct.
Q (Mr Salzedo, QC)	That's the same point?
A (Mr Williams)	Correct.
Q (Mr Salzedo, QC)	Right. Let's just say that the conversation went the way you suggest and that this point had become clear to you about cutting your rate of accrual for future benefits.

[338] See the cross-examination of Mr Williams on this point at Day 2/pp.4-13 (cross-examination of Mr Williams).

[339] See paragraph 191(3) above.

[340] Day 2/pp.13*ff*.

[341] See paragraphs 70, 190 to 191, and 201 above.

Assume that there had been a conversation about that. The Defendants would no doubt have said to you:

"Well, you knew that, we sent you the minutes, and then you got the letter as a member, you didn't say anything before, why are you upset about this point now?"

What would your answer have been to that?

A (Mr Williams) That's a completely hypothetical situation.

Q (Mr Salzedo, QC) Yes.

A (Mr Williams) You're saying, what would I say if that was the case.

I would have said, "Fair enough, you've clearly sent it to me, but I haven't logged it."

Q (Mr Salzedo, QC) Okay. I suggest to you that that conversation, if it happened, would not be something especially memorable to you, because you would have realized it had all been done properly, and you had just forgotten it – and that wouldn't be a very memorable occasion?

A (Mr Williams) But I would still be personally – I would be losing out personally on my own position, so I think I would remember that.

Q (Mr Salzedo, QC) Yes, well I suggest to you that in the light of the fact that you don't remember when you were sent clear documents about this, that you wouldn't have remembered it if it had been explained to you shortly afterwards in the next year or two, that this was something you knew and hadn't complained about the previous year or two, you wouldn't have remembered that?

…

A (Mr Williams) I don't agree.

It seems to me intrinsically unlikely that – some time after the event – the reduction in Mr Williams' and Mr Calcraft's accrual would have cropped in the context of the applicability (or otherwise) of the PIP Limit. It seems to me that Mr Williams was confusing the two.

(3) Thirdly, Mr Williams' sense of unfairness – which constitutes the basis on which he says he would have recollected discussions of the PIP had they occurred – is (as I have noted) founded on an essential misunderstanding of the position. This became very clear in the course of his cross-examination:[342]

Q (Mr Salzedo, QC) If we go to [document], again, we looked at this yesterday, and you can see the decision at 10.1.1:[343]

"Members' benefits built up in the Scheme from 5 April 2005 will increase by the rate of inflation up to a maximum of 2.5% each year. Pension for members in the Directors

[342] Day 2/pp.17*ff* (cross-examination of Mr Williams).

[343] See paragraph 45 above.

Category will continue to accrue with increases at 5% per annum."

So, one of the things that was certainly made available to you in the documents that you were sent was the fact that the executive category was retaining increases at 5% fixed.

I think you accepted that yesterday. Do you still accept it today?

A (Mr Williams) Yes, I accepted that.

Q (Mr Salzedo, QC) So – and that issue – I mean, that issue was not the same, was it, as the question of revenue limits? The distinction between the two categories we see at 10.1.1, that's not the same issue as revenue limits, is it? Do you understand that Mr Williams?

A (Mr Williams) No, I don't – I thought you were talking – well, everything has been referring to the 5% and the 2% capped so far. What do you mean by "revenue limits"?

Q (Mr Salzedo, QC) Right, well, I will – let me – I will explain to you what I mean by "revenue limits". Is it your understanding up to this moment that the issue of whether revenue limits should be retained is the same as the issue as to whether the rate of increase should be reduced to 2.5% LPI as it was for staff?

A (Mr Williams) I – I don't know. I haven't seen the term "revenue limits" in terms of this section, so…

Q (Mr Salzedo, QC) No, the term "revenue limits" is not in these minutes.

A (Mr Williams) But you're saying is "revenue" – are "revenue limits" the same as what we're talking about here or are they different?

Q (Mr Salzedo, QC) I'm going to suggest to you that they're something different, but before I do that – what I'm asking about is your paragraph 6 in [Williams 2]. That's the main area I'm still asking about.

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) And in your second sentence there, you say -

A (Mr Williams) Oh, Inland Revenue limits? Sorry.

Q (Mr Salzedo, QC) Yes, Inland Revenue limits. Yes, sorry, I was not making any distinction between Inland Revenue and Revenue, Mr Williams, there is nothing there.

Q (Marcus Smith J) Mr Williams, does that make your understanding clearer?

A (Mr Williams) Yes, yes, so the Inland Revenue limits shifted to a maximum of 2.5%...

Q (Marcus Smith J) Right, so you have a common vocabulary.

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) So your understanding up until now is that the issue you are talking about in your paragraph 6, the issue of whether the Inland Revenue limits should apply in the Executive

Scheme is the same issue: it's the issue of whether their rate of accrual, for future accrual, should only be 2.5% LPI?

A (Mr Williams) Mm.

Q (Mr Salzedo, QC) All right. Well, I do suggest to you, Mr Williams – and maybe it's not a matter for you, in a sense, I should make this clear, because it is the basis of my questions, actually the issue about Inland Revenue limits was a completely different issue. It wasn't about the 2.5% versus the 5%.

Let me try to explain it to you by – what I'm, what I'm going to put to you is what, is what would have been said to you, what Mr Woodford and Mr Hillman say they explained to you?

A (Mr Williams) Mm-hm.

Q (Mr Salzedo, QC) And where necessary, I may expand it to explain what I say Inland Revenue limits was about.

So, they would have said to you, and I want to – we'll take it one-by-one, see if you can identify whether there's any moment at which you would have been concerned if they had said this.

So, the first thing they would have said to you is that they had always understood that their rate of increase of pensions in payment would be at 5% per annum, and you understand that if they would have said that, that wouldn't have caused you a concern at that stage?

A (Mr Williams) I don't believe so. I don't know. I mean, it's again, I'm – I don't recall any discussions on this at all.

Q (Mr Salzedo, QC) No, I accept that you don't recall the discussion, Mr Williams, and at the moment – and the evidence you've given in your witness statement is that you would have recalled the discussion because they would have lead you to be concerned, indeed resentful?

A (Mr Williams) Mm-hm.

Q (Mr Salzedo, QC) I'm suggesting to you that's not right, that actually you would not have been concerned and resentful, and that explains why you don't remember it? Do you understand?

A (Mr Williams) Okay.

Q (Mr Salzedo, QC) So that's where I'm going with the questions. So I want to suggest to you what would have been said to you and see whether you can spot the moment at which it would have made you concerned or resentful.

So, they would have said that they'd always understood they were getting 5% increases when pensions came into payment, and they may have pointed out that that was confirmed by all of their regular statements of benefits that they received from the company.

A (Mr Williams) Mm-hm.

Q (Mr Salzedo, QC) And that wouldn't have concerned you at that point?

A (Mr Williams) No.

Q (Mr Salzedo, QC) And then they would have told you that they found out in the summer of 2006, for the first time, that if their pensions reached a maximum level, as defined by the Inland Revenue –

A (Mr Williams) Lifetime allowance, you mean?

Q (Mr Salzedo, QC) Sorry?

A (Mr Williams) Lifetime allowance.

Q (Mr Salzedo, QC) No, I don't mean a lifetime allowance.

A (Mr Williams) Right. Okay. My apologies.

Q (Mr Salzedo, QC) And I may need to explain to you this and see if it maybe might ring some bells with you about the time or maybe it's all too far in the past. I'll give you the whole sentence, and then I'll come back to what the "maximum level" means.

What they would have said is:

"If our pensions reach – we've found out now that if our pensions reach a certain maximum level" – I'll tell you what that means in a minute – "then further increases in payment above that level will be restricted by what was called the "revenue limits"."

A (Mr Williams) Mm-hm.

Q (Mr Salzedo, QC) What is meant by a maximum level in that context, they would have said – if you had said, what do you mean by that? – is that when the pension reached two-thirds of the, of their final salary – it's slightly more complicated than final salary, but essentially two-thirds of their final salary – at that point it would only be allowed to increase at a certain rate, which I believe at the time was 3%, 3% or RPI.

…[344]

Q (Mr Salzedo, QC) So, Mr Williams, I am suggesting to you – and take it from me, if I'm wrong, then your answers won't matter – but that the conversation would have gone that way, that if you had asked, it would have been explained that that was the nature of the limit we were talking about.

Then the Defendants would have said to you that those limits were no longer compulsory. Do you understand that?

A (Mr Williams) Mm-hm.

Q (Mr Salzedo, QC) And they would have – and then they would have said to you that it was – that there was no reason why they should be retained for them because it might affect them one day.

And the question – so the question for you – is, would that have caused you concern and resentment that – to remember the conversation?

[344] This was an exchange between Mr Salzedo, QC and me as to precisely what the permitted increase was.

A (Mr Williams)	It's a difficult question to answer because it's hypothetical and it's also – my problem is that I now have more pension knowledge than I did at the time. I think the logical answer to that would be I don't think I would be particularly concerned, though I probably wouldn't have completely understood it.
Q (Mr Salzedo, QC)	Thank you. Yes, so just to make clear, I suggest to you, Mr Williams, that actually the reason you don't remember the discussion is because it was along the lines I've suggested to you…

At this point,[345] Mr Wardell, QC objected to the question, on grounds that Mr Williams – having said he could not remember the conversation – could say no more. I overruled that objection, on the basis that it was necessarily a hypothetical conversation that was being put, because (*pace* Mr Williams' own statement) had a conversation of a certain sort occurred, Mr Williams' considered that he would have recalled it. It was because Mr Williams did not recall the conversation, that he suggested it had not taken place. It was, therefore, appropriate to ask these questions, but I fully recognize the difficulty of the exercise being undertaken by Mr Salzedo, QC (in putting the questions) and Mr Williams (in seeking to answer them). I made clear that I would carefully consider what weight could be attached to Mr Williams' answers,[346] and that I have done.

Mr Salzedo's cross-examination accordingly resumed with this question:[347]

Q (Mr Salzedo, QC)	So, obviously, you are aware that you do not remember a conversation which the Defendants say took place, several conversations?
A (Mr Williams)	Mm-hm.
Q (Mr Salzedo, QC)	And I've made some suggestions to you as to the way that conversation, I say, in fact would have gone?
A (Mr Williams)	Mm-hm.
Q (Mr Salzedo, QC)	And I'm suggesting to you that if it had gone that way, then that would explain why you don't now remember it?
A (Mr Williams)	Mm-hm.
Q (Mr Salzedo, QC)	And do you agree with that?
A (Mr Williams)	I mean, I made the point yesterday that, given the time of what we're talking about, I don't think anyone, any of the witnesses, can be 100% certain on 100% recollection, and my point was, the more normal things are, the more likely you won't recollect it; the more abnormal things are, the more likely you will recollect it. So I would answer it in the same way. If you are giving me a series of hypothetical situations where the discussion

[345] Day 2/p.25.

[346] Day 2/pp.26-27.

[347] Day 2/pp.27*ff* (cross-examination of Mr Williams).

	wouldn't have been abnormal and flagged, then I agree, I may not have recollected it. Does that make sense, sorry?
Q (Mr Salzedo, QC)	It makes sense. Do you also agree that what I put to you was something that you would not have considered abnormal?
A (Mr Williams)	It was becoming more normal, and as I said in my response two minutes ago, I probably wouldn't have understood some of it…at the time.

It is very clear to me that Mr Williams' understanding of the PIP Limit – when he was compiling his second witness statement and giving evidence before the court – was defective and thus compromised the force of his evidence. This is not a particular criticism: the Revenue Limits in general, the PIP Limit in particular, and their retention or otherwise are all complex and difficult matters, and it is not reflection on Mr Williams that he did not understand them. But it does, fatally, undermine his evidence.

311. It seems to me that as regards Mr Williams' evidence, the best that can be said is that he had no recollection of these events. I do not regard this non-recollection as particularly significant. The question of the PIP Limit would have emerged – from Mr Williams' point of view – as an error, of an extremely technical nature, that had been made, which (I find significantly) did not affect him.

(d) Findings

312. I find that:

(1) By reason of the facts that I have found in Section F(3) above, the decision to retain the PIP Limit in force was made unconsciously by KeyMed and the trustees of the Staff Scheme. The issue only came to the attention of the Defendants and – indeed, more generally – when Mercer were considering the value of the rights of the Executive Scheme members, in the context of an actuarial valuation of the Staff Scheme. That exercise inevitably raised the question of what rights the Executive Members actually had under the Staff Scheme. That is a necessarily anterior question to the question of valuation, and it necessarily raised the question of whether the PIP Limit did, or did not, apply.

(2) Mercer's July 2006 paper is the first document indicating that the PIP Limit was a matter KeyMed was considering. By 6 July 2006, at the latest, the issue of the PIP Limit was "live" and under active consideration within KeyMed.

(3) The Defendants were both of the view that the question of the application or otherwise of the PIP Limited needed to be resolved by taking an informed decision, and to this end they raised the matter with Mercer, with Mr Rowe and with the unaffected directors – Mr Williams and Mr Calcraft.

(4) The mindset of the Defendants – led by Mr Woodford, I find – was to protect their own interests by disapplying a limit that they had never appreciated applied. I find that this was discussed with the other directors, and that they were in agreement with this course. So far as Mr Williams was concerned, I consider that he did not

actually understand what the issue was all about. His evidence before me betrayed a profound lack of understanding of the pensions issues, but I find that he did agree to the lifting of the PIP Limit when this was raised. So far as Mr Calcraft is concerned, I find that he, too, would have agreed. There was no evidence as to the nature of his understanding, but I see no reason to find that he did not understand the issues.

(5) I do not find that there was a formal decision, at this point, to remove or lift the PIP Limit. That decision will be considered next. However, from the summer of 2006 all of the directors were alive to the issue, and there was provisional agreement that the PIP Limit would not apply. Mercer proceeded on that basis.

(5) The agreement to remove, and the removal of, the PIP Limit in the case of the Executive Scheme

(a) Introduction

313. I have found that the application of the PIP Limit was discovered and discussed between the Defendants, the other directors, Mr Rowe and Mercer in the early summer of 2006. From a very early stage, it was presumed that the PIP Limit would be disapplied in the case of the Executive Scheme. That much is apparent from paragraph 7.9 of Mercer's paper, quoted in paragraph 297 above.

314. On a number of subsequent occasions, it was made clear that the intention was for the PIP Limit to be disapplied so far as the Executive Scheme was concerned. Thus:

(1) On 1 October 2007, there was a telephone conference call, memorialised in a note, between various KeyMed representatives (Mr Hillman, Mr Rowe, Ms McBrearty) and various Mercer representatives (Mr Wright and three others). **{F23/817/1}** The revenue limits were discussed on this call. Item 5 records:[348]

> "[Mr Hillman] confirmed that the pre-April 2006 Inland Revenue limit applying to pensions in payment which would have restricted the fixed 5% per annum pension increases for executives would be removed under the Executive Scheme. [Mr Hillman] confirmed that it was clear that the original intention and scheme design was for fixed 5% pension increases to apply and following the relaxation of the Inland Revenue limits it was appropriate that the restriction which had been imposed on the Scheme by Government legislation should now fall away and would not apply under the Executive Scheme. In addition, attendees recognised that the changes for the lifetime allowance limit arising from the post-April 2006 legislation will result in a tax charge on a benefit crystallisation event for the Executives and as such attendees noted this additional future tax charge."

(2) On 6 October 2006, Mercer sent to Mr Rowe a letter setting out their terms of engagement for preparing an interim deed for the Executive Scheme, as well as an initial draft for review. The letter stated:

> "The deed, without covering the benefit details, refers to the fact that benefits will be as set out in explanatory literature which will need to be attached to the deed. We understand the directors get fixed 5% pension increases. The existing KeyMed Rules would restrict these increases by the old IR limits rules which permit 3%RPI on the IR max pension. As

[348] No-one had a good recollection of this call: see Hillman 1/§22.2; Rowe 1/§121; McBrearty 1/§15.

requested, the literature will not refer to these old limits i.e. under the New Scheme, members will get fixed 5% increases (probably higher increases than previously would have been the case). This is a decision KeyMed have made as compensation for the fact that a 55% tax charge will be payable."

(3) On 4 December 2006, Mr Rowe emailed Mr Wright with his comments on the scheme booklet. He had a query in relation to page 3:

"It states that all pension in payment increase by 5% each year – do we need to refer to the 2.5% maximum for service post 6 April 2005?"

This email was copied to Mr Hillman and Ms McBrearty. On 6 December 2006, Mr Wright emailed Mr Rowe, copied to Mr Hillman, Ms McBrearty and Mr Claisse, responding to this point:

"Page 3 – the 2.5% LPI change which took effect from 6 April 2005 was specifically not applied to Executives i.e. KeyMed wanted the fixed 5% pa increases to continue to accrue for Executives.

Note that on a related point to this we pointed out when providing the balance of powers schedule comparing the Executive Scheme to the Main Scheme...that the old Inland Revenue limits, whilst being retained for the main scheme, were not for the Executive Scheme. The implication of this is that while it was likely that the 5% p.a. increases for Executives in the main scheme were likely to be 'capped' at some point in the future by the old limits (which basically restrict increases to 3% or RPI if higher) this will not now be the case. I recall this decision was made on the grounds that it will compensate the executives for the effective 55% tax rate applying on future accrual but clearly as this is potentially a big cost item you may want to just check you are happy with this."

Mr Rowe's response was to go ahead as drafted, *i.e.* maintaining the non-application of the PIP Limit.

315. It is obvious from these communications that KeyMed's approach was for the PIP Limit to be removed and that Mercer, when formulating the Executive Scheme documentation along these lines, was doing so expressly at the behest of KeyMed. There was nothing covert about this: the discussions between KeyMed and Mercer were open and suggest wider discussions within both organisations in relation to this point.

316. However, whilst the issue of the PIP Limit was being addressed in this fashion, it was appreciated by the Defendants that the consent of the trustees and KeyMed had to be obtained. Thus, Mr Hillman stated:[349]

"[Mr Wright] immediately appreciated the problem that had been created and explained to me this misunderstanding could be addressed by not applying the PIP Limits in the documentation for the Executive Scheme, if the Trustees and the company agreed."

The critical consent was that of KeyMed: it was, after all, KeyMed that had to pay.

317. Although Mr Woodford was aware that various steps were being taken to prepare for the establishment of the Executive Scheme, he was not involved in these steps.[350] He was,

[349] Hillman 1/§18.4 (emphasis added).

[350] Woodford 1/§19.1.

however, involved (or claimed to be involved) in the process whereby KeyMed's agreement to this change was procured.

318. On 2 November 2007, a deed amending the Staff Scheme deed and rules was executed. The schedule to the deed stated under Item 1 "HMRC restrictions" as follows:[351]

> "Subject to paragraph 3 of this Schedule, the Provisions of the Scheme are altered so that any of them referring to, or otherwise constrained by, any limit or restriction contained in, or relevant in relation to approval under or for the purposes of, any provision of Part XIV of the Taxes Act 1988 as it has effect at any time immediately before 6 April 2006 will be construed as if that provision had not been repealed except and to the extent that the Principal Employer and the Trustees agree otherwise. The Trustees will decide how any such limit or restriction will be interpreted."

This provision, of course, demonstrated that absent specific provision, the Revenue Limits would not apply post-A-Day.

319. The Interim Trust Deed for the Executive Scheme was executed on 13 November 2007. The circumstances in which it came to be executed are highly controversial. It was on the occasion of signing that the Defendants contended that the consent of KeyMed to the removal of the PIP Limit was obtained. Paragraph 13 of the Amended Defence (the "Defence") pleads as follows:

> "…it is admitted that the Executive Scheme did not include a cap on increases in pension in payment by reference to the former "Inland Revenue limits" of 3% per annum (or by the increase in the Retail Prices Index if greater) but instead provided for a fixed 5% per annum increase. However:
>
> a. It is denied that this was an enhancement of benefits for the members of the Executive Scheme: as set out above, the provision for fixed 5% per annum increases in pensions in payment reflected the existing entitlements applicable under the Staff Scheme for any member joining the scheme before 21 July 1997. Since all members of the Executive Scheme fell within this category, the inclusion of that term in the Executive Scheme reflected their existing entitlements.
>
> b. Alternatively, if contrary to the above, the change is properly characterized as an "enhancement", it was not an enhancement due to the creation of the Executive Scheme but was an amendment that would have been considered appropriate and/or would have been made if the Defendants had remained in the Staff Scheme.
>
> c. Moreover, and in any event, the terms of the Executive Scheme including the fixed 5% per annum increases were reviewed and approved at a meeting of the directors of [KeyMed] in November 2007. (To the best of the Defendants' recollection, the meeting took place on or around 12 or 13 November 2007 around a meeting of [KeyMed's ExCom] of board members and senior managers). Even if the fixed 5% per annum increases had been contrary to the earlier agreement reached by the board, the board's approval of the terms of the Executive Scheme including the fixed 5% per annum increases superseded such earlier agreement."

320. It is to be noted that the obtaining of KeyMed's consent is pleaded as an alternative case. The Defendants' primary case is that such consent was not necessary at all, given the

[351] Hillman 1/§22.3.

Board's agreement to the establishment of the Executive Scheme in the first place. This point is considered first, in Section F(5)*(b)* below. Thereafter, in Section F(5)*(c)*, I consider whether consent was, in fact, obtained.

(b) Was KeyMed's consent needed at all?

321. It is not correct to say that the Revenue Limits carried on without more. They were phased out by the A-Day legislation and – unless specifically retained – would cease to apply. This can be seen in relation to the Staff Scheme, which specifically re-applied the Revenue Limits.[352] Absent a specific change to the Scheme rules, the Revenue Limits would fall away.

322. Thus, even if they had remained in the Staff Scheme, the Executives would have become free of the PIP Limit unless steps were taken to retain it. It is also necessary to note that this change was only made to the Staff Scheme on 2 November 2007.

323. The Executive Scheme was approved on the basis that it did not involve an enhancement of the benefits of the Executive Members.[353] In my judgment, non-imposition of the PIP Limit in the Staff Scheme did not involve an enhancement:

(1) The 5% increase on pensions in payment had always existed as regards Mr Woodford, Mr Hillman and Mr Virgo.

(2) The PIP Limit – which had also always applied – fell away through operation of law and would have done so whether Executive Scheme was created or not. In other words, had the Defendants remained with the Staff Scheme (as unamended) their position would have been exactly the same.

It is important, therefore, to appreciate that this case concerns the imposition of a restriction on the rights of all Staff Scheme Members, rather than the conferring of an enhancement on the Executive Members.

324. Had there been a proper evaluation of the continuation of the Revenue Limits within KeyMed, instead of (as I have found) a blanket and unconsidered adoption of these limits, the consent of KeyMed would have been required if the intention had been to abandon the Revenue Limits in general or the PIP Limit in particular. What should have happened (but did not happen) was that the implications of retaining the Revenue Limits on *(i)* Members of the Staff Scheme (both Executive and non-Executive) and *(ii)* KeyMed should have been fully considered. That would have entailed a proper consideration of whether the Members ought to take free of the Revenue Limits (or some of them) or whether their rights should be curtailed or diminished by voluntarily adopting the Revenue Limits (or some of them).

325. Obviously, this would have involved a careful balancing of the interests of the Members and the company. But it must be stressed that it would have been the assent of the trustees, on behalf of the Members, that would have been critical. The assent of KeyMed to the

[352] See paragraph 70 above.

[353] See paragraph 266(3)(a) above.

imposition of the Revenue Limits would have been a given, since the company would undoubtedly benefit from this.

326. The problem in this case was that both the trustees and the company agreed to the imposition of the Revenue Limits without proper consideration, so that when the implications of this decision became apparent, the mooted removal of the PIP Limit looked like the conferring of a benefit on the Executive Members, when it was in fact no such thing. That, as it seems to me, is the proper way to regard the question of the application or otherwise of the PIP Limit.

327. Of course, the decision to continue the PIP Limit had been made: the issue for the directors was whether that decision should be reversed. In short, the question for the directors was this:

Is it in KeyMed's interests not to seek to re-impose by scheme variation the PIP Limit on the Executives?

328. I reject the Defendants' contention that the consent of KeyMed was unnecessary. Whilst this might have been the case had the decision to retain the PIP Limit not been taken, the fact is that this decision had been made, and the company's consent to unmake it properly obtained. The change was one that would involve additional financial obligation on the part of KeyMed,[354] and was a decision in which Mr Woodford and Mr Hillman were personally interested. Whilst, therefore, the manner in which the PIP Limit had come to be retained would not doubt be a relevant factor, there is no doubt in my mind that KeyMed needed to agree to the abandonment of the PIP Limit, and Mr Woodford and Mr Hillman would have needed to obtain KeyMed's informed consent to this.

(c) Was informed consent obtained at the meeting(s) in November 2007?

(i) Introduction

329. As I have described, it was the Defendants' alternative case that the terms of the Executive Scheme, including the fixed 5% per annum increases and the abandonment of the PIP Limit, were reviewed and approved at a meeting of the directors in November 2007. There are, unsurprisingly, very few documents evidencing what was said and done at this meeting, beyond the documents that were actually executed so as to establish the Executive Scheme. It will be necessary to consider these documents in due course: but first, I consider the evidence of the witnesses.

(ii) The evidence of the factual witnesses

Mr Woodford

330. Mr Woodford said this in his first statement:[355]

> "19.1 Although I was aware various actions were required to prepare for the establishment of the Executive Scheme, I don't recall being involved in any further meetings prior to the point at which the documents were ready to be executed and the scheme set up. Because

[354] Although quite how much was a matter of debate amongst the experts, and proved to be a matter of considerable difficulty.

[355] Woodford 1.

the directors were involved in running overseas group companies and therefore spending a considerable amount of their time away from the UK, it was relatively unusual for the four of us to be in the same place at the same time. There was an opportunity for us to meet around the time of the next scheduled ExCom meeting on 13 November 2007, when all the directors would be attending in person at KeyMed's headquarters.

19.2 I recall meeting with [Mr Hillman], [Mr Williams] and [Mr Calcraft] in the visitors' and meeting suite at KeyMed House, around a glass table, on which documents in relation to the Executive Scheme had been laid out. Whilst I did not previously recall the exact legal title of all the papers prepared, having refreshed my memory from the documents, the documents that needed to be signed comprised an Interim Trust Deed (establishing the new Executive Scheme), a Transfer Agreement (agreeing the terms on which the members of the Executive Category would transfer out and KeyMed would make payments to the Main Scheme); a Deed of Participation (in relation to contributions made on behalf of OKG, my then current employing group company); letters to the members of the Executive Category (inviting them to join the new Executive Scheme); and a Debenture (granting a charge of KeyMed's assets in favour of the [Staff] Scheme).

19.3 I recall [Mr Hillman] in his normal manner explaining the different documents and the rationale for them. One of the documents was a letter from John, on behalf of KeyMed, separately inviting me and Paul to join the Executive Scheme and setting out the principal change that would be made to the previous arrangements. This related to the HMRC limit on increases to pensions in payment that I had previously discussed with [Mr Hillman], [Mr Williams], [Mr Calcraft] and [Mr Rowe] the summer before, when I first became aware of the issue.

19.4 I cannot now recall the exact words which I used, but I can recall referring to the decision the year before regarding the retention of the HMRC limit affecting the 5% increases for pensions in payment. I reiterated that this was in contradiction to what Paul and I had always been told in our benefits statements and scheme booklets, that we would receive 5% increases. I remember this clearly because of my frustration that the decision to retain the HMRC limits was made without due consideration and referral to the directors. I am therefore certain that [Mr Williams] and [Mr Calcraft] knew that this change was in the deed when they signed it and that this was different from the position in the [Staff] Scheme. I note that all the directors and trustees had signed the deed amending the rules of the [Staff] Scheme, retaining the HMRC limits generally, dated 2 November 2007.

19.5 Once the documents were signed, I recall that there were a number of other actions required to transfer assets out of the Main Scheme into the Executive Scheme relating to the members' benefits, but I don't remember being involved in the details of the logistics after the signing of the documents."

331. Mr Woodford was cross-examined on this evidence during the course of Days 9 and 10. A great deal of this cross-examination focused on the question of whether <u>all</u> of the documents were signed on one occasion.[356] It was suggested to Mr Woodford that the fact that at least one document had been signed before the day of the ExCom meeting[357] was inconsistent with his witness statement.[358] I do not accept that there was any inconsistency: paragraph 19.2 of his first statement makes clear that Mr Woodford was

[356] Day 10/pp.3*ff* (cross-examination of Mr Woodford).

[357] See further below: the electronic data and evidence of Ms McBrearty make it clear that this was the case.

[358] Day 10/pp.5-6 (cross-examination of Mr Woodford).

reconstructing the documents that were present at the "signing" meeting, not remembering. It follows that he could not remember – and was not asserting – that all of the Executive Scheme documents were signed at the same time.[359] They could have been signed on separate occasions – but Mr Woodford was not able to say. But he persisted in the recollection of a meeting:[360]

Q (Mr Wardell, QC)	So your great story about the glass table and giving a bit of colour to recollect what happened was just made up?
A (Mr Woodford)	No, it wasn't made up. Paul Hillman, and who else but Paul Hillman, would go through all these documents, documents such as the transfer agreement where there are millions of pounds being moved from one pension fund to another, which Nick Williams and Luke Calcraft were both in, they had to have that explained to them. Paul Hillman went through the documents, and documents in that room were signed. Whether it was…can I finish my answer?
Q (Mr Wardell, QC)	Yes, of course.
A (Mr Woodford)	Whether it was all the documents, I don't know. I've never said it was all the documents. Whether documents were signed later in the day, the following morning, but some documents were signed, and that's all that I've ever said.
Q (Mr Wardell, QC)	There's no point giving an explanation after the event, is there? There's no point in getting someone to sign up and then telling them the next day what it all means. Do you agree. [Pause]
A (Mr Woodford)	I agree with that statement, yes.[361]

Mr Hillman

332. Mr Hillman's evidence was as follows:[362]

"23.1 I recall that the documents relating to the establishment of the Executive Scheme, namely the Interim Deed, Debenture, Transfer Agreement, OKG Deed (under which OKG became a participating employer of the Staff Scheme) and Beneficiary Letters were all signed around the ExCom meeting that took place on 13 November 2007.

23.2 I remember that there was a meeting with Michael, Luke and Nick in our visitors and meetings suite around the time of the ExCom meeting. However, I cannot remember exactly when that meeting took place or who else, if anyone, attended. I recall there being some logistical problems concerning the late arrival of documents from the lawyers responsible for their preparation and that there were interruptions to the meeting.

[359] Mr Woodford made that clear in cross-examination: Day 9/p.180-181.

[360] Day 10/pp.11-12 (cross-examination of Mr Woodford).

[361] Mr Woodford hesitated before this answer, and agreed reluctantly. Mr Wardell, QC's point, although reeking of common sense, does not take account of the fact that Mr Craig appears to have been signing after everyone else (see paragraph 353 below); nor of the fact that, according to the "plan of action" (see paragraph 345 below) the documents being signed would be held in escrow, pending completion of the transaction.

[362] Hillman 1.

23.3 During that meeting we discussed various points regarding the Executive Scheme. I remember leading that discussion, page turning the Explanatory Booklet, which was attached to the Interim Deed, and going through the benefits page with the other directors. Michael reminded the attendees of our previous discussions, that there was a fixed 5% per annum increase to pensions in payment, that PIP Limits were not included in the Interim Deed and the reasons why the limits were not included. Following the discussion, the relevant documents were passed round the table for signature.

23.4 The fact that the PIP Limits would not apply for the Executive Scheme was clearly set out in the Beneficiary Letters. These letters were presented to the directors at the time they signed the other documents."

333. Mr Hillman was cross-examined on this evidence. He stood by his version of events:[363]

Q (Mr Wardell, QC)	Can we look at the execution of documents, and first of all, your witness statement, this is the execution of the new scheme documents. Your recollection is, as I understand it, that all the documents were signed at the same time?
A (Mr Hillman)	Well, they were all signed around the ExCom meeting, I'm not clear exactly what documents were signed at which time, but I think, as I say in my witness statement here, the meeting – my recollection was, as I say here, that the relevant documents were passed around the table for signature.
Q (Mr Wardell, QC)	Passed around the table?
A (Mr Hillman)	For signature.
Q (Mr Wardell, QC)	For signature. And Mr Woodford has a very similar recollection… …I suggest you have put your head together with Mr Woodford, and come up with something you've invented?
A (Mr Hillman)	Not at all.
Q (Mr Wardell, QC)	And the idea you would have this sort of recall about formal signing of documents 10 years later is, frankly, ridiculous?
A (Mr Hillman)	Well, that is your view. It isn't mine. I remember a meeting where we executed the documents, and it's – it's my honest recollection.

Mr Williams

334. Mr Williams said this:[364]

"16. It is claimed in the Defendants' Response to the Request for Further Information of the Amended Defence…that there was a discussion between the Directors of KeyMed about the documentation setting up the Executive Scheme in or around the ExCom Meeting which took place on 13 November 2007. I do not recall any such discussion. My recollection is that I was presented with the undated Trust Deed by Mrs McBrearty to sign. I was given to understand by Mrs McBrearty that it related to the Executive Scheme and, as the Defendants had already signed the document, I assumed it was in order for

[363] Day 7/pp.66*ff* (cross-examination of Mr Hillman). Unsurprisingly, Mr Hillman was cross-examined quite extensively about this. I have only set out parts of Mr Wardell, QC's cross-examination.

[364] Williams 1.

me to sign. It is also claimed…that when I was asked to sign the Trust Deed, documentation was presented to me which included letters to the Defendants inviting them to join the Executive Scheme, which explained the changes to their benefits in the Executive Scheme compared with the Executive Section of the Staff Scheme. No such letters were given to me. The first time I saw such letters was during the course of these proceedings.

17. I believed, when signing the Trust Deed and until I looked into the Defendants' pensions in October 2011…that the Executive Scheme replaced the Executive Section of the Staff Scheme and provided benefits to all those who had benefits under that section, namely, Mr Woodford, Mr Hillman, Mr Virgo, Mr Greengrass, Mr Knight, Mr Reddihough and Mr Hanwell."

335. There is a good deal of this evidence that I do not accept:

(1) These paragraphs appear to suggest an actual recollection on the part of Mr Williams as to the signing of these specific documents. It would be extremely surprising if – at this distance of time – Mr Williams could actually recall this. Unsurprisingly, Mr Williams accepted in cross-examination that these paragraphs were in fact a reconstruction of what Mr Williams considered would have happened, rather than an actual recollection of a specific incident:[365]

Q (Mr Salzedo, QC)	At paragraph 16 [of Williams 1] you say your recollection is that you were presented with the undated trust deed by Ms McBrearty to sign. Now, is that something you now actually recall?
A (Mr Williams)	It's my recollection. I wouldn't say it's a definite memory, but that was my recollection. Normal things with pensions were [Ms McBrearty] would bring them through to me.
Q (Mr Salzedo, QC)	Right. So what you are recalling is that that is what happened generally, in your view, with documents on pensions…
A (Mr Williams)	Yes.
Q (Mr Salzedo, QC)	…rather than on this specific incident?
A (Mr Williams)	Yes. I can't categorically say 100% that that is definitively what happened.
Q (Marcus Smith J)	So would it be fairer to say, it's more, having looked at the documents, a reconstruction of what you think must have happened, rather than an actual, concrete, recollection?
A (Mr Williams)	Yes.

(2) It follows that Mr Williams' statement, in paragraph 17 of his first statement, as to what his belief was at the time of signing, cannot be right and I disbelieve it. I do not accept that Mr Williams can recall what was going through his mind when signing the document. As a reconstruction, the statement is valueless, because Mr

[365] Day 1/pp.157*ff* (cross-examination of Mr Williams).

Williams only signed these documents once.[366] There was no repeated or habitual conduct from which an inference could be drawn from what Mr Williams would, in the ordinary course, have done.

(3) Equally, Mr Williams' definitive statement (in paragraph 16) that he did not see the letters to the Defendants was no more than a statement that he could not recollect seeing those letters at the time:[367]

Q (Mr Salzedo, QC)	Are you saying that you have a clearer memory that you didn't see the beneficiary letters or is it just really another thing you just don't remember?
A (Mr Williams)	Well, when I saw those as part of this process [of preparing for the trial], I didn't remember those at all.

336. I accept that Mr Williams had no recollection of the sort of meeting described by the Defendants.[368] The significance of that absence of recollection depends on how unusual such a meeting was in Mr Williams' experience. Mr Williams was not specifically asked how rare in his experience "signing meetings" like the one described by the Defendants were, but I proceed on the basis that they would have been relatively rare. Accordingly, one would expect such a meeting – if it occurred – to stick in his mind, and the fact that it did not is a point against the Defendants: the Defendants are recounting a meeting that should have stuck in Mr Williams' mind, but which has not.

Mr Rowe

337. In his first witness statement, Mr Rowe had no recollection of any signing meeting or explanation of the documents. Of the formalities to complete the Executive Scheme, he simply said this:[369]

"Ms McBrearty would have helped me with this and there was a lot of administration involved. She would have arranged for documents to be signed off and sent to Mercer. I do not recall any signing meeting taking place or any meeting to explain the terms of the documents to the Board or the signatories."

338. Mr Rowe's second statement does not comment specifically on the points made by Mr Woodford and Mr Hillman in their first statements.

339. Of course, Mr Rowe may very well not have been present at the signing meeting (if it took place), and I attach little weight to his lack of recollection. Moreover, I can attach little weight to what, in the ordinary course, Ms McBrearty would have done: the point is that this was not – on the Defendants' case – an ordinary case.

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[366] In cross-examination (Day 1/p.159), Mr Williams stuck to statement: on this point, I do not accept his evidence. I am sure that Mr Williams was not deliberately seeking to mislead on this point. It is simply that in his efforts to reconstruct, he had (in my judgment) created a false memory.

[367] Day 1/p.158 (cross-examination of Mr Williams).

[368] Mr Williams was cross-examined with great care and at some length by Mr Salzedo, QC on Day 2. A number of documents were put to him, but no recollection on the part of Mr Williams was triggered.

[369] Rowe 1/§122.

Ms McBrearty

340. Ms McBrearty was very definite that she did not attend "a meeting at which the documents were laid out on a table for signature".[370] I accept this evidence, but it may very well be that that was because she was not present at the meeting.

341. Ms McBrearty also provided some very helpful evidence regarding the mechanics of the production of the documents that were signed. I consider this evidence in greater detail below.

(iii) The documents

The date of the ExCom meeting

342. There was, indeed, an ExCom meeting on 13 November 2007. There are minutes recording a (bifurcated) ExCom meeting that took place on 13 November 2007 and 3 December 2007. **{H/16/1}** The directors were all present, as was Mr Rowe. The minutes say nothing about the signing of the Executive Scheme documents, but that is to be expected. The documents were not signed at the meeting. The meeting provided the opportunity for the documents to be signed, according to the Defendants.

The Executive Scheme documents

343. The documents relating to the Executive Scheme that were signed were as follows:

(1) *The Executive Scheme Interim Deed.* The document is dated 13 November 2007. It is signed by:

(a) Mr Williams and Mr Calcraft on behalf of KeyMed.

(b) Mr Woodford and Mr Hillman on behalf of Olympus KeyMed Group Ltd.

(c) Mr Woodford in his capacity as a trustee of the Executive Scheme, his signature witnessed by a Ms Rosemary Spencer.

(d) Mr Hillman in his capacity as a trustee of the Executive Scheme, his signature witnessed by Ms McBrearty.

(2) *The Transfer Agreement.* The document is dated 13 November 2007. The parties to the agreement were Mr Craig (acting on behalf of the transferring scheme, the Staff Scheme), Mr Hillman and Mr Woodford (on behalf of the receiving scheme, the Executive Scheme) and KeyMed. The agreement was signed by:

(a) Mr Craig, his signature witnessed by a Ms Sarah MacLeod.

(b) Mr Hillman, his signature witnessed by Ms McBrearty.

(c) Mr Woodford, his signature witnessed by Ms McBrearty.

[370] McBrearty 1/§20.

(d) Mr Williams and Mr Calcraft on behalf of KeyMed.

(3) *The Deed of Participation.* The document is dated 13 November 2007. The parties were the Trustees, KeyMed and Olympus KeyMed Group Limited. The Deed was signed by:

(a) Mr Craig, his signature witnessed by Ms MacLeod;

(b) Mr Hillman, his signature witnessed by Ms McBrearty;

(c) Mr Woodford, his signature witnessed by Ms McBrearty;

(d) Mr Williams and Mr Calcraft on behalf of KeyMed;

(e) Mr Woodford and Mr Hillman on behalf of Olympus.

(4) *The Letters.* These are addressed, respectively, to Mr Woodford and Mr Hillman, dated 13 November 2007, and signed by Mr Rowe on behalf of KeyMed. They are countersigned, on the same date, by Mr Woodford and Mr Hillman. The letter stated that "[i]t is not intended there will be major changes to your personal position. You will not be expected to contribute to the New Scheme. Your benefits will remain the same except for the following two changes", which are then described. The second of these changes is immaterial. The first change was described in the following terms:

> "The limits on increases that can be awarded on pensions in payment, that were required to be applied to approved pension schemes before 6 April 2006, continue to apply to the Existing Scheme. However, those limits will not apply to benefits under the New Scheme."[371]

(5) *The Debenture.* The document is dated 13 November 2007. The parties are KeyMed and the Trustees. The document is signed by:

(a) Mr Williams and Mr Calcraft on behalf of KeyMed.

(b) Mr Craig in his capacity as Trustee of the Staff Scheme, witnessed by an "M Peters". In any event, the signature is not the same as the person who witnessed Mr Craig's signature on the Deed of Participation.

(c) Mr Woodford in his capacity as Trustee of the Staff Scheme, witnessed by Ms McBrearty.

(d) Mr Hillman in his capacity as Trustee of the Staff Scheme, witnessed by Ms McBrearty.

344. In some cases, there were multiple signed versions of the same document.[372] The table below, seeks to identify who signed which document, but does not seek to grapple with the multiple versions. The purpose of the table is simply to provide some form of

[371] The explanatory booklet that was also produced at this time was to similar effect: Day 2/p.42 (cross-examination of Mr Williams).

[372] See the cross-examination of Mr Williams on Day 2/pp.62*ff*.

overview of who signed what. Where a signature was witnessed, the identity of the witnesses is stated in brackets:

	Signed by Mr Woodford	Signed by Mr Hillman	Signed by Mr Williams	Signed by Mr Calcraft	Signed by Mr Craig	Signed by Mr Rowe
Executive Scheme Interim Deed	Yes (Spencer)	Yes (McBrearty)	Yes	Yes	No	No
Transfer Agreement	Yes (McBrearty)	Yes (McBrearty)	Yes	Yes	Yes (MacLeod)	No
Deed of Participation	Yes (McBrearty)	Yes (McBrearty)	Yes	Yes	Yes (MacLeod)	No
Letters	Yes	Yes	No	No	No	Yes
Debenture	Yes (McBrearty)	Yes (McBrearty)	Yes	Yes	Yes (Peters)	No

The "plan of action"

345. On 12 November 2007, Mr Wright emailed to Mr Rowe – copied to, amongst others, Mr Hillman and Ms McBrearty – a "plan of action" for the completion arrangement for the Executive Scheme. Unsurprisingly, this made provision for the signing of the relevant documents. The plan of action provided as follows:

"**Documents**

The following documents will be needed:

1. An interim trust deed establishing the [Executive Scheme].

2. The booklet relating to the [Executive Scheme] (and related invitation letters if appropriate).

3. The transfer agreement.

4. Deed of participation of Olympus KeyMed Group Limited in the KeyMed Pension and Assurance Scheme.

5. Letters to [the Defendants] inviting them to transfer their past service rights.

6. Debenture.

Timetable

Date	Item
Monday 12 November	1. Pinsent Masons to agree final forms of transfer agreement, deeds of participation and letters to executive members and notify Sackers. 2. Pinsent Masons to send (by courier) to Mr Rowe, interim trust deed plus booklet and related items for establishing the [Executive Scheme].

	3. On receipt of confirmation (per 1) Sacker & Parents to send (by courier) to Mr Rowe: (a) the transfer agreement; (b) the deed of participation; (c) the letters to executive members; (d) debenture.
Tuesday 13 November	1. Company to execute (items (b) to (e) in escrow): (a) interim trust deed; (b) transfer agreement; (c) deed of participation; (d) two letters to executive members; (e) debenture. 2. Company to date interim trust deed 13 November 2007. 3. Company to issue booklet and related items to the two executive members. 4. Company to email [Mr Wright] confirming execution of interim deed and above documents.
Between Tuesday 13 November and Friday 16 November	1. Mercers to register the [Executive Scheme]. 2. Company to send to Hugh Craig transfer agreement for signature and Debenture for registration. 3. Pinsents to apply for stamp duty clearance. 4. Company to return interim trust deed to Pinsents and the transfer agreement, deed of participation to Sacker & Partners LLP. 5. The Company to send transfer letters to executive members.
By 28 November	1. Pinsent Masons to obtain stamp duty clearance. 2. Hugh Craig to sign transfer agreement and pass undated to Sackers. 3. Executive members to sign (in escrow) but not date and return to Sackers letter inviting them to transfer past service rights.
Thursday 29 November	Transfer agreement, deed of participation, letters to executive members and debenture to be dated with that date.
30 November	Transfer agreement becomes effective without further action.
December	Implementation, registration of debenture returns, etc.

346. I doubt very much whether this plan of action was followed to the letter. But it gives some idea of the process, and in particular its formality. There was a great deal of work that needed to be choreographed.

Chronology

347. It is possible to establish some form of chronology as to when the various documents required for the establishment of the Executive Scheme were produced:

Date	Time	Event	Reference
6 Nov 2007	4:38pm	Mr Claisse sends Ms McBrearty a final version of the Interim Trust Deed and Executive Scheme booklet for her to print out.	Email sent at 4:38pm on 6 Nov 2007 Email sent at 5:09pm on 6 Nov 2007 McBrearty 1/§16
7 Nov 2007		Ms McBrearty receives back a signed version of the Staff Scheme amending deed.	Email sent at 5:09pm on 6 Nov 2007
12 Nov 2007	10:01am	Mercer send to KeyMed the "plan of action" for the completion of the Executive Scheme.[373]	Email sent at 10:01am on 12 Nov 2007 McBrearty 1/§17
12 Nov 2007	1:01pm	Pinsent Masons seek Ms McBrearty's email so that they can send her a letter regarding the registration of the Executive Scheme, as she will be dealing with the registration of the scheme.	Email sent at 1:01pm on 12 Nov 2007 McBrearty 1/§17
12 Nov 2007	4:26pm	Sackers inform Mr Wright that the following documents are being couriered to Mr Rowe: - the Transfer Agreement - the Debenture - the Deed of Participation - the Letters Copies of these documents were attached to the email, which was also sent (as a copy) to Ms McBrearty.	Email sent at 4:26pm on 12 Nov 2007 McBrearty 1/§17
12 Nov 2007		According to Ms McBrearty, "Mr Hillman asked me to witness his signature to the Interim Deed, which he then gave me and which had also already been signed by Mr Woodford".	McBrearty 1/§18
12 Nov 2007		According to Ms McBrearty, she then "took the Deed to each of Mr Williams and Mr Calcraft, telling them it was for the new Executive Scheme and asking them to sign on behalf of KeyMed".	McBrearty 1/§18
12 Nov 2007	4:37pm	Ms McBrearty scans the Interim Deed and Booklet.	Metadata showing the date and time of the creation of the PDF McBrearty 1/§18
12 Nov 2007	4:53pm	Ms McBrearty emails Mr Claisse and Mr Wright, attaching a copy of the Interim Deed and saying:	Email at 4:53pm on 12 Nov 2007 McBrearty 1/§18

[373] As to the "plan of action", see paragraph 345 above.

		"Success part 1 – this will be sent tomorrow by courier"	
13 Nov 2007	8:14am	Mr Hillman sends to Mr Rowe and Ms McBrearty a copy of HMRC's receipt, acknowledging successful receipt of the registration form for the Executive Scheme	Email at 8:14am on 13 Nov 2007 McBrearty 1/§21
13 Nov 2007	4:09pm	Ms McBrearty emailed to Mr Claisse and Mr Wright copies of the member announcements and signed transfer requests, which she had received back via Mr Rowe.	Email at 4:09pm on 13 Nov 2007 McBrearty 1/§21
13 Nov 2007	4:52pm	Ms McBrearty emails Mr Claisse and Mr Wright to say that the letter appointing the actuary for the Executive Scheme had been posted but may have missed the last collection.	Email at 4:52pm on 13 November 2007 McBrearty 1/§21

348. The emails and other documents regarding the execution process enabled Ms McBrearty to say with a degree of confidence when, for example, the Interim Deed was signed. I regard the evidence of the scanning of the Interim Deed and the emailing of that document to Mercer as compelling. It seems to me that Mr Woodford and Mr Hillman must be wrong if and to the extent that they contend that this document was signed on 13 November 2007. The documentary evidence, supported by Ms McBrearty's evidence, strongly suggests that this document was sent – signed by all – to Mercer on 12 November 2007.

349. I should stress that this is not a criticism of the Defendants. Neither asserted that all of the Executive Scheme documents were signed on the same occasions: their evidence was that there was a signing meeting, as they described, at which some of these documents were signed. The Defendants were not asserting that particular documents were signed on a particular occasion.

350. Unfortunately, the paper trail only takes Ms McBrearty so far, as she herself acknowledged in her statement:[374]

> "19. As regards the signature of the Transfer Agreement and Debenture, I cannot recall taking these around for signature by Mr Williams or Mr Calcraft. I think that it is likely that I did this at a different time from taking the Interim Trust Deed around for their signature because I created a pdf copy of an incomplete version of the Debenture (as the signatures of Mr Hillman and Mr Woodford were not witnessed and Mr Craig had not signed) on 13 November 2007 at 10:06. I witnessed the signing of the final version of the Debenture by Mr Woodford and Mr Hillman, unlike the signing of the Interim Trust Deed, where I only witnessed Mr Hillman's signature, with Mr Woodford's signature being witnessed by Mr Hillman's PA, Rosemarie Spencer. This suggests that the Interim Trust Deed was signed at a different time from the Transfer Agreement and Debenture. I would then have walked around the final versions for signature by Mr Williams and Mr Calcraft, and sent them to Hugh Craig for him to sign.
>
> 20. I definitely did not attend a meeting at which the documents were laid out on a table for signature."

[374] McBrearty 1.

(iv) Findings as regards the execution of the Executive Scheme documents

351. The various documents necessary for the establishment of the Executive Scheme were not signed in one go at a single meeting of the four KeyMed directors. It is clear, and I so find, that the Executive Scheme Interim Deed itself was executed on 12 November 2007, one day before the ExCom meeting.[375] This ties in with the fact that the Interim Deed had two different witnesses: Ms Spencer witnessed Mr Woodford's signature; Ms McBrearty witnesses the signature of Mr Hillman. The inference is that Mr Woodford and Mr Hillman signed at different times – otherwise the same person would have witnessed the signing.

352. It is also clear that some of the other documents would not necessarily have been signed by all signatories at the same time. For example, any document signed by Mr Craig (the Transfer Agreement, the Deed of Participation and the Debenture) will likely have been signed by Mr Craig away from KeyMed.[376] No-one suggests he was present at KeyMed's offices, and certainly the Defendants did not suggest he was present at the meeting they allege occurred.

353. Unfortunately, there is a dearth of evidence about how Mr Craig's signature was obtained: the "plan of action" suggests that he was to sign after the KeyMed signatures had been obtained, but there is little evidence to suggest how Mr Craig's signatures were to be obtained or how the documents to be signed by him made their way to and from Mr Craig.

354. There is one email from Mr Wright dated 9 November 2007, in which Mr Wright says:[377]

> "I forgot that the Interim Deed will also have to be signed by [Mr Craig] – so they will be signing the Interim Deed at KeyMed on Monday and then sending to [Mr Craig] for signing on Tuesday."

As I say, Mr Craig never signed this document – nor, so far as I can tell, was he ever intended to – but this mistake on Mr Wright's part may explain how the Executive Scheme Interim Deed was signed earlier than the other documents. Certainly, the email suggests that the Interim Deed was signed on Monday 12 November 2007, and not Tuesday 13 November 2007, which conforms to the other data regarding the signing of this document.

355. It is documents that actually did involve Mr Craig that Ms McBrearty is least certain about. She says in terms that she cannot recall taking the Transfer Agreement and the Debenture to Mr Williams and Mr Calcraft for signing.[378] She is silent about the Deed of Participation. These documents are all documents requiring (and bearing) the signatures of all four directors as well as Mr Craig.

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[375] See paragraph 348 above.

[376] See Day 7/p.78.

[377] Put at Day 2/pp.42-43 (cross-examination of Mr Williams). See also Mr Claisse's email to Ms McBrearty dated 21 November 2007, which states: "We had a call from Hugh today who was chasing for the copies of the remaining items. We sent him the interim deed, but he hasn't had anything else. Can you send me copies and we will circulate?". This email, however, does not suggest that the interim deed was sent for signing.

[378] McBrearty 1.

356. The signatures of the Defendants were witnessed. For the most part, they were witnessed by Ms McBrearty. Although it is possible that Ms McBrearty had forgotten her own attendance at the signing meeting, I consider her very definite assertion that she did not attend to be credible. I find that the Defendants signed these documents out of the presence of the other directors some time on 12 or 13 November 2007 and in the presence of Ms McBrearty.

357. The question, then, is what happened next? How were the signatures of Mr Williams and Mr Calcraft obtained? There are two possibilities:

(1) Ms McBrearty – in the usual way – may have walked these documents round for Mr Williams and Mr Calcraft to sign. This is entirely possible, and I would see nothing odd in Ms McBrearty failing to remember this. But it is necessary to note that she does not positively assert that she walked these documents round for signing.

(2) Alternatively, given the fact that ExCom meeting was taking place on 13 November 2007, Mr Hillman and Mr Woodford may have suggested that – since they would all be at the same meeting – it would be more efficient for them to obtain Mr Williams' and Mr Calcraft's signatures.

358. In my judgment, because of the coincidence of the need for Mr Williams and Mr Calcraft to sign with the occurrence of the ExCom meeting, the latter is much the more probable, and I find that there was a signing meeting at which Mr Williams and Mr Calcraft signed (at least) the Transfer Agreement and the Debenture.

359. This explanation fits with the evidence I heard:

(1) It is consistent with Ms McBrearty's evidence and Mr Williams' reconstruction that Ms McBrearty brought round a document relating to the Executive Scheme for him to sign.

(2) It is consistent with the evidence of the Defendants. Both Defendants were adamant that there was a meeting at which documents relating to the Executive Scheme were signed. It is, of course, possible that the meeting was a misrecollection or that the Defendants are lying. But I do not think so. Furthermore, Mr Williams accepted that it was possible that he and Mr Calcraft had signed some documents on 12 November 2007 and some on 13 November 2007.[379]

(3) There was also a degree of urgency. Clearly, the documents needed to be executed by – amongst others – Mr Williams. But Mr Williams was often in the US. In one of the email exchanges between the professionals working on the documentation for the Executive Scheme, it was noted that "I understand that one of the required signatories for KeyMed is based in the US but is back in the UK on Monday for 2 days [this would be Monday 12 and Tuesday 13 November 2007] and the intention

[379] Day 2/pp.53-54 (cross-examination of Mr Williams).

is he signs all the required documentation then, but this does mean we need these documents issued for Monday – Tuesday at the latest."[380]

360. Accordingly, I find that there was a signing meeting, at which some (but not all) of the Executive Scheme documents were signed by some (but not necessarily all) of the KeyMed directors. There remains the question of KeyMed's consent to the final version of the Executive Scheme, including in particular the decision not to impose on the Defendants the PIP Limit. It is to that that I now turn: essentially, the question is whether they gave their informed consent to this, knowing of the conflict of interest under which Mr Woodford and Mr Hillman laboured.

(v) The assent of Mr Williams and Mr Calcraft

Signing the Interim Trust Deed on 12 November 2007

361. Clearly, Mr Williams and Mr Calcraft gave their consent, on behalf of KeyMed, on two occasions. First, when they signed the Interim Deed which Ms McBrearty brought round; and secondly, when they signed the other documents at the meeting on 13 November 2007.

362. Mr Williams was asked about what must have happened when Ms McBrearty came round:[381]

Q (Mr Salzedo, QC)	Your reconstruction of what you think must have happened is that Ms McBrearty presented the deed to you for signature?
A (Mr Williams)	Yes.
Q (Mr Salzedo, QC)	And at the time it was presented to you, you understood that the deed related to the Executive Scheme?[382]
A (Mr Williams)	Yes.
Q (Mr Salzedo, QC)	And you also understood that Mr Woodford and Mr Hillman were going to be beneficiaries of that scheme?
A (Mr Williams)	On that specific point, I don't recollect clearly. My recollection was…it was an interim deed and as I highlighted in my witness statement,[383] I assumed it was for more people than [Mr Woodford] and [Mr Hillman], but clearly I was wrong.
Q (Mr Salzedo, QC)	Yes, you're right, it was an interim deed. If you understand it was for more people than [Mr Woodford] and [Mr Hillman], it follows that you understood that [Mr Woodford] and [Mr Hillman] were going to be beneficiaries of the scheme?
A (Mr Williams)	Yes, but not the only beneficiaries.
	…

[380] Mr Williams accepted that this was likely to be a reference to him: Day 2/pp.39-40 (cross-examination of Mr Williams).

[381] Day 2/pp.29*ff* (cross-examination of Mr Williams).

[382] I have found that Mr Williams cannot have had a recollection of this: see paragraph 335 above. But this was Ms McBrearty's recollection of what she told Mr Williams and Mr Calcraft.

[383] Williams 1/§17. See paragraphs 334 to 335 above.

Q (Mr Salzedo, QC) So your understanding at the time, as far as you can now reconstruct it or remember it, would have been that Mr Woodford, and possibly Mr Hillman, I know you say you're not sure, but no more than those two, were the only beneficiaries of the new scheme who were still accruing additional rights by further work?

A (Mr Williams) Yes.

…

Q (Mr Salzedo, QC) [Asking about Mr Williams' signing of the Interim Trust Deed.]

And you say in your witness statement that Mr Woodford and Mr Hillman had already signed.?[384]

A (Mr Williams) I believe so, yes.

Q (Mr Salzedo, QC) And you can see here, they have signed first for OKG, which was the associated employer, wasn't it?

A (Mr Williams) I believe so.

Q (Mr Salzedo, QC) And then you can see that there's a signature as a deed by Mr Woodford…

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) …with a witness. Then, on the next page, I think we can see similarly a signature by Mr Hillman [with a witness][385]?

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) What was your understanding of why they had signed individually, as a deed?

A (Mr Williams) That was how the deed was set out.

Q (Mr Salzedo, QC) You would have understood at the time that they were…

A (Mr Williams) There were two companies.

Q (Mr Salzedo, QC) Yes.

A (Mr Williams) There was KeyMed and OKG, and I assume that was how the deed was set out by whoever put it together.

Q (Mr Salzedo, QC) These signatures are stated to be just by the two individuals, aren't they? If we just go back to the previous page, it's probably easier now you see Mr Hillman, you can see them all, so the signatures I am just drawing your attention to, the last two, where they sign as individuals, what I suggest to you is that at the time you would have understood that they were trustees of the new scheme, and that was why they were signing in their own names.

A (Mr Williams) I – I don't see how that is inferred from that. My reading of that is that Luke Calcraft – who is below me, where the secretary is being replaced for director – and myself have signed on behalf of KeyMed. On behalf of OKG, [Mr Woodford] and [Mr Hillman]

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[384] Again, I suspect that this recollection derives from Ms McBrearty.

[385] The transcription reads "as a witness, your witness", which makes no sense and does not accord with my recollection of what was asked.

have signed. And then [Mr Woodford] has signed again at the bottom that it has been witnessed.

…

Q (Mr Salzedo, QC) I'm not saying you can tell from this page that they were trustees. We now know they were trustees, don't we, of the new scheme?

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) And I'm suggesting to you that you would have understood at the time that that's why they were signing it as individuals, as well as for OKG?

A (Mr Williams) I wouldn't have taken that inference at that time, no.

Q (Mr Salzedo, QC) Let's just go back, can we go back to page 4 [of the Interim Trust Deed]?

The very first page sets out the parties, and you can see it sets out KeyMed, OKG and then Mr Woodford and Mr Hillman, the trustees.

Is it your evidence that you think you wouldn't even have looked at the first page to see who the parties were?

A (Mr Williams) I don't remember looking at this, no. So yes.

Q (Marcus Smith J) Mr Williams, perhaps we could broaden the question, because I quite sympathise that you are not going to be able to remember what you did on a particular occasion, but when you are presented with a document like this, let's say it's been pre-signed by other people, what is your practice?

A (Mr Williams) In this situation, again, my recollection, which I can't say is 100%, is that that was presented to me by [Ms McBrearty] and it was already signed by [Mr Woodford] and [Mr Hillman], and my practice, to answer your specific question, my Lord, on that, would be if everyone else has signed it, I will not spend huge amounts of time on it, rightly or wrongly.

Q (Mr Salzedo, QC) I think you said you – if we maybe just bring the signature page back up…I think you have said that you did understand that you and Mr Calcraft were being asked to sign for KeyMed.

A (Mr Williams) Yes, for that.

Q (Mr Salzedo, QC) You would have understood that much?

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) You would have read the words "Executed and delivered as a deed by KeyMed"?

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) And I suggest to you that you would, at that time, have had enough understanding of what this document was to know that Mr Woodford and Mr Hillman had not signed for KeyMed?

A (Mr Williams) Correct. They signed for Olympus KeyMed Group, which is a holding company.

Q (Mr Salzedo, QC) All right. So you understood that you were being asked to sign for KeyMed and that Mr Hillman and Mr Woodford had not signed for KeyMed?

A (Mr Williams) I'm just – my Lord, I'm sorry, I'm just repeating what to me is obvious from that document, that [Mr Calcraft] and I signed on behalf of one company, [Mr Woodford] and [Mr Hillman] signed on behalf of another company. I don't know why that is. I don't know why that's necessary.

Q (Mr Salzedo, QC) Well, at the time, you knew this related to the Executive Scheme?

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) And you knew that Mr Woodford and Mr Hillman were two beneficiaries of the Executive Scheme?

A (Mr Williams) Exactly, yes.

Q (Mr Salzedo, QC) So, you must have realized that the reason that you were being asked to sign on behalf of KeyMed, rather than them, was because of their obvious conflict of interest?

A (Mr Williams) That's an inference. I don't remember that. But that's a logical inference.

Q (Mr Salzedo, QC) So you – and Mr Calcraft would have been in the same position as you in relation to this, wouldn't he?

A (Mr Williams) Yes.

Q (Mr Salzedo, QC) So you and Mr Calcraft must have understood that your duty was to consider the interests of KeyMed in relation to this document?

A (Mr Williams) I accept that.

Q (Mr Salzedo, QC) So you would have sought some explanation to understand what the Executive Scheme was and what you were signing up to before you signed it, wouldn't you?

A (Mr Williams) I would have, as I replied in two minutes earlier, if everyone else had signed it, there would be no reason for me to question any of it. I had no reason to question [Mr Woodford], [Mr Hillman] or [Mr Calcraft] at that time.

Q (Mr Salzedo, QC) Well, I've just…

A (Mr Williams) So, I'm – you can argue I'm incompetent for not going through that with a fine-toothed comb and I accept that.

Q (Mr Salzedo, QC) I'm not suggesting to you, Mr Williams, that you should have gone through it with a fine-toothed comb, let me make that very clear.

I am suggesting to you that you did in fact realise that you were signing for the company in circumstances where Mr Woodford and Mr Hillman could not do so. I think you have accepted that, and then what I'm suggesting to you is that you, therefore, would have made sure you had some idea what the document was about.

Is it your evidence that you don't accept that? You think you would have just signed because someone else had already signed?

A (Mr Williams) I would have – it's hypothetical. I can't recall it, so I can't really give you a non-hypothetical answer. My logical inference would be I would have discussed it with Sally briefly and everyone else has signed it. It's an interim deed for the Executive Scheme. I don't see why I would have questioned it.

363. In light of the foregoing, I make the following findings of fact as regards Mr Williams' state of mind:

(1) I have accepted and found that Mr Williams was not present at the 20 December 2005 board meeting at which the establishment of the Executive Scheme was agreed by the KeyMed board.

(2) I have also accepted that, as a matter of his general practice, Mr Williams would not as a matter of course have reviewed the minutes of that meeting, when they came to be circulated.[386]

(3) I do not consider it to be possible that the first Mr Williams heard of the Executive Scheme was when he was asked by Ms McBrearty to sign the Interim Trust Deed on 12 November 2007. I make that finding for two distinct reasons:

(a) First, as I have found, there was some discussion, in the summer of 2006 and thereafter, regarding the Executive Scheme in general and the removal of the PIP Limit in particular. Party to those discussions were Mercer, Mr Rowe, the Defendants and Mr Williams and Mr Calcraft. Those discussions, as I have found, proceeded on the basis that the PIP Limit would not apply to the new Executive Scheme. Mr Williams would have appreciated, in general terms, what the establishment of the Executive Scheme entailed, including the removal of the PIP Limit.

(b) It was Mr Williams' evidence that he would have been willing to sign simply because Mr Woodford, Mr Hillman and (perhaps) Mr Calcraft had already signed. I reject that evidence. Whilst it may be that Mr Williams adopted a cavalier attitude towards Board minutes that he thought did not concern him, he would not have so disregarded his duties so as to sign a document simply on Ms McBrearty's assertion that it related to the Executive Scheme and because others had signed before him. If this was the first time Mr Williams had heard of the Executive Scheme, he would not have signed the document at all. He would have wanted to know why a new pension scheme was being established. I do not, therefore, accept that this was the first occasion on which Mr Williams heard of the Executive Scheme. Had this been the case, then Mr Williams would have wanted to know much more.

I find that Mr Williams would have known something of the Executive Scheme before 12 November 2007. There would have been many occasions on which he could have done so, given the elapsed time between the Board meeting in December 2005 and November 2007. I consider that, in seeking to reconstruct his actions, Mr Williams understated the extent to which he would have competently

[386] See paragraph 462(3) below.

performed his duties as a director, and was too willing to accept that he had been less than diligent as a director. It may be that he took this course because it was the surest way of enabling KeyMed's case to prevail: but whatever the reason, I do not accept this part of Mr Williams' evidence. I do not find that Mr Williams was deliberately seeking to mislead the court. However, in the course of preparation of his statements and his evidence, I find that he mislead himself into minimizing the extent to which he, personally, would have had regard to information relating to the Executive Scheme that crossed his desk.

(4) Under cross-examination, Mr Williams accepted that:

(a) He and Mr Calcraft were signing for and on behalf of KeyMed. That was true not merely of the Interim Trust Deed, but a number of other documents.

(b) He was aware of Mr Woodford's and Mr Hillman's personal interest in the Executive Scheme.

(c) He was aware that Mr Woodford and Mr Hillman were <u>not</u> signing for KeyMed.

(5) I am not prepared to accept that Mr Williams was as naif and blindly trusting as he sought to suggest. Of course, he would have had a regard for Mr Woodford and Mr Hillman as the senior directors of the company. But that would have made him more conscious, not less, that he and Mr Calcraft were the decision-makers for the purposes of KeyMed in this case.

(6) That said, I do not consider that this was an especially big decision. The creation of the Executive Scheme had been approved two years before, and since then a considerable amount of time had been spent preparing for the establishment of the Scheme. The only matter that required specific consideration was whether KeyMed's interests required that the PIP Limit be imposed upon the Defendants contrary to their rights under the Staff Scheme. Even that, as I have found, had been debated since the summer of 2006.

364. There was very little evidence about Mr Calcraft's state of mind. He obviously knew of the December 2005 Board resolution and had approved the draft minute. He subjectively knew of the conflict of interest of the Defendants. The extent to which he was aware of the issues relating to the Executive Scheme after the 2005 Board meeting is difficult to say: there are few documents, and Mr Calcraft could not give evidence.

365. It would be wrong, however, to tar Mr Calcraft with the same incompetent brush as Mr Williams sought to daub himself. I proceed on the basis that Mr Calcraft would have acted in accordance with his duties as a director and would not have signed the documentation relating to the Executive Scheme on 12 and 13 November 2007, had he not been satisfied that this was in the interests of KeyMed.

<u>Signing the other documents on the day of the ExCom meeting (13 November 2007)</u>

366. I have found that there was a signing meeting on 13 November 2007, where further documents were signed by Mr Williams and Mr Calcraft, these documents already having been signed by Mr Woodford and Mr Hillman.

367. Mr Williams, as I have described, had no recollection at all of this meeting, and I accept that evidence. The strength of this lack of recollection (if it can be put that way) was explored in cross-examination:[387]

Q (Mr Salzedo, QC)	So, Mr Hillman recalls that there was a meeting where he took you and Mr Calcraft through the explanatory booklet, do you remember the one that was attached at the end of the PDF of the deed?
A (Mr Williams)	Mm-hm.
Q (Mr Salzedo, QC)	And do you accept that it's right that Mr Hillman took you through the explanatory booklet?
A (Mr Williams)	That's not my recollection.
Q (Marcus Smith J)	Can we nuance that a little bit? You were asked whether it's right. Can I just gauge the extent of your disagreement? Is it simply that it could have happened but you can't remember or that you positively are saying that it didn't happen? I appreciate it's very difficult, Mr Williams, to calibrate your memory.
A (Mr Williams)	It could have happened. I've said earlier that I can't categorically state my recollection is absolutely correct, but it – my recollection was I signed that with Sally with other signatures on there. That may be incorrect, but I can't guarantee my recollection is 100% certain around that time. My point in the witness statements was more a case of it was – everything had gone through in a very methodical way, highlighting conflicts of interest, *et cetera, et cetera*, I believe I would have recalled it better. For the same rule of abnormality and normality in terms of the effect on recollection that I've already highlighted. …
Q (Mr Salzedo, QC)	Mr Williams. First of all, do you accept that it's right at the discussion [Mr Woodford] reminded you and Mr Calcraft about the fixed 5% and the reason why the Inland Revenue Limits were not included in the deed?
A (Mr Williams)	Same answer as before: I don't recall that, but I may be wrong.
Q (Mr Salzedo, QC)	And do you accept that if he had have done, that's not something that would have been especially memorable to you now?
A (Mr Williams)	Potentially. My pension knowledge at the time was not high.

368. If, as I have found, there was a signing meeting on 13 November 2007. I consider that it is not possible that Mr Woodford and Mr Hillman could simply have told Mr Williams and Mr Calcraft to sign various documents without explaining what they were. That explanation need not necessarily have been a long one, given the knowledge Mr Williams and Mr Calcraft would already have had. But I find that such an explanation took place and that Mr Williams and Mr Calcraft both knew:

[387] Day 2/pp.50-51 (cross-examination of Mr Williams).

(1) Why the Executive Scheme was being set up, namely in order to avoid the PPF Risk.

(2) That Mr Woodford and Mr Hillman were personally interested in this decision.

(3) That, additionally, the Executive Scheme would (in contrast to the Staff Scheme) not contain the PIP Limit.

369. It follows that I find that the decision to establish the Executive Scheme was based upon the informed consent of KeyMed, including (I stress) the lifting of the PIP Limit. In this regard, it is important, I consider, to view events as a whole, beginning with the Board meeting in December 2005, through to the discovery that KeyMed had, without due consideration, voluntarily retained the Revenue Limits, to the steps that the directors took to rectify this, culminating in the November 2007 signing. In cross-examination, Mr Woodford said this:[388]

Q (Mr Wardell, QC)	So you have a remarkable memory as to what happened in November 2007, Mr Woodford?
A (Mr Woodford)	I remember it back to 2006. I don't remember everything, but I certainly remember, you know, how – and I did from the beginning, when – once I'd got my head round what Olympus were claiming, this was where a decision was made without, to me, any explanation or control. It was the *Marie Celeste* thing, as I call it. You know, how can a decision like that be made. That's why I remember that bit. That's the only bit I have any clear recollection. Then I went back on to my hobby horse about: how could that happen?
Q (Mr Wardell, QC)	And even if this had happened, that would be no discharge of your duty as a director, would it?
A (Mr Woodford)	I'm sorry, I'm not…
Q (Mr Wardell, QC)	Even if you had had these conversations, it would be no discharge of your duty as a director, would it? You don't mention cost of the proposal, do you?
A (Mr Woodford)	The directors were aware – we're back to what we were discussing just a few minutes ago – that this was fully funded.
Q (Mr Wardell, QC)	I don't understand that. You don't tell them anything about the cost of this removal of the [Revenue Limits], do you?
A (Mr Woodford)	Because it's not an additional cost.
Q (Mr Wardell, QC)	You just address the issue from the perspective of you as a beneficiary, don't you?
A (Mr Woodford)	This is just what we've been talking about.
Q (Mr Wardell, QC)	You say it was fair to you as a beneficiary that the limits should be removed?
A (Mr Woodford)	I felt, and I still do, and I felt at the time, that there was an obligation on the company to honour what it had told us over 20 years, that it had been fully funded on that premise, and I think

[388] Day 9/pp.182*ff* (cross-examination of Mr Woodford).

	Luke Calcraft and Nick Williams understood that and agreed to that.
Q (Mr Wardell, QC)	Well, why didn't you honour the same approach to the people in the staff scheme who had joined before 1997?
A (Mr Woodford)	And, as I acknowledged before, I would make a different decision. That decision is one I'm not comfortable with. I don't remember making it. I think it was a bad decision.
Q (Mr Wardell, QC)	And I suggest that, yet again, you have put your head together with Mr Hillman's and you have come up with closely matching recollections that are far too good to be true?
A (Mr Woodford)	That I remember lots of documents being signed? I mean, why would I attempt, or Mr Hillman attempt, with people like Luke Calcraft and Nick Williams, to send somebody round with all these documents. You know, they – they would have to understand – what's a deed of participation, what is this debenture, what is this trust deed? I mean, I'm sorry, but it's beyond my comprehension of how you could ask your colleagues, by just saying "Sign all this". Or "Send somebody round." That would be – if you were going to try to deceive someone, that would be such a complicated, clumsy and exposed way of doing it.
Q (Mr Wardell, QC)	But that's how you operated? They did what you told them to. They did not question you at all about decisions relating to the pension?
A (Mr Woodford)	Who are the "they"?
Q (Mr Wardell, QC)	Mr Calcraft and Mr Williams.
A (Mr Woodford)	I refute that.

(vi) Other points regarding process made by KeyMed

370. KeyMed made a number of other criticisms of the process by which the decision to establish the Executive Scheme came to be made. I do not consider these points to be academic, despite the findings of fact I have made so far. The criticisms are criticisms of the process of which the Defendants were in overall charge. None of them were answered completely satisfactorily during the course of the trial. It is necessary to note these deficiencies in process, because the questions of Conspiracy, bad faith and dishonesty remain at large, and the criticisms that KeyMed makes of the process are relevant to these issues.

371. The criticisms made were threefold:

(1) *Mercer's concern regarding the cost of the lifting of the PIP Limit was not addressed.* The point was that the cost of lifting the PIP Limit was potentially substantial but never actually ascertained. Mr Rowe said this:[389]

"Mr Wright commented further (with Mr Hillman copied) in an email dated 6 December 2006. In that email he commented that the implication of the old Inland Revenue limits not

[389] Rowe 1/§108.

being retained in the Executive Scheme was that, while it was likely that increases for Executives in the Staff Scheme would have been "capped" at some point in the future by the old limits (restricting increases to 3% or RPI if higher), this would not now be the case in the Executive Scheme. He went on to say that "as this is potentially a big cost item, you may want to just check you are happy with this". I cannot remember the specific discussion but I would have referred to question of whether similar costings should be obtained to Mr Hillman. When I responded to Mr Wright on 21 December 2006 confirming that he should "go ahead as drafted" without asking for costings, this would have been at the direction of Mr Hillman. This seemed somewhat unusual. In a contract where there was a risk of significant cost to KeyMed, I would try to get more information to help assess the extent of the risk before making a decision about whether to enter into it or request a change. However, I saw this as a judgment call for Mr Hillman, so did not question it."

(2) *There was a failure to obtain legal advice for KeyMed regarding the Executive Scheme.* Mr Craig raised the question of separate legal advice for KeyMed on a number of occasions. The need for such advice was minuted, but the minute removed as "actioned" without the advice having been obtained. Mr Woodford and Mr Hillman both sought to explain why no legal advice for the company was obtained:

(a) Mr Woodford said:[390]

"I see that these draft minutes indicate that Hugh, Paul and I agreed that the new Executive Scheme deed would be reviewed by an independent lawyer on behalf of the company. As an agreed action, it should have been followed through and as [Mr Rowe] was the administrator and secretary to the trustees, it would have been usual for him to highlight in the next meeting any item that had not been actioned. I don't know why this action wasn't followed through in practice, although I note that there are no initials against it to record who was responsible for the action point, nor a deadline."

(b) Mr Hillman said this about the obtaining (or rather, failure to obtain) legal advice:[391]

"20.1 I am reminded by my review of a set of Staff Scheme minutes that a meeting took place on 29 March 2007, attended by Hugh, Michael, John, Mel, Glenn and me. I note that on 23 March 2007, Mel sent separate agendas for a Staff Scheme Trustee meeting and an "Executive Scheme Trustee" meeting, both to be held on 29 March 2007, to Hugh for comments. The Executive Scheme had not yet been established. The final, signed Staff Scheme Trustee minutes do not reference a specific discussion relating to the new scheme, therefore I believe that the Staff Scheme Trustees discussed the establishment of the Executive Scheme at the Staff Scheme Trustee meeting and that it was decided that it would be helpful to extract those minutes that dealt exclusively with the Executive Scheme for ease of reference.

20.2 My initial view was that it was not necessary for the company to have separate legal advice on the creation of the Executive Scheme as it was not intended that creation of the scheme would confer any additional benefits.

[390] Woodford 1/§18.3.

[391] Hillman 1.

There were several lawyers involved to ensure that the drafting accurately captured the intention: Pinsents had been engaged to advise the Executive Scheme Trustees, Sackers had been engaged to advise the Staff Scheme Trustees and Hugh and his firm, BWB, provided additional legal advice when required.

20.3 There was always sensitivity in KeyMed about spending money on unnecessary advice and I remember thinking that a significant amount (and probably enough) had already been incurred on lawyers' fees in relation to the split of the Schemes.

20.4 A week before the Staff Scheme Trustee meeting, Hugh sent John a letter stating that he had spoken to me on 22 March 2007 about the "knotty issue" of KeyMed being separately advised. I remember that this conversation prompted me to reconsider my previous stance on the need for separate advice and, having re-read the draft minutes of the Staff Scheme Trustee meeting, I am reminded that Michael, Hugh and I decided that (i) the powers comparison table would be sent to the directors for consideration; and (ii) the final Interim Deed (and associated documents) would be sent for review by a separate lawyer who would advise KeyMed.

20.5 I recall that the intention was to send the Interim Deed to another firm for comment, however, it would appear that this advice was not then actually sought. John generally instructed lawyers and took responsibility for ensuring that actions were completed. I do not know why this agreed action was ultimately not taken. However, it seems likely from the documents that it was due to the relevant minute inadvertently being omitted from the final version of the meeting minutes. I note that a second, different, set of draft minutes regarding the Executive Scheme was produced for 29 March 2007 that dealt solely with the KeyMed debenture. From an email sent on 16 April 2007, I can see that Mel proposed to John that this section be moved to a separate set of minutes for the Executive Scheme.

20.6 I believe that John created another set of Executive Scheme minutes rather than inserting the section in relation to the debenture into the draft minutes for the Executive Scheme that had been produced previously and which included the action to seek legal advice on behalf of the company. The second set of draft minutes (that did not include an action to seek legal advice) was then sent by John to Glenn at Mercer on 29 January 2008 and was appended to the minutes of the Executive Scheme Trustee meeting that took place on 29/30 January 2008. I believe that this may explain why separate advice was not sought."

(3) *The fact that Mercer linked the PIP Limit with the additional tax burden on the Defendants.* On a number of occasions, Mercer explicitly linked the removal of the PIP Limit to the fact that it was compensation to the Executive Members for the higher tax burden that the A-Day regime imposed upon them.[392] Of course, this suggestion was expressly contrary to the basis upon which the Board had approved the Executive Scheme, and the evidence of Mr Hillman was that there was no link between the removal of the PIP Limit and the new tax charge, and that he told

[392] See, for example, paragraph 314(2) above.

Mercer so.[393] Yet, nevertheless, the misapprehension (if that is what it was) on the part of Mercer lingered.

372. These are all valid criticisms of the process by way of which the Executive Scheme came to be established. As Mr Hillman acknowledged in another context – things could have been done better. The question, which I pose now, and seek to answer in Section I, is what inferences do I draw from these failings.

G. AMENDMENT OF THE SPOUSAL BENEFIT RULE

(1) Introduction

373. The amendment of the spousal benefit rule was done by an amending deed to the Executive Scheme (the "Amending Deed") dated 1 September 2009. The Amending Deed was made between KeyMed of the one part and Mr Woodford and Mr Hillman of the other part.

374. The Amending Deed recorded the trustees' power to amend the Interim Trust Deed constituting the Executive Scheme with the consent of the principal employer, KeyMed. Clause 3 of the Amending Deed recorded that KeyMed and the trustees would administer the Scheme in accordance with an announcement in the following terms:

> "With effect from 6 April 2009, both the lump sum death benefit and the pension payable to your spouse and/or Dependent Children will be based on your "Final Pensionable Earnings" and not your "Pensionable Earnings" as stated in the Explanatory Booklet.
>
> For this purpose, "Final Pensionable Earnings" means the highest average of your Pensionable Earnings on any three consecutive anniversary dates (6 April) within the ten years preceding the date of your death.
>
> …
>
> Any spouse's pension due from either Death in Service or Death in Retirement will not be subject to a reduction due to the difference in age between you and your spouse."

375. The Amending Deed was signed by Mr Williams and Mr Rowe on behalf of KeyMed and by Mr Woodford and Mr Hillman as trustees.

376. KeyMed's essential point regarding the spousal benefit amendment is that the amendment constituted an enhancement of benefits for members of the Executive Scheme, contrary to the express restriction imposed at the 20 December 2005 Board meeting. There was, so it was said, no Board authorization for this enhancement.[394]

377. In my judgment, this raises two related points:

(1) First, whether the resolution of the Board, contained in Item 53 a prohibition binding for all time in the future preventing benefits under the Executive Scheme from being enhanced.

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[393] See, for example, Hillman 1/§§18.10, 18.11.

[394] See paragraph 63 of the Particulars of Claim, set out in paragraph 74(2) above.

(2) Secondly, whether the Amending Deed was properly consented to. Such consent would, no doubt, be capable of overriding a limiting restriction arising out of a prior Board meeting; but even if there were no such limiting restriction, it would be necessary for KeyMed properly to consent to this amendment to the Executive Scheme, not least since it involved a higher or potentially higher financial commitment on the part of KeyMed.

378. I shall consider first whether the terms of Item 53 precluded later enhancements of benefits under the Executive Scheme: Section G(2) below. I then consider whether the circumstances in which the Amending Deed came to be consented to: Section G(3) below.

(2) The effect of Item 53 on future enhancements to the benefits under the Executive Scheme

379. The terms of Item 53 are set out in paragraph 198 above. The decisions that I consider Item 53 recorded are set out in paragraph 200 above. For present purposes, the relevant decision is the fourth,[395] namely that the transfer of the Executive Members out of the Staff Scheme and into the new Executive Scheme would involve no enhancement of benefits.

380. I consider that the Board's decision related to the terms of the transfer of the Executive Members out of the Staff Scheme and into the Executive Scheme. It did not purport to say anything beyond that. The Executive Scheme was established in November 2007,[396] and I consider that the Board's directive was complied with: the benefits of the members of the Executive Scheme were not enhanced.

381. There is nothing in Item 53 to prevent KeyMed further enhancing the benefits of members of the Executive Scheme, and I reject KeyMed's contentions as regards the effect of Item 53.

(3) Proper agreement to the Amending Deed

(i) Introduction

382. In their written closing submissions, the Defendants accept that the amendment of the spousal benefit rule was a benefit to Mr Hillman (and his to-be wife):[397]

> "The suggestion that the removal of the spousal benefit reduction formed part of a fraudulent conspiracy is particularly hard to fathom. As already noted, it took place nearly two years after the Executive Scheme had been formed (and almost four years after the decision to set up the Executive Scheme was taken). It was obviously motivated by Mr Hillman's decision to re-marry having found a spouse more than 10 years his junior. It is difficult to see why anyone would deny a long-serving senior colleague the relatively minor benefit of seeing his wife's financial position protected in the event of his death. The Amending Deed setting out the change is short and clear. There is no suggestion that there was any concealment of its purpose. It was properly executed by Mr Williams, a non-conflicted director, and by Mr Rowe as company secretary, and signed by Mr Woodford (who himself had no conflict of interest in relation to this amendment). Again

[395] Summarised in paragraph 200(4) above.

[396] In circumstances considered in Section F above.

[397] See paragraph 294 of the Defendants' written closing submissions.

it is not clear what else it is said that Mr Hillman ought to have done to bring about the change he desired, or why it is said that any of this involves any fraud or conspiracy at all."

383. I consider the relationship of this allegation to the Conspiracy allegation in Section I below. For present purposes, I confine myself to the question of whether there was or whether there was not consent to the Amending Deed. As to this, KeyMed's written closing submissions contended:

> "160. Mr Hillman claims in his witness statement to have an extraordinarily detailed recollection of discussions with Mr Calcraft on 27 August 2009 and with Messrs Williams and Rowe on 1 September 2009 during the course of which the directors agreed to the removal of the spousal reduction and Messrs Williams and Rowe agreed to sign the amending deed on behalf of the company. It is simply incredible that almost nine years later he claims to have such a detailed recollection of these conversations (*e.g.* the recollection that Mr Williams read through the announcement and recognized without prompting that the change affected Mr Hillman personally; the same goes for the recollection that Mr Rowe actively offered to sign on behalf of the company).
>
> 161. Neither Mr Williams nor Mr Rowe remembers these conversations:
>
> 161.1 Mr Williams' evidence is that, if the discussion had happened in the way described in Mr Hillman's witness statement, he would expect to remember it, as it was unusual for him to be called into Mr Hillman's office. He believes that the likelihood is that the deed was presented to him for signature and, if it was already signed by the Defendants, he would have signed himself without further consideration. He also stated that if he had been aware that he was approving a change to the spousal reduction, he would have been favourably disposed to it, but he would have expected the change to be applied to the Staff Scheme too, and that he would expect to have remembered raising this with Mr Hillman. Of course, it is common ground that no costs implications of the change were provided to Mr Williams (see further below).
>
> 161.2 Mr Rowe has no recollection of the removal of the spousal reduction. He states that Mr Hillman's account of a discussion is inconsistent with how documents were generally signed at KeyMed and that because of this he would be likely to remember it if his signature was obtained in the way Mr Hillman claims. In cross-examination, Mr Rowe agreed as a matter of reconstruction that before signing the deed, he would have read the announcement and that therefore he would have been aware at the time that the spousal reduction was being removed. That reconstruction is inconsistent with Mr Rowe's surprise at learning about the removal of the spousal reduction during the course of these proceedings. But the point does not go anywhere because Mr Rowe was not a director. Mr Williams is clear he would have signed the deed without any consideration (see above)."

384. Apart from the Amending Deed itself, and the announcement of the change to members, there are no material documents that assist in terms of the extent to which the deed was properly consented to on behalf of KeyMed.[398] The evidence was, in essence, confined to the testimony of Mr Hillman, Mr Woodford, Mr Williams and Mr Rowe. The evidence from their witness statements is set out below: I then state my conclusions, in light of this evidence and the evidence given in cross-examination.

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[398] In cross-examination, this absence of documentation was commented upon. In this case, Mr Hillman acknowledged: "I wish that things were better documented": Day 7/p.155 (cross-examination of Mr Hillman).

(ii) Mr Hillman's version of events

385. Mr Hillman became aware in 2009 that the spousal benefit conferred by the Executive Scheme on spouses of members was reduced by 2.5% for each additional year in excess of 10 years by which the spouse was younger than the member.[399] This directly affected Mr Hillman, who was in a relationship with a lady more than 10 years his junior, whom he intended to marry.[400] As a result, he "decided to discuss with [Mr Woodford] whether, considering my length of service, it would be reasonable for the terms of the spousal reduction to be changed".[401]

386. Mr Hillman describes the circumstances in which the Amending Deed came to be drawn and executed in the following terms:[402]

> "29.3 I remember discussing the issue in [Mr Woodford's] office. My diary confirms that a meeting with [Mr Woodford] regarding pensions was scheduled on Wednesday 26 August 2009. [Mr Woodford] was well aware of my personal circumstances and said he did not have any objection to the spousal reduction being removed in respect of the Executive Scheme. We both understood that this would need to be discussed with the other directors, as any amendment would amount to a benefit change which needed to be approved by [KeyMed].
>
> 29.4 I recall that we had a road safety meeting on Thursday 27 August 2009, which was attended by [Mr Calcraft] and [Mr Woodford] (among others). I recollect having a discussion with Mr Calcraft in relation to the spousal reduction after that meeting in [Mr Calcraft's office].
>
> 29.5 [Mr Calcraft] had taken over my position at Olympus Medical Systems Europe in 2006 and was now acting as Claudine's [Mr Hillman's partner, and soon-to-be wife] manager. Accordingly, [Mr Calcraft was well-aware of my personal circumstances. During our conversation, I reminded Luke that Claudine and I were intending to get married in early 2010 and asked him whether he would object to the removal of the spousal reduction in respect of the Executive Scheme. He told me that he did not have a problem with the proposed change. However, I did not have a copy of the Amending Deed and Announcement to show him during that discussion.
>
> 29.6 Entries in my diary support my recollection that [Mr Williams] and [Mr Rowe] were on holiday the week commencing 24 August 2009. Monday 31 August 2009 was a bank holiday, and so [Mr Williams] and [Mr Rowe] returned to the office on Tuesday 01 September 2009.
>
> 29.7 Once he had returned, I remember having a discussion with [Mr Williams] about the spousal benefit in my office. When we were both working in the USA, [Mr Williams] and I would regularly go out for dinners together and he was also aware of my personal situation and my relationship with Claudine.
>
> 29.8 I had the Amending Deed with me at my meeting with [Mr Williams]. My recollection is that [Mr Williams] was reading through the points set out in the Amending Deed and the accompanying Announcement in turn and he recognized that that amendment in

[399] Hillman 1/§29.1.

[400] Hillman 1/§29.2.

[401] Hillman 1/§29.2.

[402] Hillman 1.

respect of the spousal reduction affected me directly. [Mr Williams] did not have a problem with the change and he signed the Amending Deed there and then.

29.9 After that meeting, I met with [Mr Rowe] (again, in my office) to update him on general developments during his period of leave. I remember that we talked about pension issues and I mentioned that I had met with [Mr Woodford], [Mr Calcraft] and [Mr Williams]. I also explained the Amending Deed and Announcement, including the issue of the spousal reduction, to John. He offered to sign on behalf of the company in his capacity as Company Secretary and then executed the Amending Deed."

Mr Hillman's version of events was challenged in cross-examination, but he stood by his statement.[403]

(iii) Mr Woodford's version of events

387. Mr Woodford's role in the execution of the Amending Deed was relatively minor. His statement confirmed the approach Mr Hillman made to him regarding his circumstances and his request for "a change in the rules to address the impact of them on him personally".[404]

388. Mr Woodford's view was as follows:[405]

"I was aware of [Mr Hillman's] circumstances, and I felt that, given his exceptional contribution to the company over more than 30 years, it was appropriate that his commitment be recognized by a rule change to remove the personal disadvantage his wife would otherwise have suffered under the then current rules. I didn't see the change as being controversial, however, I did not have the power to approve any such change unilaterally. I discussed with [Mr Hillman] that he would need to seek the approval of [Mr Williams] and [Mr Calcraft], and that they were free to come to their own conclusions, which he understood. Given that the deed executing this change was dated September 2009, I deduce this discussion was during the summer of 2009."

(iv) Mr Williams' version of events

389. Mr Williams' recollection was as follows in his witness statement:[406]

"20. It has been explained to me that changes were made to the Executive Scheme in 2009, which included, *inter alia*, removing the reduction applying to the spouse's pension where the spouse was more than ten years younger than the member. It is claimed in the "RFIAD"[407] that I was aware of this. More particularly, it is alleged that I discussed this proposed change with Mr Hillman in his office in or around 1 September 2009 and that I approved the amendment which was confirmed by my signing the Amending Deed dated 1 September 2009. Whilst I did sign the Amending Deed, which had the effect of removing the young spouse's reduction for the benefit, in practice, of Mr Hillman's wife only, I do not have any recollection of any discussion with Mr Hillman about this. I am sure that if this had been discussed with me in the way described in the RFIAD, I would remember it, as it was unusual for Mr Hillman to call me into his office to discuss anything relating to the obtaining of my signature: we generally had discussions around

[403] Day 7/pp.145*ff* (cross-examination of Mr Hillman).

[404] Woodford 1/§30.1.

[405] Woodford 1/§30.2.

[406] Williams 1.

[407] The Defendants' Response to the Claimant's Request for Further Information of the Amended Defence.

his PA's desk. I have no recollection of specifically approving the change at all. Whilst I do not recall signing the Amending Deed, I believe that it would have been presented to me for signature and, if Mr Hillman and Mr Woodford had already signed it, I would have signed it myself without further consideration.

21. I would also point out that if I had been asked to approve the change to the spousal reduction, I would have been favourably disposed to it as Mr Hillman's wife had been an employee of Olympus in Hamburg. However, I would have expected the change to be applied to the Staff Scheme as well and would have raised this with Mr Hillman, and I would therefore expect to be able to remember this."

390. It must be stressed that these paragraphs reflect no actual memory on the part of Mr Williams at all. The paragraphs are a reconstruction of what Mr Williams believed would have happened.

391. Since Mr Williams' statement was made in response to the RFIAD, it is appropriate that the terms of this are set out.

"**Under paragraph 56b**

Of: "*the terms of the amendment to the explanatory memorandum removing the reference to a reduction in surviving spouses' benefits and the accompanying amending deed were specifically discussed by Mr Hillman with each of Mr Woodford, Mr Calcraft, Mr Williams and Mr Rowe on various occasions over the period 26 August 2009 – 1 September 2009 and approved by each of them.*"

Request

4. Please identify:

   a. The date on which each of the discussions occurred;

   b. Which, if any, of the discussions were at a KeyMed directors' meeting or a meeting of the trustees of the Executive Scheme;

   c. Where each discussion took place;

   d. The persons present during each discussion; and

   e. Whether it is the Defendants' case that Mr Woodford, Mr Calcraft, Mr Williams and Mr Rowe approved the amendment orally or in writing. If it is the Defendants' case that the amendment was approved in writing, please identify the document or documents relied upon.

Response

4.

   (1) A discussion between Mr Hillman and Mr Woodford on or around 26 August 2009 in Mr Woodford's office. Approval at this meeting was given orally. Approval in writing was given when Mr Woodford signed the Amending Deed.

   (2) A discussion between Mr Hillman and Mr Calcraft on or around 27 August 2009 in Mr Calcraft's office. Mr Calcraft gave his approval orally.

(3) A discussion between Mr Hillman and Mr Williams on or around 1 September 2009 in Mr Hillman's office. Mr Hillman had the draft Amending Deed with him and Mr Rowe read it. Mr Rowe offered to sign the Amending Deed on behalf of [KeyMed] as Company Secretary to indicate [KeyMed's approval] and did so."

392. This is in line with the version of events given by Mr Hillman and Mr Woodford, albeit expressed in legal language. Mr Williams thus would have understood, when signing his statement, precisely what the Defendants' case was.

(v) Mr Rowe's version of events

393. Mr Rowe said this in his first statement:[408]

"I note that Mr Woodford and Mr Hillman state in their response to a request for further information in the proceedings that a discussion took place between Mr Hillman and myself on or around 1 September 2009 during which I read the draft amending deed and offered to sign it on behalf of KeyMed as Company Secretary to indicate KeyMed's approval, and did so. This is not how deeds or other documents, like special resolutions of Directors, were signed at KeyMed. There was much less formality. The documents were generally walked round to collect the signatures by a secretary or Mrs McBrearty or myself. I certainly have no recollection of a meeting with Mr Hillman to sign the deed. As I cannot recall signing the deed, I cannot say for certain that there was no meeting. But if my signature had been obtained in the way Mr Woodford and Mr Hillman state, I would be more likely to remember it as it would have been very different from the usual practice."

(vi) Findings

394. I shall leave, for the moment, the question of whether Mr Hillman's recollection is so detailed as not to be true or honest.[409] Rather, in terms of evaluating the evidence, it is safer and more appropriate to begin with Mr Williams and Mr Rowe. As regards each of them, two things are true:

(1) Both of them signed the Amending Deed.

(2) Neither of them could recall doing so.

Thus, in each case, it is a question of reconstructing what sort of examination the Amending Deed would have received from them when signing.

395. Mr Rowe's statement says nothing about the attention the document would have received from him: rather, it focusses on the apparent "formality" of the process described by Mr Hillman. I attach very little weight to this: it seems to me that Hillman 1/§29.1 is not describing a meeting of any great formality at all. The much more significant point is the one <u>not</u> dealt with in Mr Rowe's statement, but considered in cross-examination:[410]

[408] Rowe 1/§163.

[409] This was the contention of KeyMed: KeyMed's written closing submissions at paragraph 162.

[410] Day 4/pp.13-14 (cross-examination of Mr Rowe).

Q (Mr Salzedo, QC)	So, the first point I was putting to you was that when you looked at this, you would have read it sufficiently to understand that the effect of the deed was to implement the announcement?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And the announcement itself is that single page that we have on the screen at the moment, and I suggest you would have read that at the time, as you've just read it now?
A (Mr Rowe)	Yes, at the time.
Q (Mr Salzedo, QC)	Yes.
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And so you would have understood that one of the changes being implemented was that the spouse's pension would not be subject to reduction due to the difference in age between a beneficiary and a spouse?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	And on [counsel referred to the page], we have the signatures, and you and Mr Williams signed for the company, Mr Woodford and, on the next page, Mr Hillman signed as trustees?
A (Mr Rowe)	Mm-hm.
Q (Mr Salzedo, QC)	If we just go back [a page], you again understood that this was a document you were signing for the company in a situation where Mr Hillman and Mr Woodford were beneficiaries [of] the scheme, and therefore couldn't?
A (Mr Rowe)	Yes.

396. Apart from the point raised by KedMed in closing – that Mr Rowe, as company secretary, could not sign for the company – it is plain that Mr Rowe actually knew:

(1) Of the conflict of interest between the Defendants and KeyMed;

(2) What the Amending Deed was intending to achieve;

(3) That he was signing on behalf of KeyMed.

I should say that I find this entirely unsurprising. Mr Rowe presented as a careful – indeed, perhaps over-cautious – person (certainly when giving evidence). I do not consider that I would have believed him had he said anything else in answer to Mr Salzedo, QC's questions. And once one takes this evidence from Mr Rowe into account, Mr Hillman's description of what he recalls happening seems an entirely natural one, and not improbable at all.

397. I turn, then, to Mr Williams. I am afraid that I regard Mr Williams' reconstruction of events as inherently improbable and I disbelieve it. I have reached this conclusion for the following reasons:

(1) Although I consider that Mr Williams had serious shortcomings in terms of his performance as a director, he did not appear to me to be so cavalier a person that he would sign what even on a cursory view was a formal document without actually

considering what he was signing. I disbelieve the last sentence of paragraph 20 of Williams 1. Even if both Mr Woodford and Mr Hillman had signed the Amending Deed before Mr Williams did so, I consider that Mr Williams would have considered what he was signing and would not have signed "without further consideration".

(2) It is worth noting that it was not established that Mr Woodford did sign the Amending Deed before Mr Williams:[411]

Q (Mr Salzedo, QC)	And I think you say that you would have signed it if Mr Hillman and Mr Woodford had already done so?
A (Mr Williams)	Well, I would have been, as I put in the – I would have been favourably disposed to it because Mr Hillman's wife worked for the company.
Q (Mr Salzedo, QC)	A point I do need to take up with you is that Mr Woodford had in fact not already signed it when you did. Do you say that that's something you think couldn't be right?
A (Mr Williams)	I can't remember.

The likelihood is that Mr Woodford signed later:[412] but I find that whether that was the case or not, Mr Williams would not have signed without consideration.

(3) The Amending Deed is not a complex document – unlike some of the other documents Mr Williams signed. It is (relatively) short, and the spousal benefit point is one capable of being readily understood. I consider that, even on a fairly cursory reading, anyone would have understood:

(a) That Mr Williams was signing for KeyMed and that Mr Woodford and Mr Hillman were signing as trustees. In the end, Mr Williams accepted that this was the case.[413]

(b) That the Amending Deed effected a change to the provisions of the interim deed constituting the Executive Scheme. It was a relatively straightforward document, and the change to spousal benefit would have been obvious. Mr Williams was asked whether he would have understood the Amending Deed: he chose not to answer this question, preferring to repeat the mantra that he could not recall signing the Amending Deed.[414] To be clear: I accept

[411] Day 2/p.67 (cross-examination of Mr Williams).

[412] Mr Woodford's evidence (see paragraph 389 above) was that the approval of Mr Calcraft and Mr Williams was critical; that suggests (but no more) that he would have signed after the important consents had been received.

[413] The definition of the parties in the opening words of the Amending Deed makes this clear, as does the signature page. In cross-examination, Mr Williams sought to suggest that the signature page could have made it clearer that Mr Woodford and Mr Hillman were signing as trustees: Day 2/pp.68-69 (cross-examination of Mr Williams). This was an attempt to evade the point. No doubt any document can be made clearer: however, the question was whether Mr Williams understood the capacity in which he was signing, and he accepted that he appreciated he was signing for KeyMed, whereas Mr Woodford and Mr Hillman were signing in a difference capacity: Day 2/p.69 (cross-examination of Mr Williams).

[414] Day 2/pp.70-71 (cross-examination of Mr Williams).

that Mr Williams had no recollection of signing the Amending Deed. However, the question of whether, if he had read the document, he would have understood it, could have been answered by Mr Williams. I consider that had he looked at it, as I find he did, he would have understood it.

(4) Mr Williams' witness statement suggested that Mr Hillman would not have explained the purport of the document. I regard that as highly unlikely. Mr Hillman was advocating a change that was unequivocally to his benefit, and justifiable only on the basis of his long service. I consider that the likelihood is that Mr Hillman would have acted as an advocate, and explained his personal circumstances, particularly given the likelihood of a favourable hearing.[415]

(5) In cross-examination, Mr Williams accepted that it was perfectly possible that Mr Hillman did explain the Amending Deed, and the reasons for it, to him.[416] The reason for suggesting the contrary was Mr Williams' expectation that a "one-off" change to the Executive Scheme should also be carried through in the Staff Scheme.[417] I reject this as a sensible or probable reconstruction of what would have happened:

(a) I believe Mr Hillman when he says that this was an amendment to the Executive Scheme directed at his own personal circumstances. I believe he would have explained this to Mr Williams.

(b) For Mr Williams to have raised the question of a corresponding amendment to a different scheme affecting a potentially larger number of persons would have been remarkable. That ignores the entirely subjective nature of Mr Hillman's request.

398. In short, I consider that Mr Williams and Mr Rowe signed the Amending Deed knowingly on behalf of KeyMed, knowing what they were signing, and knowing of Mr Hillman's (and Mr Woodford's) interests as members of the Executive Scheme, to whose advantage this change was. I accept KeyMed's point that there was no attempt to cost the change to the Executive Scheme.

H. CONSERVATIVE FUNDING AND INVESTMENT STRATEGIES

(1) KeyMed's contentions

399. KeyMed contends that the Defendants acted in breach of duty and in furtherance of the Conspiracy by:

(1) *Funding the Executive Scheme on an extremely conservative basis.* As to this:

(a) KeyMed contends that, in addition to its normal contributions, the Defendants procured that KeyMed made a series of additional special

[415] Mr Williams himself acknowledged that he would have been favourably disposed to Mr Hillman's request: Williams 1/§21.

[416] Day 2/p.71 (cross-examination of Mr Williams).

[417] Williams 1/§21.

contributions[418] which ensured that the Executive Scheme was funded on an "extremely conservative basis".[419] This was intentional on the part of the Defendants.[420]

(b) The Defendants:[421]

> "…caused Mr Williams and Mr Calcraft, who along with the Defendants signed board resolutions authorizing the making of the special contributions, to believe that the special contributions were advised by Mercer, in circumstances where Mercer's advice in fact identified the maximum special contribution that it considered could be justified and was not advice that such a contribution should be made."

(c) KeyMed placed particular emphasis on a special contribution of £4,800,000 paid (and procured by the Defendants to be paid) in September 2011, shortly before Mr Woodford left Olympus in acrimonious and contentious circumstances. There was, at the same time, a special contribution of £1,000,000 to the Staff Scheme. As regards these payments in particular, and the special contributions generally, KeyMed pleads:[422]

> "…the specific circumstances of the special contributions paid on 23 September 2011 confirm that in relation to those payments (and KeyMed will contend the contributions more generally), the Defendants caused them to be paid in furtherance of their Conspiracy."

(d) The Staff Scheme was <u>also</u> funded extremely conservatively. KeyMed's case, in this regard, is as follows:[423]

> "…it is to be inferred that the conservative funding strategy adopted in relation to the Staff Scheme was intended to conceal from the other KeyMed directors the extremely conservative funding strategy being implemented by the Executive Scheme. KeyMed relies on the same as demonstrating the Defendants acting in furtherance of their Conspiracy."

(2) *Adopting an extremely conservative investment strategy.* As to this:

(a) Until November 2009, the investment policy for both the Staff Scheme and the Executive Scheme was to invest 40% in equities and 60% in gilts.[424] I do not understand KeyMed to make an allegation in respect of this investment policy.

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[418] Pleaded in paragraph 71 of the Particulars of Claim.

[419] Paragraph 72 of the Particulars of Claim.

[420] Paragraph 73 of the Particulars of Claim

[421] Paragraph 73.3 of the Particulars of Claim.

[422] Paragraph 76 of the Particulars of Claim.

[423] Paragraph 75 of the Particulars of Claim.

[424] Paragraph 77 of the Particulars of Claim.

(b) The investment policy in relation to both Schemes thereafter changed, so as to move away from equities to gilts and/or cash. In the case of the Executive Scheme, the trustees agreed to amend the investment strategy at a meeting on 4 November 2009.[425] In the case of the Staff Scheme, the investment strategy was changed 11 months later, on 7 October 2010.[426]

(c) It is contended by KeyMed that the change in investment strategy in relation to the Executive Scheme was in breach of duty and in furtherance of the Conspiracy.[427] The change in investment strategy in relation to the Staff Scheme – although of course it did not directly benefit the Defendants – was also a breach of duty and done in furtherance of the Conspiracy because the Defendants:[428]

> "…used their positions as trustees of the Staff Scheme to adopt an investment strategy that concealed the purpose of the investment strategy that they were pursuing in relation to the Executive Scheme…"

(2) Overview and summary of my conclusions regarding the "unduly conservative" nature of the funding and investment strategies

400. There can be no doubt that the investment strategy in relation to both schemes was a conservative one. Equally, there can be no doubt that the Staff Scheme and the Executive Scheme were both funded very conservatively. By "conservative", I mean that both investment and funding were directed at achieving – with a high degree of likelihood – pension funds capable of fulfilling or meeting the rights of members of both the Staff Scheme and the Executive Scheme. In short, the effect of both strategies was to eliminate – or at least minimize – the risk of a shortfall in relation to such rights.[429]

401. Plainly, this was an advantage to the members of both schemes. But it does not necessarily follow that this was a <u>disadvantage</u> to KeyMed, still less that the adoption of conservative funding and investment strategies was contrary to the interests of KeyMed and/or improper. In their written closing submissions, the Defendants put the point thus:[430]

> "Fundamentally, the adoption of a cautious or conservative approach to risk is simply not the stuff of breach of duty. Different people may take different attitudes to risk, but for company directors to take the view that they should not be taking any unnecessary risks with the pension funds of their employees is a decision for which they should be praised, not censured."

402. The fact is that, under a Defined Benefit Scheme, the obligations of the scheme employer are defined: by the scheme adopting a conservative funding or investment strategy, the scheme members do not get <u>more</u>. They simply gain a greater assurance that what they are entitled to – what the scheme employer has promised – will be delivered. Equally,

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[425] Paragraph 78 of the Particulars of Claim.

[426] Paragraph 79 of the Particulars of Claim.

[427] Paragraphs 82 and 83 of the Particulars of Claim.

[428] Paragraphs 82.2 and 83 of the Particulars of Claim.

[429] I am, of course, including future rights, *i.e.* those cases where pensions were not in payment, but where benefits were still accruing or where a member was deferred.

[430] Paragraph 299(a) of the Defendants written closing submissions.

the scheme employer – in having a conservatively run scheme – will have the benefit of knowing that there will not, years down the line, be an unfunded liability which suddenly has to be funded.

403. By this, I do not seek to suggest that the contrary approach is indefensible: it certainly is not. It can be quite proper for a riskier investment strategy to be followed, whereby less money is paid in upfront, but invested more riskily, so that greater returns in due course make up the funding shortfall. That is entirely appropriate, provided the scheme employer and the trustees are comfortable with this level of risk. The point was made, with admirable clarity, by Mercer in its pension options paper of November 2005. The benefits – but also the risks – of funding on an "on-going" basis were spelt out in the passage quoted at paragraph 230(2) above.

404. It follows that the mere fact that a conservative investment and funding strategy is being followed in no way justifies an inference of impropriety or breach of duty towards the scheme employer.

405. In this case, whilst I accept that the funding and investment strategies for the Executive Scheme were conservative, I do not consider that either strategy was "unduly" conservative or in breach of duty. I reach this conclusion for the following reasons:

(1) The rules of the Staff Scheme and – when it was established – those of the Executive Scheme gave the trustees more control in terms of investment and funding strategy than is perhaps common in occupational pension schemes. The trustees were, obviously, obliged to use these powers in the interests of the members of the schemes.

(2) Given his role and personality, it was Mr Woodford who framed the investment and funding strategies for both the Staff and Executive Schemes. However, not only could that be said to be his role or function, but also:

(a) He had good reason to adopt this approach.

(b) He did so at all times consulting with the scheme actuary, Mercer.

(c) He did so at all times consulting the Board of KeyMed.

(d) When acting as a trustee, Mr Woodford's views had been endorsed by the other trustees, and Mr Woodford acted in line with views of his fellow trustees. (This point I note, but do not expand upon greatly: the essence of KeyMed's claim against the Defendants is that they failed in their duty to the company, not that they were in breach of their duty to members of either Scheme. Indeed, it is the essence of KeyMed's claim that the members of both Schemes benefited from the investment and funding strategies adopted.)

(3) The adoption of the same funding and investment strategy for the Staff Scheme as for the Executive Scheme is inconsistent with the notion that the Executive Scheme funding and investment strategy was in furtherance of the Conspiracy. Furthermore, the continuation of the same strategy for the Staff Scheme, after the Defendants had left Olympus and ceased to be trustees of the Staff Scheme

undermines the contention that the funding and investment strategies were essentially inappropriate.

(4) The fact that the Staff and Executive Schemes were exceptional, in terms of their funding and investment strategies, when compared to other United Kingdom schemes (that were in deficit) undermines, rather than supports, KeyMed's case, but is (in any event) an essentially irrelevant factor. Equally, however, that fact that the strategy in terms and funding and investment proved to be successful and of benefit to KeyMed seems to me to be fundamentally irrelevant when determining whether these strategies were proper. The fact that something has turned out well, even if (hypothetically speaking) done for improper reasons, seems to me also to be an essentially irrelevant factor.

I expand upon these points in the following paragraphs

(3) The rules of the schemes and the respective powers of trustees as against KeyMed

406. It is a necessary and important part of the context to understand the rules under the schemes regarding contributions to the schemes. The following set out the provisions contained in the Scheme Rules of the 2000 Staff Scheme Definitive Deed and Rules, but there is no material difference between the two schemes:[431]

"**EMPLOYERS' CONTRIBUTIONS**

Ordinary annual contributions

11.1 Each Employer shall pay contributions to the Scheme in respect of its Employees who are Members. An Employer's contributions shall be paid at a rate which:

(a) from time to time the Trustees, after obtaining Actuarial Advice, shall determine to be necessary to provide the benefits under the Scheme for and in respect of the Members, taking into account any contributions payable by Members under Rule 12 (Members' contributions) and any additional liability falling on an Employer under Rule 10 (Maternity absence);

(b) will not prejudice Approval.

Special contributions

11.2 An Employer, with the consent of the Trustees, may at any time, pay a special contribution to the Scheme for any purpose consistent with the purposes of the Scheme. The Trustees shall apply the contribution solely for the purpose stated by the Employer, provided that this does not prejudice Approval.

Manner and frequency

11.3 Each Employer shall pay its contributions to the Trustees, or as otherwise directed by the Trustees, at such intervals as the Trustees decide.

Termination and suspension

[431] Rule 11.1 was set out at paragraph 119(2) above, but is repeated here for convenience.

11.4 An Employer may at any time terminate its contributions to the Scheme by giving three months' written notice to the Principal Employer, the Trustees and to all its Employees who are Members. Any notice of termination of contributions is without prejudice to the Employer's obligation to pay contributions to the Scheme in respect of the period before the effective date of the notice. Any notice of termination extends to any liability of the Members who are Employees of the Employer to contribute to the Scheme.

11.5 If a Participating Employer terminates its contributions under sub-rule 11.4, the provisions of Rule 60 (Withdrawal of Participating Employers) will then apply. If the Principal Employer terminates its contributions under sub-rule 11.4, the provisions of Rule 62 (Termination of the Scheme) will then apply."

407. Rule 62.2 provides that on termination, the trustees shall either resolve to wind-up the Scheme or else adopt the other alternatives specified in that sub-rule.

408. These rules are significantly more member friendly than the sort of rules that might be contained in other Defined Benefit occupational pension schemes. Thus, it is the trustees who determine the rate (Rule 11.1) and timing (Rule 11.3) of the employer's payments into the Scheme, and not the employer. Naturally, the trustees must have regard to Actuarial Advice and to what is "necessary" – and to this end, would no doubt have regard to the views of the employer – but (as has been described)[432] the trustees' duty to the Members is paramount.

409. The Trustees cannot direct the employer to make a special contribution. Rule 11.2 would appear to me to have two purposes:

(1) To enable the employer to pay into the Scheme more generously than the trustees were requiring. Thus, were an employer to be concerned that the trustees were taking too great a risk, and running excessive unfunded employer obligations, the employer would be able to rectify this by making a special contribution.

(2) To enable an employer to anticipate ordinary annual contributions, because it suited the employer to make earlier payment than the trustees were requiring.

410. There is obviously a close nexus between ordinary annual contributions, the trustees' approach to funding the Scheme's liabilities and special contributions. Underlying all three is the fact that – within limits – it is the trustees and not the employer who "call the shots".

411. This is, obviously not even a partial answer to the points made by KeyMed: but it is relevant to the context. The trustees would be expected to act in the members' best interests and to use their powers under the Scheme Rules accordingly. As these provisions show, the employer's ability to resist this is limited.

412. Furthermore, a solvent principal employer – as KeyMed was – would find it difficult unilaterally to extricate itself from its obligations. KeyMed could, of course, terminate its obligation to contribute under Rules 11.4 and 11.5: but all that would do would be

[432] See paragraph 119 above.

trigger the winding up of the Scheme, and oblige KeyMed to fund any liabilities exceeding the value of the Scheme's assets as a debt.[433]

413. The same position pertains so far as investment strategy is concerned. Rule 51 of the Scheme Rules – again, the position under the Executive Scheme was materially no different – was as follows:

"**POWERS OF INVESTMENT**

51.1 Subject to sub-rules 51.2 and 51.3, the Trustees may invest all or any part of the Fund in any form of investment which they could invest in if they were absolutely and beneficially entitled to the assets concerned. The investments need not produce income. The Trustees may also transpose and vary any of the investments.

51.2 Where required to do so by section 35 of the [Pensions Act] 1995 (Investment Principles), the Trustees shall consult the Employers (or their nominated representative) on a regular basis about the investment strategy to be followed by the Trustees in investing the Fund."

414. Subject, therefore, to the duty to consult, the discretion regarding investment vested in the trustees and not in KeyMed.

(4) The framing of the investment and funding strategies

(a) The investment strategy

(i) Mr Woodford's approach

415. Mr Woodford acknowledged that his own approach to investment strategy for the Schemes was "conservative".[434] Initially, the approach was to divide the portfolio by placing 40% of the Staff Scheme's assets in equities and 60% in bonds. Thus, at a meeting of the Trustees on 27 January 2004, this approach was affirmed.[435]

416. As regards the attitude Mr Woodford had to equity versus bonds/gilts, he explained it as follows:[436]

"I appreciated that, based on historic performance, equity yields could theoretically be greater than the coupon on bonds, but that the possibility of the higher return was offset by the risk that they could depreciate materially in value. Bonds might not have had such a dramatic potential for growth, but they provided a secure and stable year on year return. Moreover, high quality fixed income vehicles provided the most predictable matching of known liabilities for a scheme which had been closed to new entrants for several years, with an increasing profile of maturing members. The critical point was that by investing in gilts and AAA-rated corporate bonds, the scheme's capital value would be preserved, compared with the potential for sudden and

[433] See Rule 63.16.

[434] Woodford 1/§9.6.

[435] See Item 10.4 of the minutes.

[436] Woodford 1/§9.7.

unpredicted falls in equity values. I understood that in such investment considerations, it was always an issue of risk/reward."

417. It was Mr Woodford's evidence that the 2008 global financial crisis made him extremely nervous.[437] As Mr Woodford noted,[438] "all the members depended on the trustees to safeguard their pension savings, and the company would ultimately have to make good any shortfall in funding". Nevertheless, so far as the Staff Scheme was concerned, the investment strategy as described above was continued,[439] although kept under review.[440] However, it was changed in the case of the Executive Scheme.

418. I have focused on Mr Woodford's thinking because – in light of all of the evidence – it seems to me that his voice would have been determinative in terms of the sort of long term financial strategy that would have informed investment and funding decisions. Certainly, as I shall describe, these decisions were endorsed by the other trustees and by KeyMed itself. The evidence before me was that there was consensus on these points, not that Mr Woodford was overriding views contrary to his own.

(ii) Change in investment approach: trustees meeting regarding the Executive Scheme

419. Separate trustee meetings of the Staff Scheme and the Executive Scheme were held on 4 November 2009. The investment strategy for the Staff Scheme had been considered at the Staff Scheme Trustees' meeting, and continued unchanged, albeit with increasing misgivings.[441]

420. However, for the Executive Scheme, Mr Woodford stated:[442]

> "…I remember that Mercer explained that there was little advantage in continuing to take risk by maintaining the 60/40 investment strategy. It was formally agreed that the investment strategy should be changed to move to 100% in cash and gilts by the time that I retired from the scheme, which was expected to be in 2015."

The minutes for the meeting record a decision to this effect.[443]

(iii) Change in investment approach: trustees meeting regarding the Staff Scheme

421. The change was decided upon on 7 October 2010, at a meeting of the trustees, comprising Mr Woodford, Mr Hillman, Mr Rowe (now a trustee) and Mr Reynolds (now also a trustee). Mr Craig had sent his apologies.

422. Mr Woodford's explanation for the change was as follows:[444]

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[437] Woodford 1/§24.1-24.3.

[438] Woodford 1/§24.2.

[439] Woodford 1/§24.3.

[440] Woodford 1/§26.1.

[441] Woodford 1/§33.1 and §32.4.

[442] Woodford 1/§33.1.

[443] See the minutes of a meeting of the Executive Scheme trustees dated 4 November 2009, Item 3.1.

[444] Woodford 1/§39.2.

"The trustees and the directors had been discussing for some time the issue of de-risking both schemes and this had come into sharp focus during the financial crisis of 2008-2009. We had a duty both to protect the rights of the scheme members, and also as directors to avoid any unfunded liabilities, and I felt that if it was possible to minimize the risks involved, we should do so. As I have previously stated, [Mr Hillman] and I discussed this with [Mr Williams] and [Mr Calcraft] on numerous occasions and I recall they were in complete agreement with us about the rationale for de-risking and moving into gilts…"

(iv) KeyMed's involvement

423. As I have noted,[445] investment strategy was principally a matter for the trustees of both schemes. However, KeyMed was certainly informed of the approach. Mr Rowe prepared a presentation regarding the Staff Scheme for an ExCom meeting on 24 November 2010. The presentation made unequivocally clear that the investment strategy had changed, with an original asset allocation of 40% equities and 60% gilts to 100% gilts. The presentation explained why a new approach had been adopted. Mr Williams accepted that the slides contained very clear statements of investment policy.[446]

424. In his first statement, Mr Williams noted the presentation, and stressed that it was for information only, with no alternative approach suggested and no approval being sought.[447] He also suggested that this was the only time the question of investment had been raised with him. Mr Hillman responded in his second statement as follows:[448]

"In paragraph 53 of his statement, [Mr Williams] refers to the fact that [Mr Rowe] gave a presentation to the ExCom on 24 November 2010 which explained the Staff Scheme's new strategy of investing in 100% gilts. [Mr Williams] states that this was an informative presentation and that he cannot recall any alternative approach being suggested or any vote or approval of the strategy. As mentioned in the minutes of the ExCom meeting, there was a discussion with the directors about the merits of this proposal. I also remember having a separate discussion involving [Mr Williams] and [Mr Calcraft] during which they indicated that they were supportive of the proposal to de-risk the Staff Scheme. Although not included in the minutes, I believe that this discussion took place at the board meeting on 18 October 2010, at which the directors also discussed the funding level of the Schemes."

425. This was put to Mr Williams:[449]

Q (Mr Salzedo, QC)	So Mr Hillman essentially says there was a bit more of a discussion involving you than I think you said in your witness statement. Do you accept that he at least may be right about that?
A (Mr Williams)	That's possible. To use my analogy on abnormality and normality, I certainly would not have had any issue with de risking the Staff Scheme.

[445] See paragraphs 413 to 414 above.

[446] Day 2/pp.73-74 (cross-examination of Mr Williams).

[447] Williams 1/§53.

[448] Hillman 2/§6.41.

[449] Day 2/pp.75-76 (cross-examination of Mr Williams).

(v) Mercer and reasonable approaches to investment strategy

426. The adoption of the investment strategy was a matter for the trustees of each scheme. So far as the Executive Scheme was concerned, the Defendants were the only trustees.[450] But that state of affairs had been agreed by KeyMed, and the consequence was that investment strategy was for the Defendants to determine, subject to proper consultation.

427. I do not consider that it can seriously be suggested that the investment strategy was one that could not properly have been adopted by the Defendants as trustees. It lay within the range of reasonable options for a trustee to take and – as it seems to me – a conservative approach, protecting the interests of members, is easily defensible, given the obligation on a trustee to look to the interests of members.

428. The matter may be tested by reference to the Staff Scheme. I should say at the outset that I reject as entirely implausible the notion that the entire investment and funding strategy of the Staff Scheme was informed by a desire, on the part of the Defendants, to disguise their misfeasances in relation to the Executive Scheme. The converse seems to me to be the case: the Staff Scheme and the Executive Scheme investment policies went in the same direction because that was in the interests of both schemes. The soundness of that conclusion is underlined by the fact that the investment (and funding) strategies continued after the Defendants' departure from Olympus. Quoting from the Defendants' written closing submissions:[451]

> "KeyMed's case is particularly difficult to understand in circumstances in which the trustees of the Staff Scheme have maintained the funding and investment strategies that were adopted in 2009-2010 after Mr Woodford and Mr Hillman were replaced in 2011 until at least late 2017. If they were unreasonable or inappropriate strategies, why were they retained? KeyMed's attempt to answer this point is to suggest that there is some fundamental difference between the position when the strategy is first decided upon and the position when the strategy has been in place for some time. That distinction (which is not based on any evidence) makes no sense: if it was inappropriate not to invest in more return-seeking assets in 2009, 2010 and 2011, it would have been equally inappropriate to adopt that course in 2012, 2013, 2014 and 2015 and so on."

There is considerable force in this submission, which I accept. Bearing in mind the width of the discretion vesting in the trustees regarding the adoption of an appropriate investment strategy, the contention that an investment strategy was so inappropriate as to amount to a breach of duty on the part of a trustee is, inevitably, something of an ambitious one. One would certainly expect, on a change of trustees, for such an investment strategy to be abandoned at the first opportunity. The fact that it was not, I find to be telling.

429. The fact is that the investment strategy was not changed because Mr Rowe and Mr Williams considered it to be a sound approach. Mr Rowe was a trustee of the Staff Scheme at the time the decision was made; Mr Williams was a director of the Board, who subsequently became a trustee of the Staff Scheme. Moreover, Mercer were, throughout, involved in informing the trustees of the actuarial position regarding the decisions the trustees were taking. If the change to the investment strategy had been unreasonable or inappropriate, then Mercer would have said so. Moreover, none of the experts who gave

[450] This point is not in dispute.

[451] Paragraph 299(e) of the Defendants' written closing submissions.

evidence before me criticized or sought to criticize Mercer. Furthermore, none of the experts themselves went so far as to say that the investment decisions made by the trustees of either scheme went outside the range of reasonable approaches open to the trustees.

(b) The funding strategy

(i) Measures of funding

430. There are various different measures of how a pension is being funded:

(1) *Ongoing basis.* Mr Bowie describes this in the following way:[452]

> "This funding basis is used where trustees intend to build up sufficient funds to pay member benefits as they fall due from the scheme (as opposed to transferring the liability to an insurer or the individual…). Legislation requires the trustees to be "prudent" (or conservative) when setting the assumptions for this basis. In essence, this means that the trustees are obliged to put aside assets which they believe will give them a better than 50:50 probability of being able to pay the schemes benefits based on the scheme's investment strategy. This is to cover the possibility of adverse future experience such as, for example, poor investment returns. "Technical Provisions" is commonly used interchangeably with the "ongoing basis", but, in fact, refers to the funding basis used by the trustees. As a result, it could mean the buy-out basis, for example, if that were in fact the trustees' primary funding target."

(2) *Buy-out or solvency basis.* This funding basis is described by Mr Bowie as follows:[453]

> "If the trustees intend to transfer the liabilities in the scheme to a third party insurer, a buy-out funding basis would be used. In pricing the cost of taking on pension scheme liabilities, an insurer will aim to remove as much risk as possible within the investment strategy. Therefore, when setting their basis, due in part to capital and regulatory considerations, insurers assume that any assets taken on will be invested in very low risk investments, such as gilts and high quality corporate bonds (irrespective of the past asset allocation of a scheme). This conservative investment assumption means that the value of the liabilities (or "liability reserve" in terms which insurance companies use) calculated on a buyout basis is typically significantly higher than the value of liabilities calculated on a typical scheme's ongoing funding basis."

(3) *Cash Equivalent Transfer Value basis or "CETV" basis.* This funding basis is described by Mr Bowie as follows:[454]

> "This is the basis used to calculate the value of the members' benefits for transfer to an individual arrangement in the member's name. The CETV basis needs to be at least a best estimate of the value of the benefits – i.e. an approach that takes account of the returns expected from the scheme's future investment strategy with the assessment of the expected returns being without bias toward either an over or under estimate of the future returns (i.e. the returns which the trustees believe has a 50:50 probability of being achieved). This is

[452] Bowie 1/§4.35.

[453] Bowie 1/§4.36.

[454] Bowie 1/§4.37.

not a funding basis as such since legislation requires prudence to be included in the funding basis which, by definition, a best estimate basis does not."

431. There is, clearly, a big difference between these funding bases. The ongoing basis for funding contains within it certain very clear dangers for the members of schemes. As Mercer described it in its paper "Pension Options for Senior Executives following A-Day":[455]

"In practice to date, schemes have tended to be funded on the basis they are "ongoing", i.e. that they are not about to wind up and so funding has been based on the assumption that a good proportion of the cost of benefits will be met by the expected future out-performance of a scheme's equity holdings. However, the cost of pensions set by insurance companies makes no such allowance for this equity out-performance. As a result, in the event of a wind-up, buying out accrued pensions typically results in insufficient assets to secure benefits in full, i.e. pensions have to be cut back."

(ii) Rules regarding funding measures

432. The Pensions Act 2004 introduced a "Statutory Funding Objective" for UK occupational defined benefit schemes, whereby such schemes were obliged to have sufficient and appropriate assets to cover their "technical provisions". "Technical provisions" were defined as the amount required, on an actuarial calculation, to make provision for the scheme's liabilities. As Mr Bowie made clear, "technical provisions" is something of a moveable feast, and refers to the trustees' funding target.[456]

433. Trustees are required to obtain actuarial valuations to value the scheme's assets and technical provisions at intervals of not more than three years. If, having obtained an actuarial valuation which indicates that the Statutory Funding Objective is not met on the effective date of the valuation (i.e. assets are less than the technical provisions), the trustees must prepare or revise a recovery plan which must set out the steps to be taken to meet the Statutory Funding Objective, and the period within which that is to be achieved.[457]

434. The rules also require the actuarial valuation to estimate the buy-out position of the scheme – that is, the cost of purchasing annuities for all members from a third party insurer and the associated expenses with winding up the scheme.[458]

(iii) Special contributions and the consent of KeyMed

435. The history of special contributions to the Schemes is set out in the table below.[459] A short narrative is provided in relation to each:

No.	Date of contribution	To Staff Scheme	Executive Scheme	To Narrative

[455] See paragraph 228*ff* above.

[456] The relevant law is summarised in Bowie 1/§4.38. It is unnecessary to set out the law in detail: the question before me is whether the Defendants' acted lawfully in light of their duties, not precisely what the law requires.

[457] Bowie 1/§4.39.

[458] Bowie 1/§4.40.

[459] Paragraph 71 of the Particulars of Claim and paragraph 71 of the Defence.

1	**8 Dec 2005**	£5,000,000	None	This contribution was made before the decision to establish the Executive Scheme was made (on 20 December 2005). The minutes for the Staff Scheme Trustees' meeting on 27 March 2006 record (at Item 5.1.1) that "[a] special contribution of £5m was made on 8 December 2005".
2	**30 Mar 2006**	£12,000,000	None	The minutes for the Staff Scheme Trustees' meeting on 27 March 2006 record (at Item 14.1) that Mercer estimated that there would be a funding shortfall in the Staff Scheme of £12,000,000 at 31 March 2006. Mr Woodford recalled that the Trustees all had a concern about the size of the deficit.[460] The minutes record that "[t]he Trustees, in consultation with KeyMed, advised that a special contribution of £12,000,000 would be made into the Scheme's funds by 31 March 2006" and such a payment was made.
3	**30 Mar 2007**	£5,470,000	None	The minutes for the Staff Scheme Trustees' meeting on 29 March 2007 record certain discussions that took place at the previous meeting held on 19 September 2006. Specifically, it is recorded: (1) At Item 10.3 that, provisionally Mercer had assessed the funding of the Scheme on an on-going basis at 93.5% (a deficit of £5,700,000) and on a wind-up basis at 62.9% (a deficit of £48,000,000). (2) At Item 11.5, suggestion that this shortfall could be met by KeyMed providing a first charge over its assets in the amount of £5,000,000, with higher additional annual contributions over the next five years. In fact, as is recorded in Item 15.4, KeyMed agreed to make a special contribution of £5,000,000, to preserve the level of funding of the Scheme.[461]
4	**18 Jul 2008**	£10,145,000	£3,039,000	Mercer were asked to complete an actuarial valuation of the Executive Scheme by 30 June 2008.[462] On 13 June 2008, in response to a request from Mr Rowe as to "whether there is scope to make further additional contributions immediately to the Staff and Executive Schemes", Mr Wright – after making various assessments regarding mortality – concluded: "From the point of view of paying a lump sum the mortality basis is one assumption that can be reviewed given the Pension Regulator's consultation document and the need to continually monitor and update our mortality allowance. Depending on the level of prudence the Trustees and [KeyMed] wish to incorporate in the basis, this alone could justify up to an additional £13m. Alternatively, a lump sum of say £10m could be used say under basis 3 to get both schemes up to 97%

[460] Woodford 1/§14.5.

[461] See also Woodford 1/§18.1.

[462] Woodford 1/§23.1.

				funded – split £7.9m Staff and £2.1m Executives. If [KeyMed] and the Trustees wish to make a lump sum along the above lines then I will need to write formally to the Trustees of both Schemes to confirm the above points and the impact on both Schemes." At a meeting of the Board of KeyMed on 18 July 2008, it was resolved (amongst other things): (1) To make a special contribution to the Staff Scheme of £10,145,000; (2) To make a special contribution to the Executive Scheme of £3,039,000.[463]
5	**21 Oct 2008**	£5,300,000	£1,900,000	In a document dated 17 October 2008, Mercer provided a funding update indicating that both Schemes were in deficit on an on-going basis. As regards the Staff Scheme, the deficits were: - As at 5 April 2008, 88% or £10.1 million. - As at 30 September 2008, 93% or £6.4 million. - As at 15 October 2008, 93% or £5.3 million. In the case of the Executive Scheme, these were: - As at 5 April 2008, 91% or £3 million. - As at 30 September 2008, 97% or £600,000. - As at 15 October 2008, 94% or £1.9 million.[464] The minutes of a meeting of the KeyMed Board on 21 October 2008 referenced Mercer's funding update, which had been requested "[f]ollowing the recent adverse financial market performance". It was resolved: (1) That a special contribution of £5,300,000 would be made to the Staff Scheme. (2) That a special contribution of £1,900,000 would be made to the Executive Scheme.
6	**17 Dec 2008**	£3,656,000	£6,581,000	Mercer provided a funding update, in relation to both Schemes, on 17 December 2008. Again, this was at the request of Mr Rowe. Mercer assessed the funding position as at 12 December 2008 as follows: - The Staff Scheme was funded to 96%, a deficit of £3,656,000. - The Executive Scheme was funded to 84%, a deficit of £6,581,000. Mercer noted the reasons for this: long-term gilt yields had fallen; and – as regards the Executive Scheme only – there was a change to the mortality basis.[465] The minutes of a meeting on 17 December 2008 note the contents of the report

[463] Woodford 1/§23.4.

[464] Described by Mr Woodford at Woodford 1/§24.3.

[465] See also Woodford 1/§27.3.

				requested by KeyMed and show that it was resolved: (1) To make a special contribution of £3,656,000 to the Staff Scheme. (2) To make a special contribution of £6,581,000 to the Executive Scheme.[466]
7	**27 Mar 2009**	£4,587,000	£3,238,000	At a meeting of the directors on 27 March 2009, further special contributions were agreed. The minutes record: "As a result of the market conditions continuing to be volatile both in terms of equity/asset valuations and affecting the movements in liabilities. The pension scheme actuaries, Mercers, were requested to carry out a funding update and provide a report to the [KeyMed] Board in relation to Staff and Executive Schemes. The report was reviewed by the [KeyMed] Board, which highlighted a requirement for the company to pay an additional £7.8 million to the Schemes to remove the deficit in funding levels. The principal increase in liabilities was the result of a 0.4% p.a. drop in long term gilt yields – this was due to the "quantitative easing" policy announced by the Government i.e. – the Government buying back bonds, which was announced on the 5 March 2009. The [KeyMed] Board agreed that the company should ensure that the Schemes' funding remains at the 100% level on an ongoing funding basis in the context of maintaining the protection of this benefit for the majority of the key employees within the [KeyMed] group at all levels of the organization. [Mr Rowe] to arrange for the payment to be made on 31 March 2009 and to advise the trustees of the Schemes accordingly." Mr Woodford considered that the "report" reviewed by the Board was contained in an email from Mercer dated 19 March 2009.[467] This comprised an email from Mercer, again in response to a request from Mr Rowe, "to look at the scope for paying additional contributions this month as well as looking ahead to the projected accounting position at 31 March 2009."
8	**21 Oct 2009**	£2,800,000	£2,294,000	In a letter dated 23 September 2009, Mercer referred to an indication from Mr Hillman that "the company and the Trustees wish to fund both schemes on the principle that that they should be able to secure benefits on a wind-up basis, and that we should take this into account at the next triennial review. This approach will also need to be agreed by the Trustees of both Schemes and, as you suggest, will need to be formally minuted at the next Trustee meetings. Any changes to the funding strategy will also have to be

[466] Woodford 1/§27.3.

[467] Woodford 1/§28.1.

				reflected in revised Statements of Funding Principles." Mercer's letter raised a number of difficulties with this approach, but Mercer concluded that on a wind-up – or buy out – basis the shortfall would be £10.4 million as at 31 August 2009, split £6.4 million (Staff Scheme) and £4.0 million (Executive Scheme). Mercer also indicated that "there is greater flexibility to the company in adopting a buy-out funding target as a "secondary funding objective" rather than the primary objective."[468] This letter was considered at a meeting of the directors on 21 October 2009. The minutes of this meeting recorded: (1) That following advice provided by Mercers advised [*sic*] that if the company wish to allow the trustees to "de-risk" the scheme's investment strategy, the company could fund on a secondary basis of "buy-out". (2) That the company should ensure that the Schemes' funding remains at 100% on a "buy-out" basis in the context of maintaining the protection of this benefit for the majority of the key employees within the [KeyMed] group at all levels of the organization". (3) Mr Rowe was authorized to action payments to the Schemes totaling £8.45 million.[469] In separate minutes of the same date,[470] it was resolved "[f]ollowing changes within the financial market performance and a change of basis of funding from an ongoing basis to a "wind-up" basis" that: (1) A special contribution of £2,800,000 would be made to the Staff Scheme. (2) A special contribution of £2,294,000 would be made to the Executive Scheme.
9	**26 Mar 2010**	£2,400,000	None	In his first statement, Mr Woodford explained the reason for this payment:[471] "At the meeting of the directors on 26 March 2010, I note from the minutes that it was agreed that the annual contribution for the [Staff] Scheme of £2.4 million for the year 2010/2011 (that is, the next financial year) would be paid in advance. I see the authorization of the contribution was also separately documented. I do not recall the precise detail of the discussions at that meeting, but given the timing I believe that with the year-end approaching, we knew the company had significant cash balances and would have wanted to consider whether it

[468] See also Woodford 1/§31.1.

[469] These comprised £3.35 million annual employer contributions, £2.8 million special contribution to the Staff Scheme and £2.3 million special contribution to the Executive Scheme.

[470] Woodford 1/§31.2.

[471] Woodford 1/§37.1.

				would be advantageous for part of this to be invested into the pension schemes."
10	**16 Sep 2010**	None	£50,000	This payment was not considered in the evidence before me.
11	**8 Oct 2010**	£7,200,000	£7,800,000	In an email dated 8 October 2010, Mercer provided – at the request of Mr Rowe – estimated buyout deficits for both Schemes.[472] The directors considered this at a meeting on 8 October 2010. The minutes record that following changes within the financial market performance and a change of basis of funding from an ongoing basis to a "wind-up" basis, the company requested Mercers to provide a funding update as at 30 September 2010 for both Schemes. As a result, the following special contributions were agreed: (1) A special contribution of £7,200,000 to the Staff Scheme. (2) A special contribution of £7,800,000 to the Executive Scheme.
12	**16 Dec 2010**	£1,200,000	£2,400,000	There was a KeyMed Board and ExCom meeting on 24 November 2010. Item 57.3 is Delphic, recording on that "[Mr Rowe] presented the current situation related to the [Staff] Scheme to the group. The group discussed and there were no actions arising." Yet there is an electronic payment authorization, authorizing payments in these amounts to: (1) As regards the Staff Scheme, to "top up fund on on-going basis"; and (2) As regards the Executive Scheme, to "fully fund on buyout". Further payments to both Schemes were considered at meetings of the Staff Scheme and the Executive Scheme Trustees on 19 October 2010, but there is no more specific record of the Board's deliberations.[473]
13	**23 Sep 2011**	£1,000,000	£4,800,000	As these contributions were the subject of different exploration at the trial, I consider them below.

436. I have found that:

(1) The primary decision-making-power in relation to investment and funding matters lay with the trustees of the schemes.[474]

[472] Woodford 1/§40.1.

[473] Woodford 1/§§41.1 to 42.1. Mr Woodford notes, in Woodford 1/§43.1: "I see from the documents contributions were subsequently made into both Schemes during December, as had been envisaged in the trustee meeting."

[474] See paragraph 413 above. Of course, this position was not absolute. As has been seen, there were duties to consult; and the trustees could not compel the making of special contributions.

(2) The trustees owed no duty to KeyMed in relation to the exercise of these powers. Instead, their duty was owed only to the members of the respective schemes.[475]

437. However, although in the case of ordinary annual contributions it is clear that the trustees were in the "driving seat", special contributions were a matter for KeyMed. In this regard, it was suggested by KeyMed that the special contributions described in paragraph 435 above were not properly decisions of the company. As to this:

(1) KeyMed made two, basic, criticisms of the Defendants.

(a) First, that in some cases a Board resolution authorizing the payment of a special contribution could not be found or – if found – was referenced *en passant* in the course of meetings of trustees.

(b) Secondly, in those cases (the majority) where there was a Board resolution, it was suggested that this in no way evidenced the proper consent of the directors and amounted to no more than a "papering of the file", *i.e.* the creation of a paper trail designed to make it look like there had been a proper process within KeyMed, when in fact there had not.

(2) I do not accept these criticisms. The practice of documenting the decision by KeyMed to make a special contribution began with Special Contribution 4 on 18 July 2008. This was the occasion of the first special contribution to the Executive Scheme, and it may be that the establishment of the Executive Scheme caused the practice of documenting KeyMed's decision to make a special contribution was documented to be changed. What cannot be said is that the use of short resolutions to document decisions of KeyMed's Board was confined to special contributions. It was a practice that was common within KeyMed:

(a) Thus, for instance, a minute dated 17 December 2004 records a Board resolution (signed only by Mr Woodford) that KeyMed accept a borrowing facility from Barclays Bank plc and that Mr Woodford be authorized to sign.

(b) Again, on 13 January 2005, there was a meeting of directors, evidenced by a minute, whereby the wording of a power of attorney was accepted and approved.

(c) Yet again, on 23 March 2006, it was resolved at a meeting of directors, evidenced by a minute, that Mr Virgo's resignation as a director of KeyMed be accepted with effect from 24 April 2006.

As Mr Salzedo, QC demonstrated in his re-examination of Mr Hillman, such resolutions were common in KeyMed and not unusual.[476] As Mr Hillman said, the minute would record the outcome of the meeting. I have no doubt that the meetings recorded by the minutes were informal:[477] but that does not, to my mind, detract

[475] See paragraph 119 above.

[476] Day 8/pp.46-47 (re-examination of Mr Hillman).

[477] Both Mr Hillman and Mr Woodford referred to the informal way in which KeyMed sought to do business: Day 8/p.58 (re-examination of Mr Hillman); Day 9/p.4 (cross-examination of Mr Woodford).

from the fact that the persons at such meetings would be applying their minds to the business at hand.

(3) So, I find that there was nothing unusual in the manner in which a decision, by KeyMed, to make special contributions was documented. I do not accept that this was "papering the file". Rather, I find that these documents evidence a proper decision by KeyMed.

(4) The minutes recording the making of special contributions were unusual or atypical in one sense: they were generally signed by all of the directors. This, I infer, was because of Mr Woodford's perception that all directors were – to an extent – conflicted in making such decisions:[478]

> "And not just for myself, for the two other directors as well, because they were beneficiaries of the scheme, but also directors of the company. So there was an inherent conflict for all four of us, particularly for myself and Mr Hillman, because we were also trustees at that time."

It is important to stress that the conflict that essentially existed lay between KeyMed and the fact that the directors authorizing the special contribution on KeyMed's behalf were themselves members of the schemes. It was, after all, the members (of both the Staff and the Executive Schemes) who benefitted from the special contribution, but KeyMed who paid. I have no doubt that this was why all of the directors signed.

(5) The earlier special contributions were not recorded in minutes of KeyMed Board meetings. As a counsel of perfection, perhaps they should have been, but I am not prepared to infer that KeyMed did not consent to these contributions. As the table in paragraph 437 demonstrates, these decisions were taken in plain sight, with the involvement of Mercer. I can see nothing irregular in them: and, in any event, these contributions relate only to the Staff Scheme.

(iv) In the interests of the company

438. As I noted in paragraphs 402 to 403 above, a conservatively funded scheme is likely to be to the benefit of the members of that scheme. What does not follow is that such a strategy is to the disadvantage of the employer sponsoring the scheme. Clearly, this is a question of judgment, but I find that there were excellent reasons for KeyMed to adopt and endorse by way of special contributions the approach to funding being taken by the trustees of the Staff and Executive Schemes:

(1) To the extent that the Staff and Executive Schemes were Defined Benefit schemes, the obligations of KeyMed were defined and had to be met. Apart from the extent that the Staff Scheme was a Defined Contribution scheme, where KeyMed could simply make its contribution and be done, KeyMed had long-term and substantial obligations which it could not avoid. Nor, as I have noted, did it have very much say in how these obligations were funded. But the trustees' conservative approach

[478] Day 8/p.152 (cross-examination of Mr Woodford).

meant that the risk of KeyMed having material future unfunded obligations was a low one.

(2) Obviously, funding "up front" might have cash-flow implications in certain organisations: but that was not the case with KeyMed, which was cash-rich at the time. The use of its money to pay contributions to the Staff and Executive Schemes did not affect its balance sheet and was generally positive for its profit and loss account. There was no significant downside to the conservative funding approach.

(3) In the case of the Executive Scheme, there was the further advantage to KeyMed that the liabilities to Mr Hillman and Mr Woodford were both large and potentially short term. Given that both Defendants might retire in the short-term and quickly (*i.e.* with short notice), and given that their rights were considerable, that militated very much in favour of conservatively funding the Executive Scheme. The same was less true of the Staff Scheme, both because its Members were more numerous and, generally, younger. Moreover, the existence of the Staff Scheme – with its longer-tail liabilities – meant that if there was a risk of a surplus in the Executive Scheme (*i.e.* if, having discharged the liabilities to the Defendants, there was money left over[479]) that surplus could readily be deployed by transferring it to the Staff Scheme.

439. In addition to this, the same points that can be made in relation to the conservative investment strategy can be made as regards the funding strategy:[480] the funding strategy was continued after the Defendants left Olympus; Mercer were throughout involved; and none of the experts either sought to criticize Mercer or contend that the funding strategy was outside the range of reasonable approaches.

(v) Irrelevant matters

440. Mr Bowie, on behalf of KeyMed, sought to highlight how unusual KeyMed's approach to investment and funding was, by pointing out the extent to which other funds in the United Kingdom were in deficit or even the subject of recovery plans.[481] At best, these were irrelevant points. As I have described,[482] both high risk and low risk investment and funding strategies are defensible for pension funds: the former may be in the interests of the employer but are certainly contrary to the interests of the members; the latter may be in the interests of the employer and are certainly in the interests of the members. I see nothing in the fact that KeyMed was an outlier, when compared to other schemes, to justify even a slight inference that KeyMed's schemes were either badly run or run contrary to the interests of KeyMed.

441. Conversely, however, I do not consider the Defendants' point that – as it has turned out – the conservative strategies put in place have resulted in a significant gain to KeyMed

[479] In the event, there was a surplus of some £10 million.

[480] See paragraphs 426 to 429 above.

[481] See paragraph 433 above.

[482] See paragraph 400 to 403 above.

to be particularly relevant. In their written closing submissions, the Defendants say this:[483]

> "The absurdity of KeyMed's case can be seen most clearly in the fact that the adoption of the revised funding and investment strategies has in fact resulted in a significant *gain* to KeyMed. As explained by Mr Scott, due to the strong performance of the particular long-dated gilt portfolio selected when the strategy was changed compared to equities in the period after 2011, the supposedly inappropriate conservative *investment* approach resulted in an increase in the value of the Staff Scheme producing a gain to KeyMed of £11.9 million as at 1 November 2011 (when Mr Woodford and Mr Hillman ceased to be trustees) and £34.5 million as at 6 November 2017. (Mr Bowie values the gains at £9.3 million and £12 million respectively.) If one compares the position with that which would have arisen had less conservative *funding* strategies been adopted as well, the benefit to KeyMed becomes even greater: the combination of the funding and investment strategies adopted in 2009-2010 led to a gain to KeyMed of **£65.2 million** compared to the position it would have been in had the funding remained on an ongoing basis and the investment strategy remained 40% invested in equities. KeyMed is therefore complaining about the adoption of funding and investment strategies which brought about a massive net benefit to the company. That might be taken as a fair indication that the adoption of those investment and funding strategies was not unreasonable, and that in pursuing this argument to trial KeyMed has lost touch with reality."

442. I can see the relevance of this point to quantum; and also, to the extent that it matters, to why this claim has been brought by KeyMed. But I do not consider that the fact that the conservative investment and funding strategies have, in the event, turned out well (as I find, although I make no finding as to the extent of the benefit: on this, the experts were not agreed), says anything probative about the soundness of the original decisions. Decisions are made in light of an uncertain future: they turn out well or the turn out badly. The question whether this was luck, good judgment or bad judgment ameliorated by later events remains open.

(vi) Special Contribution 13

443. Special Contribution 13 took place when Mr Woodford was about to "whistle-blow" on wrongdoers within Olympus. It is unnecessary to describe in detail the dishonesty and illicit conduct that Mr Woodford considered he had discovered within Olympus. He describes this, in detail, in paragraphs 44 to 46 of Woodford 1. He was not cross-examined on this material and – whatever the truth of the situation – I find that (subjectively) Mr Woodford considered that, in articulating his findings to Olympus, he was exposing himself to dismissal or worse; and that Olympus might well take steps, when responding to his "whistle-blowing", that would be intended to and would damage him and his supporters to the detriment of KeyMed generally and the schemes in particular.

444. It is in these circumstances, that Special Contribution 13 needs to be seen:

(1) Special Contribution 13 was no more than a continuation of the strategies that KeyMed had, as I have found entirely properly, been pursuing for some time. It did not constitute a change of direction in terms of KeyMed's approach to the funding of the schemes.

[483] See paragraph 299(g) of the Defendants' written closing submissions.

(2) Special Contribution 13 was undertaken in circumstances of, as I find, great stress, where Mr Woodford feared – and feared reasonably – that Keymed might be the victim of irresponsible and detrimental actions by – or perhaps through – its shareholder.

(3) In these circumstances, he took steps to ensure the continuation of the policies that he and his team had been implementing for some years as regards the Staff and Executive Schemes. To that extent, Mr Woodford's concern about Olympus' reaction to his "whistle-blowing" may have forced his hand in acting earlier than he otherwise would have done, but not inconsistently with what Mr Woodford considered to be KeyMed's interests. Although Mr Williams questioned the allocation of payments between the Staff and Executive Schemes, and so questioned Special Contribution 13, in the end he acceded to this decision.

445. In short, I find that although Special Contribution 13 was made in extraordinary circumstances, it was not, in substance, any different from the decisions made previously regarding other, and earlier, special contributions.

(5) Findings

446. I find that:

(1) It is true to say that "conservative" investment and funding strategies are generally in the best interests of the members of Defined Benefit occupational pension schemes. That does not, however, mean that "conservative" investment and funding strategies are contrary to the scheme employer's interests. The scheme employer's interests may, equally, favour a "conservative approach". In this, much turns on the employer's calculations regarding the likelihood of a riskier investment strategy reducing the need for higher levels of funding because higher returns will be generated; and on the employer's appetite for risk.

(2) In this case, Mr Woodford's view was that a conservative investment approach was appropriate in relation to both Schemes. KeyMed was aware of that approach, and its consent to that approach was not required. But it did not object and in my judgment acceded to – indeed, furthered – the approach of the trustees. It cannot be said that the investment approach lay outside the range of reasonable approaches that could have been adopted; and (although I regard this as an irrelevant factor) events have shown that the approach taken was in fact beneficial for KeyMed. More to the point, that approach was continued after the Defendants left Olympus. Had it been inappropriate – or even if the new trustees of the Staff Scheme had disagreed with it – it could have been changed.

(3) There is a nexus between a conservative investment strategy and a conservative funding strategy, in that the former implies higher levels of funding. That said, the pensions legislation permits a scheme to run relatively high levels of unfunded future obligations and (moreover) many schemes in the UK are so far in deficit that they are subject to recovery plans.

(4) The powers that the trustees had in relation to ordinary annual contributions meant that KeyMed's ability to underfund the Schemes was constrained. However, KeyMed was cash-rich, and the trustees' view that the Schemes should be

conservatively funded was endorsed by KeyMed and backed up by the special contributions that KeyMed made to both Schemes. I find that this funding approach – whilst in the interest of members of both Schemes – was also in the interests of KeyMed. It reduced very materially the risk that KeyMed would be called upon, at some point in the future, to make significant payments into one or other or both of the Schemes.

(5) Again, the outcome of this approach was in fact (as the events turned out) beneficial to KeyMed: although, even if it had not been, I would not have criticized the approach. More importantly, the funding approach was maintained after the Defendants left Olympus.

447. In short, for the reasons I have given, I conclude that both the investment and the funding strategy adopted by the Schemes was entirely reasonable not only for the trustees to adopt for the members of the Schemes, but also for KeyMed itself. Moreover, KeyMed did not merely acquiesce in this approach, but actively endorsed it. Whilst it may be that the funding and investment strategies can be described as "conservative", that in no way implies that they were inappropriate or "unduly" conservative.

I. ASSESSMENT OF AND CONCLUSIONS REGARDING KEYMED'S ALLEGATIONS

(1) Introduction

448. The pleaded allegations against the Defendants relate to:[484]

(1) The establishment of the Executive Scheme and the removal or disapplication of the PIP Limit, separate allegations which (for the reasons I give in paragraph 75(1)(a) above) I have considered together.

(2) The amendment of the spousal benefit provisions in the Executive Scheme.

(3) The conservative funding and investment strategies.

449. In the case of each of these allegations, it is said that:

(1) The Defendants breached their duty to act within powers, in the sense that they used those powers for an improper purpose.[485]

(2) The Defendants breached their duty to promote the success of KeyMed, in the sense that they failed to exercise their discretion *bona fide* in what they considered to be in the interests of KeyMed.[486]

[484] Summarised in paragraph 75 above.

[485] See paragraphs 84 to 90 above.

[486] See paragraphs 91 to 95 above.

(3) The Defendants failed to exercise independent judgment, in that they subordinated KeyMed's interests to their own.[487]

(4) The Defendants failed to exercise reasonable care, skill and diligence.[488]

(5) The Defendants acted in conflict of interest without properly declaring that interest to KeyMed's directors.[489]

450. Parasitic upon these alleged breaches of duty are the following allegations:

(1) An alleged breach of the duty to report misconduct.[490] Self-evidently, to have content, this alleged breach requires KeyMed to establish misconduct on the part of the Defendants or one of them for them to report.

(2) The Conspiracy claim.[491] Since the Conspiracy alleged is an unlawful means conspiracy, that claim can only succeed if a breach of duty on the part of the Defendants is established.

451. KeyMed also alleged that the Defendants owed duties to KeyMed as trustees of the Schemes. For the reasons given in paragraphs 116 to 121 I have found that, as a matter of law, no such duty was owed to KeyMed by the Defendants in this regard.

452. The breaches of duty described above were said, by KeyMed, to have been dishonest breaches, and I have found that that is the only case open to KeyMed on the pleadings.[492] For the reasons that I have given, KeyMed's original alternative case of non-dishonest breach is not open to it.

453. I have made detailed findings of fact in relation to each of the allegations advanced against the Defendants. Before considering whether, on the facts as I have found them, KeyMed has made out any, part of or all of its case, it is necessary that I consider the wider case of dishonesty made against the Defendants. KeyMed suggested that I could be satisfied as to the Defendants' dishonesty in relation to the causes of action pleaded against them by reference to facts and matters other than those facts and matters going to those causes of action.

454. Accordingly, I need to reach a conclusion as regards the Defendants' honesty in general, because – at the end of the day – the case against the Defendants is one of dishonesty and it may be (although it is not necessarily) a proper inference that a person who has been dishonest in one area, may be dishonest in other areas also.

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[487] See paragraphs 96 to 99 above.

[488] See paragraphs 100 to 104 and 112 to 114 above.

[489] See paragraphs 105 to 111 above.

[490] See paragraphs 115 to 116 above.

[491] See paragraphs 121 to 122 above.

[492] See paragraphs 124*ff* above.

455. I propose to consider these wider questions of dishonesty and credibility first, in Section I(2) below. I will then – in Section I(3) – state my conclusions in relation to the pleaded allegations against the Defendants.

(2) Wider questions of credibility and honesty

(a) Approach

456. I have treated all of the oral evidence of the witnesses with a degree of caution, simply because of the factors that I have identified in paragraph 164 above. That, I stress, is in no way a reflection of the efforts or honesty of the witnesses, but simply a recognition that recollection at this remove of time, without documentary support, is precarious. I have sought, wherever possible, to tie the witnesses' evidence to the documents.

457. Subject to this general note of caution, I have reached conclusions regarding the credibility of the witnesses who appeared before me. My conclusions regarding the Defendants are the most important; but given that KeyMed's main witnesses – in particular, Mr Williams and Mr Rowe – were important elements in the case against the Defendants, it is necessary, first, to reach a view as to their reliability. I then turn to the credibility of the Defendants.

(b) KeyMed's witnesses

(i) The tendentious nature of the witness statements of the KeyMed witnesses.

458. A general theme of the KeyMed witness statements was the level of innuendo against or suggestion of dishonesty on the part of Mr Hillman and Mr Woodford, which was not subsequently borne out in the oral testimony of the witnesses, when they came to be called. Inevitably, this affected the weight I felt able to give to the evidence of these witnesses.

459. The following is a non-exhaustive list of such instances:

(1) In paragraph 15 of Kaufmann 1, Mr Kaufmann referred to the investigations conducted by Olympus into these questions, and noted that "[t]he investigations took some time to conclude on account of documentation having been destroyed or deleted by the Defendants". Mr Hillman responded to this in his second statement,[493] denying improper deletion of documents. His statement concludes with:

> "I do not believe that the deletion of the documents described above would have hampered or delayed any investigation carried out by KeyMed into the issues raised in this claim."

This was put to Mr Kaufmann in cross-examination, who accepted Mr Hillman's statement.[494]

(2) Paragraph 15 of Kaufmann 1 also referred to a concern that if Olympus' investigations should become known to Mr Woodford, "this might impact on our

[493] Hillman 2/§11.4.

[494] Day 1/p.67 (cross-examination of Mr Kaufmann).

ability to secure the evidence". Read in light of the reference to destruction of documents in the preceding sentence, the suggestion (intended or otherwise) was that Mr Woodford would seek to hamper Olympus in securing documents. In the end, Mr Kaufmann's concern boiled down to a concern that Mr Woodford might assert rights of confidentiality he had to prevent KeyMed obtaining documents from Mercer.[495]

(3) In relation to the December 2005 Board meeting, Mr Williams made a number of points which I consider verge on advocacy rather than evidence.[496] I have considered it appropriate to deal with these points in the context of the December 2005 Board meeting,[497] and I have rejected those points. Given that Mr Williams did not especially press these points or stand by them in cross-examination, I have taken the view that Mr Williams, in his witness statements, was taking any point he could prejudicial to the Defendants.

(4) The same is true of Mr Rowe. By way of example:

(a) When discussing a meeting of the trustees of the Staff Scheme, in paragraph 55 of Rowe 1, Mr Rowe concluded the paragraph with the following sentence:

> "I do not know if the Board of KeyMed discussed the issue."

It is difficult to see the point of this statement: read closely, it is no more than a statement that Mr Rowe did not know what went on at Board meetings he was not present at. But the suggestion is to to hint darkly at something improper going on. Mr Rowe was asked about this sentence in cross-examination and was unable to provide a coherent answer as to why this was his evidence.[498]

(b) In paragraph 60 of Rowe 1, Mr Rowe referred to a report sent on 10 December 2004 regarding the implications of A-Day on Mr Hillman. Mr Rowe – entirely fairly – stated in his witness statement that "I cannot recall seeing the report". But he then went on to say – quite categorically – that he would not have expected to have seen the report, for various reasons. Yet the documentary evidence shows that Mr Rowe did in fact see the document. His speculation that this was a document for Mr Hillman's eyes only was wrong. When this was put to Mr Rowe, he simply resorted to his inability to recall the document and could not justify his statements that he would not have seen it.[499]

(c) In the last sentence of paragraph 74 of Rowe 1, Mr Rowe noted that certain minutes contained no note of the Defendants' conflict of interest (which was

[495] Day 1/p.70 (cross-examination of Mr Kaufmann).

[496] See paragraph 249 above.

[497] See paragraphs 249*ff* above.

[498] Day 2/pp.130-132 (cross-examination of Mr Rowe).

[499] Day 2/pp.139-141 (cross-examination of Mr Rowe).

true). In cross-examination, Mr Rowe was unable to explain why there was a need to mention a conflict of interest at this meeting; nor was he able to explain the purpose of this point.[500]

In cross-examination, the point was put directly to Mr Rowe that his witness statement contained a number of statements that were not evidence, but were tendentious innuendo:[501]

Q (Mr Salzedo, QC)	…in your paragraph 78 you comment that KeyMed remained financially strong?
A (Mr Rowe)	Yes.
Q (Mr Salzedo, QC)	Are you trying to suggest that there was anything improper in the trustees considering protection in the event of insolvency because, in fact, KeyMed remained financially strong? [Pause.]
A (Mr Rowe)	I think, yes, that it was financially strong at that time, from my recollection of it, and there was no suggestion of its insolvency. So the covenant would have been strong, so, you know, in the light of these proceedings, the use of a charge or debenture would seem to be at odds with the strength of the covenant – of the company.
Q (Mr Salzedo, QC)	"In the light of these proceedings". So, is this right, Mr Rowe, you have formed a view that these proceedings are justified and you have put sentences like this in your witness statement…
A (Mr Rowe)	I'm not…
Q (Mr Salzedo, QC)	…really, as an expression of that view?
A (Mr Rowe)	I'm not saying this is – it's just the rationale for having that sentence in there, which you've asked me to explain…
Q (Mr Salzedo, QC)	What I'm obviously trying to identify with you is what is your evidence, what are you trying to say by these various sentences that say things that don't necessarily seem relevant but which carry this obvious implication, and so the question I actually asked you was, are you meaning to suggest by that that you think there was something improper in the trustees in March 2006 considering requesting a charge because the covenant was so strong that that wasn't necessary. Are you suggesting that there was some impropriety in that decision by the trustees?
A (Mr Rowe)	No.

(ii) My assessment of the reliability of the KeyMed witnesses

460. Turning to the individual reliability of the KeyMed witnesses, my primary focus is on Mr Williams and Mr Rowe, given their importance. Mr Kaufmann, Mr Takeuchi, Ms

[500] Day 3/pp.32-38 (cross-examination of Mr Rowe).

[501] Day 3/pp.50*ff* (cross-examination of Mr Rowe).

McBrearty and Mr Cherry all gave evidence to the best of their ability, and I believed what they said. But their evidence – apart from Ms McBrearty's extremely helpful analysis of the Executive Scheme documents and when they were produced[502] – did not go to matters central to this case.

461. I turn to the evidence of Mr Williams and Mr Rowe.

Mr Williams

462. Mr Williams had an acknowledged animus against the Defendants regarding the pension fund he considered they had improperly accumulated for themselves. He frankly acknowledged this in cross-examination, and sought to set aside his personal feelings:[503]

Q (Mr Salzedo, QC)	You feel, as I understand it, that Mr Woodford and Mr Hillman's conduct concerning their pension scheme was inappropriate, is that right?
A (Mr Williams)	Correct.
Q (Mr Salzedo, QC)	You believe that Mr Woodford's approach was and is hypocritical because he lectures on corporate governance, but built up a pension in ways you consider inappropriate.
A (Mr Williams)	Correct.
Q (Mr Salzedo, QC)	And you were frustrated in 2011 when you came to understand that nothing the Defendants had done was unlawful. Is that right?
A (Mr Williams)	Correct.
Q (Mr Salzedo, QC)	In 2014, you asked for a "bulldog-type lawyer" to be engaged to see if there was any line you could take legally. Is that right?
A (Mr Williams)	Correct.
Q (Mr Salzedo, QC)	Do you understand that as a witness of fact, your duty is to set aside your personal feelings about the Defendants or their conduct in order to give impartial factual evidence of what you can actually recall?
A (Mr Williams)	Yes.

I consider that Mr Williams did his best to give such impartial factual evidence, and that his evidence to the court was honest and intended to be helpful. However, I consider that his evidence needs to be treated with a great deal of caution for the following reasons:

(1) His recollection was, even taking account of the circumstances, unsurprisingly poor, and (given the documentary issues I have described) it was difficult for him to reconstruct. In light of these difficulties, I consider that his witness statements were too definite in the assertions they made.

(2) This problem was compounded by two aspects particular to Mr Williams. First, the pensions issues that the KeyMed board grappled with were undoubtedly complex. It is with no disrespect to Mr Williams that I say I consider that – even when giving

[502] See paragraphs 342 and 348-349 above.

[503] Day 1/pp.74-75 (cross-examination of Mr Williams).

evidence, but generally – he actually did not understand the nature and effect of the decisions that KeyMed was making. In short, I do not consider that Mr Williams actually understood what he was approving. In a Board member with responsibility for making decisions for the company, this is a serious failing. More to the point, given this failure of understanding, criticisms made of the Defendants based upon Mr Williams' evidence, must be treated (and I do treat them) with caution. I doubt whether these failures of understanding would have been apparent to persons speaking to Mr Williams at the time: they became evident when Mr Williams' understanding was tested under cross-examination.

(3) Secondly, Mr Williams was cavalier in reading board materials that came to him. Although at all material times he knew what a director's responsibilities were,[504] and appreciated that he had a responsibility personally to consider each decision made by the KeyMed board (including in relation to pensions),[505] he appeared to adopt an inconsistently narrow view of his responsibilities as a director. In his witness statement, Mr Williams explained his practice of reviewing minutes as follows:[506]

> "8. I usually received the minutes of Director's meetings a number of weeks after the meeting had taken place. Because the focus of the meetings was usually on operational matters, I would scan the minutes to see if there was anything that had been discussed at the meeting which might affect that part of the business for which I was responsible or any action points that were listed for me. This was particularly the case when I was working in the US, as much of the information that was covered in Director's meetings and recorded in the minutes dealt with matters local to the UK that were, at that time, of lesser concern to me as I was primarily focussed on the US business. Because of the time difference between the UK and the US, the minutes would, at that time, be seen first by my secretary, Ms Arlene Perry ("Ms Perry"), who was based in the UK, and we developed a very efficient way of working. Ms Perry would read the minutes, identify the action points for me and draft emails for me to send. I would then call her when I was travelling to the office in the morning, US time, to discuss the action points and emails for me to take forward when I arrived in the office. Given the length of the minutes, I found this to be an efficient way of identifying action points quickly. I came to rely on Ms Perry and I would not look at the minutes which she had reviewed for me unless there was something specific I wanted to check. In the interests of speed and efficiency, Ms Perry continued to review minutes for me when I returned from the US and would highlight to me anything that I needed to action. I believe other Directors also had their secretaries do this for them.
>
> …
>
> 12. As I have mentioned, it was my practice to ask my secretary, Ms Perry, to go through minutes that had been sent to me and to let me know if there was anything that related to me. As I was not a member of the Executive Section of the Staff Scheme and pensions were the sole responsibility of the Defendants, Ms Perry would not have flagged up to me anything relating to pensions as something I needed to review. Furthermore, when I did scan the minutes, as pensions were not

[504] Day 1/pp.76-78 (cross-examination of Mr Williams).

[505] Day 1/pp.77-78 (cross-examination of Mr Williams).

[506] Williams 1.

my responsibility, I would not have paid any attention to a minute that related to pensions…

…

22. I received significant numbers of minutes during the relevant time period, not just in respect of KeyMed, but also other companies. This is another reason why I found it expedient to have Ms Perry review minutes for me and to highlight action points for me. I do not recall regularly receiving minutes of Trustee Meetings before I became a Trustee of the Staff Scheme in 2011, although I see from the minutes of Trustee Meetings that were produced to me whilst making this statement that I was on the distribution list for copies of the minutes of the Trustee Meetings of the Staff Scheme…"

Mr Williams confirmed that this was his approach when cross-examined,[507] and I accept his evidence, particularly when it represents an admission of a serious dereliction of his own duties as director. It may very well be that Mr Williams' failure to engage on questions relating to pensions caused or contributed to his demonstrated lack of understanding of the decisions KeyMed was making in the areas of the Staff and Executive Schemes. The consequence is that the decisions of the Board on pensions questions received inadequate and incompetent supervision from Mr Williams, in breach of his own duties as a director. This is, of course, precisely the kind of situation that would have enabled Mr Woodford and Mr Hillman to take advantage of the company, as KeyMed alleges. Whether or not they did so is, of course, a central point to be addressed in this Judgment. There are two points that will need to be resolved in order to establish whether this was a situation where Mr Williams' approach allowed the Defendants' alleged breaches of fiduciary duty to flourish:

(a) First, did the Defendants' appreciate the lack of scrutiny accorded by Mr Williams to pensions matters?

(b) Secondly, what was the approach of the other director whose position as similar to Mr Williams, namely that of Mr Calcraft?

I consider these questions further below.

(4) Building upon this sloppy conduct in relation to the review of minutes, Mr Williams also sought to suggest that documents relating to the Staff and Executive Schemes would simply have been signed by him, without regard to their content, because they had previously been signed by Mr Woodford and Mr Hillman, and pensions were their business not his. Mr Williams asserted this blind trust in the Defendants on three occasions:

(a) When signing the documents establishing the Executive Scheme.[508]

[507] Day 1/pp.78-82.

[508] See paragraphs 334 to 335 above.

(b) When signing the Amending Deed amending the spousal benefit rule.[509]

(c) When signing the minutes recording a decision to make a special contribution.[510]

(5) In relation to the first two occasions, I have concluded that Mr Williams' evidence is not to be accepted. I disbelieve it.[511] That is also my conclusion in relation to the documents recording KeyMed's decision to make a special contribution. Mr Williams was not the sort of person to commit himself and assume a responsibility without knowing the commitment he was assuming responsibility for. In short, he would understand what he was signing before he signed a document. Of course, I understand that for Mr Williams to admit this would have been extremely damaging to KeyMed's case, which case Mr Williams' supported.[512] That, I find, is why Mr Williams gave the evidence that he did on these points and I regret that I do not consider that this can be a case of misrecollection. We are talking here of Mr Williams' general practice and I am afraid that I have concluded that, on these points, Mr Williams was telling deliberate untruths.

Mr Rowe

463. Mr Rowe was an extraordinarily hesitant and painstaking witness. He was determined to see the background documents about which he was being questioned and would read them from end-to-end. I make no criticism of this: a witness is perfectly entitled to refresh his memory of documents before testifying about them. The problem with Mr Rowe was that – having looked carefully at the documents he was being asked about – he almost always had nothing to add. Subject to the three points Mr Rowe was keen to advance, which I consider below, substantially Mr Rowe's witness statements and his oral evidence recounted the bare content of documents, then adding that he could recall nothing more.

464. If this were all, Mr Rowe's evidence could simply be jettisoned as adding nothing to what the documents themselves say. However, Mr Rowe's evidence contained three broad themes, which I do not accept. I should briefly explain these themes, and explain why I do not accept Mr Rowe's evidence in this regard:

(1) First, Mr Rowe sought to present himself as the lowly implementer of the decisions of others, an administrator with no power or responsibility himself. I accept that Mr Rowe was not at the top of the organization; and, as I shall find, Mr Woodford, at least, was a demanding and controlling leader of KeyMed. But that does not mean, and I do not accept, that Mr Rowe's role was solely administrative. He took, and had the power to take, substantive decisions. Most importantly, in this case,

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[509] See paragraph 389 above.

[510] These minutes are described in paragraph 437 above. Mr Williams evidence that he relied upon the Defendants and did not bring an independent mind to bear is at Williams 1/paras. 28-29; Day1/pp.83-84 (cross-examination of Mr Williams).

[511] See paragraphs 335 and 363*ff* above (in relation to the documents establishing the Executive Scheme) and paragraph 397 (in relation to the Amended Deed).

[512] See paragraph 168(2) above.

and as I have found, he alone took the decision to retain the Revenue Limits.[513] Whilst in this case, Mr Rowe took a decision he should have referred to others – probably because he did not understand its implications – this incident shows that his position was not merely ministerial but involved making decisions on behalf of KeyMed. Whilst I accept that Mr Rowe was subordinate to both of the Defendants, that does not mean his role was itself not a responsible one. Mr Rowe sought to underplay his responsibility, and I reject this description of his role. At least in the context of the pension schemes, he played an important role in interfacing with Mercer, particularly when seeking to consider the implications and effects of A-Day.

(2) Secondly, and relatedly, Mr Rowe sought to suggest that the Defendants were in complete charge of KeyMed's affairs, at least so far as the Staff and Executive Schemes were concerned:

(a) Mr Rowe suggested that decisions regarding the Staff Scheme and the (when once established) the Executive Scheme were made by the Defendants drawing no distinction between their roles as trustees and as directors:

> "As Mr Hillman and Mr Woodford took decisions (for example on funding and investment issues) for both the Trustees and KeyMed, there was no distinction in their roles. The discussions at Trustee meetings effectively involved them in both their Trustee and Director capacities. At Trustee meetings, Mr Wright would sometimes flag that a particular decision on a matter was something for KeyMed, at which point Mr Woodford would tell him he was making the decision on behalf of KeyMed. I believe that any reference in the Trustee minutes to the Board making a decision or consulting with KeyMed was purely for the purposes of the minutes. The decisions were taken by Mr Hillman or Mr Woodford. I assumed that Mr Hillman and Mr Woodford would update their fellow UK Directors on any decisions that were made but, as I did not attend Director's meetings until I became Company Secretary for KeyMed in April 2009, I cannot say whether this in fact occurred before that date…" There were, according to Mr Rowe, "no real checks and balances on Mr Woodford in his management of KeyMed."

There were, according to Mr Rowe, "no real checks and balances on Mr Woodford in his management of KeyMed."[514]

(b) Mr Rowe also sought to suggest that Mr Craig was aligned with the views of the Defendants:[515]

> "Throughout my involvement with the Staff Scheme from around 2000, I was aware that over time, and since the former Finance Director, Barry Knight, had left KeyMed, the main decision-makers in relation to the Staff Scheme, on both the Trustee and the company side, had become Mr Woodford and Mr Hillman. In practice, by the time of my involvement, Mr Woodford and Mr Hillman exercised exclusive control over Staff Scheme decision-making. They also in practice exercised exclusive control over Executive Scheme decision-making from both the

[513] See paragraph 292(4) above.

[514] Rowe 1/§40. See also Rowe 1/§41.

[515] Rowe 1/para. 20.

Trustee and company side from the date of its establishment. At Staff Scheme Trustee meetings, there was rarely any difference of opinion amongst the Trustees. Mr Craig might make points, rather than disagree, but the views of the three Trustees almost always seemed to be aligned. I do not know if Mr Woodford discussed issues with Mr Craig prior to or after the Trustee meetings. In any case, where there was a difference in view, it would be Mr Woodford's that would prevail."

(c) I do not accept Mr Rowe's evidence that the Defendants were able to run KeyMed as their own private fiefdom, taking decisions as trustees and directors in one go, uncontrolled by the staff infrastructure around them. As to this:

(i) The documentation simply does not support this view of KeyMed's operations. The Defendants were at pains to take questions like the establishment of the Executive Scheme to the Board.[516] Equally, for issues like the change to the spousal benefit rule[517] and the special contributions KeyMed chose to make involved consultation with the other directors.[518] I do not infer from the fact that the Defendants' proposals were assented to that they were dominant: it is just as legitimate an inference that their proposals were regarded as sensible and acceded to for that reason.

(ii) I did not see Mr Craig give evidence, but from the documents I have formed the view that he was an active and responsible chairman of the trustees.[519] I do not consider that his will would have been bent to that of the Defendants: indeed, his insistence that KeyMed have legal advice in relation to the Executive Scheme shows an independent personality.[520]

(iii) Having seen him give evidence, Mr Williams did not strike me as the sort of person to avoid challenging a decision he considered to be wrong or questionable. Indeed, as regards Special Contribution 13, he did question the payment, and had to be persuaded by Mr Hillman.[521]

(iv) I did not see Mr Calcraft give evidence. But the documents suggest that relations between the Defendants and Mr Calcraft were cordial and informal.[522] However, cordial and informal relations to one side,

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[516] See paragraphs 266(10) and 266(11)above.

[517] See paragraph 398 above.

[518] See paragraph 435 above.

[519] See paragraph 160(2)(b) above.

[520] See paragraph 371(2) above. Of course, this advice was not obtained – a point I shall return to.

[521] See paragraph 444(3) above.

[522] See, for example, Mr Woodford's email to Mr Calcraft on 15 November 2007. Mr Hillman was cross-examined about this on Day 6/pp.121-122 (cross-examination of Mr Hillman): his view was that Mr Calcraft did not regard himself as "massively inferior" to Mr Woodford. See also the exchange between Mr Hillman and Mr Calcraft, which similarly shows a pleasantly informal relationship: paragraphs 253-254 above.

Mr Calcraft was capable of challenging decisions of his fellow directors. That was Mr Hillman's evidence.[523] I am not prepared to assume that Mr Calcraft was a "rubber stamp"; and although I have seen very few communications involving Mr Calcraft, that is not the impression that they give to me.

(3) Thirdly, Mr Rowe appeared to suggest that the Defendants ruled KeyMed in a climate of fear, so that their orders went unchallenged. Mr Rowe presented himself, and perhaps others within KeyMed, as having their will overborne by the Defendants – or, at least, by Mr Woodford:

(a) In his first witness statement, Mr Rowe recounts one episode where Mr Woodford "publicly humiliated Mr Calcraft, shouting at him and virtually reducing him to tears for some perceived shortcoming (I cannot recall what)."[524] All I can say is that this sits ill with the communications between Mr Calcraft and the Defendants that I have described above.

(b) He also suggests that he was the victim of Mr Woodford's temper: he recounts an episode where Mr Woodford took the view that he had made an error, for which he was told he would be disciplined, and after which he became "much more cautious with my decisions other than low level day-to-day decisions relating to the management of staff and in general". He did not want to "jeopardise my position at KeyMed".[525] There was evidence from both Mr Woodford and Mr Rowe as to the justification for Mr Rowe's reprimand from Mr Woodford. Certainly, Mr Woodford's email to Mr Rowe is aggressive and shows a high degree of crossness: Mr Woodford's point was that Mr Rowe's transgression was a serious one, and Mr Rowe (certainly in his evidence before me) did not accept this. I am not going to get into the rights and wrongs of this episode: it is collateral. It may be that Mr Rowe is right, and that after his reprimand he became over-cautious. I do not consider that the point really matters, because Mr Rowe's critical decision – to cause the Revenue Limits to be maintained – occurred before this reprimand.[526]

(c) I am prepared to accept that Mr Rowe (but only Mr Rowe) was a cautious individual, who would have been concerned to "keep in" with his superiors. Certainly, that would chime with the demeanour of Mr Rowe when giving evidence. But I am not prepared to accept Mr Rowe's more general point that KeyMed's staff operated in a climate of fear.

465. The three themes advanced by Mr Rowe all go in one direction, which is to suggest that the Defendants exercised a level of control over KeyMed's affairs that was inappropriately greater than the control and power they should have had, given their positions. For the reasons I have given, I do not accept Mr Rowe's evidence in this regard.

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[523] Day 6/pp.149-150

[524] Rowe 1/§30.

[525] Rowe 1/§37.

[526] See paragraph 292(4) above.

(ii) The suggestion of a vendetta

466. Towards the end of his first witness statement,[527] Mr Woodford made the assertion that "this claim is being driven by a loathing that I have perceived towards me on the part of some of my former colleagues",[528] arising out of the circumstances of his departure from Olympus.

467. He identified a number of people behind this allegedly ill-intentioned claim, including Mr Kaufmann.[529] Of these people, Mr Kaufmann was the only person called to give evidence before me.[530]

468. The reason why KeyMed has brought this claim is not a matter that I need concern myself with, unless it affects the quality of the evidence of the KeyMed witnesses. Although, plainly, Mr Woodford had issues regarding KeyMed's claims against him and the witnesses adduced by KeyMed, the assertions made by Mr Woodford of a vendetta were not put to Mr Kaufmann nor to any other KeyMed witness. It was Mr Salzedo, QC's position that he was not going to press this line of argument.[531]

469. I can quite appreciate why: the motive with which an action has been brought is not necessarily going to be helpful in assessing the weight of the evidence or in determining disputed issues of fact. In the event, the decision not to put this point to Mr Kaufmann and the other Olympus witnesses who might have been able to speak to this matter[532] means that it would be inappropriate to consider the point in this Judgment or to allow it to have any bearing on my thinking. I have dismissed it from my mind.

(c) Mr Woodford and Mr Hillman

470. Mr Hillman and Mr Woodford gave evidence in that order. Mr Woodford was not present when Mr Hillman gave evidence. Mr Hillman presented as an articulate and precise witnesses. He appeared to have a reasonably good recollection of events and sought to differentiate between what was recollection and what was reconstruction. I fully recognise that in a case such as this, the distinction between recollection and reconstruction is a difficult, even an impossible one, to draw. Mr Hillman gave two, extremely detailed, witness statements. Both make detailed reference to the contemporaneous documents that Mr Hillman considers that he would have seen at the time. That is an entirely appropriate way of preparing a witness statement, but the corollary is that in seeking to reconstruct – from documents and recollection – what must have happened, a witness's memory will be distorted, even augmented. In *Gestmin SGPS SA v. Credit Suisse (UK) Limited*, Leggatt J put the point as follows:[533]

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[527] Woodford 1/§51.

[528] To quote from Woodford 1/§51.3.

[529] Woodford 1/§51.9.

[530] Mr Salzedo, QC did not seek to cross-examine certain other witnesses whose evidence only went to this point.

[531] Day 2/pp.52-53.

[532] The point might have been put – had Mr Salzedo, QC been so inclined – to Mr Takeuchi, Mr Saito and Mr Osa.

[533] [2013] EWHC 3560 (Comm) at [17].

"Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)."

Given the way in which Mr Hillman's statements were obviously compiled, this is a matter that I have had well in mind, when considering Mr Hillman's evidence.

471. Mr Woodford was a forceful and articulate witness. He obviously was a powerful and decisive businessman, who (in exchanges with Mr Wardell, QC) more than held his own. Yet he was also highly intelligent and reflective. He had an instinctive grasp of conflicts of interest, and the difficulties they presented, and was quite willing to accept when mistakes had been made, as indeed was Mr Hillman. Mr Hillman's focus was more on the inadequate way in which matters had been documented. Mr Woodford tended to look more to the substance. He was, for instance, quite frank that the decision made in April 2005 that (with the exception of Executive Members) the future pensions in payment of pre-21 July 1997 joiners should be reduced had, with hindsight, been a mistake.

472. Like Mr Hillman, Mr Woodford's statements – entirely appropriately – showed a clear attempt to reconcile recollection with the documentary record and, where recollection failed, to seek to reconstruct what happened. I consider that Mr Woodford was doing his best in this regard, but – as with Mr Hillman – there is an obvious danger that memories will be overwritten or altered by subsequent events to recall.

473. Mr Woodford was also a man who had a strong sense of his own entitlement. His salary increased with his responsibilities, and he was concerned to ensure that he received his due. When – due to the A-Day changes – he found himself faced with a present tax charge for future pension entitlements, he persuaded Olympus to pay these charges. That, to my mind, is both a measure of Mr Woodford's value to Olympus, and Mr Woodford's perception of his own value to Olympus. I stress that I see nothing improper in this: I am simply recording that I found Mr Woodford to be a hard-but-fair businessman, capable no doubt of decisiveness, even ruthlessness, and of great determination. KeyMed benefited from these qualities, but Mr Woodford deployed them also to his own account. Subject to the duties imposed on directors and trustees, there is nothing wrong with this.

474. Mr Woodford could also, no doubt, be abrasive and had a temper. But I do not consider that these resulted in an organisation that simply did his bidding: that is inconsistent with the facts as I have found them to be.

475. Although very old, Mr Woodford's progress review reports from 1981 and 1982 provide limited, but helpful, insight. They record an employee with "excellent salesmanship…producing some very good results. He is enthusiastic and loyal. His administration and reporting are generally good, but he is careless with demonstration stock. He needs to become more mature and careful of his kit. [Mr Woodford] is an asset to the sales

force."[534] A few months later, his "good sales abilities and effectiveness" are noted, but it was also said that he had an "image" of "someone far more loyal to self than KeyMed".[535] In mid-1982, he was told of "his obvious talents", but also of his "impetuous nature". Mr Woodford himself observed that his "uniqueness of personality might prove a problem with higher management".[536]

476. Mr Woodford and Mr Hillman gave evidence fluently and, on the face of it, cogently. If they were lying to the court, they did so convincingly and brazenly. This is exactly what KeyMed alleged. Having carefully considered KeyMed's arguments in this regard, I reject them. I find that Mr Woodford and Mr Hillman were witnesses doing their best to tell the truth. Where their recollections were in error, those errors were innocent and in all probability due to the effort of trying to reconstruct precisely what happened, where memory was perhaps vague and the documents not as complete as they might have been. The best example of such an error relates to the very reason for the Executive Scheme's establishment. In this regard, I have not accepted the evidence of Mr Hillman and Mr Woodford, but I find the error understandable, explicable, and innocent.[537]

477. My reasons for rejecting KeyMed's contentions as to the (dis)honesty when giving evidence of the Defendants are as follows:

(1) *The road safety campaign run out of KeyMed.* Both Mr Woodford and Mr Hillman were cross-examined at length on this collateral point. Two broad themes emerged from this cross-examination.

(a) First, that the Defendants used, without good reason and whilst concealing from Olympus, KeyMed's resources to fund and operate a campaign that had nothing to do with KeyMed's business and everything to do with an obsession on the part of Mr Woodford. I am quite prepared to accept – as indeed, Mr Woodford did – that road safety was something of an obsession with Mr Woodford. However, I do not consider – in this collateral area – that I can properly make findings about whether the campaign had no benefits to KeyMed. Nor can I properly make findings about whether matters were concealed from Olympus. These points were put to the Defendants, and they denied them. On this, collateral issue, I consider that such denials are final. It is neither appropriate nor indeed possible (given that the allegations have not precisely been articulated, and disclosure not been given in relation to these matters[538]) to reach a final view.

(b) Secondly, in advocating their campaign, both Defendants were caught out in exaggerations and untruths. Thus, both exaggerated their medical qualification, relying upon their training as salesmen of medical equipment to this end. Mr Hillman even became – for the purposes of the road safety

[534] Review by Mr Butler on 30 October 1981.

[535] Review by Mr Butler on 1 April 1982.

[536] Review by Mr Butler on 1 June 1982.

[537] See paragraph 266(8) above.

[538] That is not to say that KeyMed did not produce a great deal of material that was deployed in cross-examination. A great deal of material was produced. But it was not produced pursuant to the court-supervised disclosure process and the issues were not the subject of pleadings – nor could they have been, given their collateral nature.

campaign – "Dr" Hillman, a clear untruth. It may be that the evidence deployed by the Defendants was "beefed up" to show, more emphatically, vehicle skid marks and the effect on lines of sight of vegetation. Certainly, the Defendants were caught in an embarrassing incident where Mr Hillman, at a meeting, masqueraded as Mr Woodford. None of these matters adds lustre to the reputation or character of the Defendants. But these matters all spring from the same obsession regarding road safety: the Defendants were advocates – passionate advocates, Mr Woodford to the fore – of road safety and – as advocates – they wrongly allowed themselves to exaggerate and misrepresent. But that is all that these matters amount to: I am entirely unpersuaded that even if Mr Woodford or Mr Hillman lied in the course of their campaign, that this is in any way probative of *(i)* dishonesty when conducting the affairs of KeyMed or *(ii)* dishonesty when giving evidence before me.

(2) *Collusion when giving evidence.* On a number of occasions, Mr Wardell, QC suggested that the Defendants had improperly colluded in the evidence that they gave, so as to present a common, inaccurate, and dishonest history of events. I reject this allegation. One reason – probably the most usual reason – for a coincidence of evidence is that the witnesses are recounting the same (true) version of events. That, I consider, is what happened here. Of course, the level of similarity would be heightened in this case, because both Defendants would (in the course of what were, I find, independently produced witness statements) be shown and asked to consider the same or very similar universe of contemporary documents. Those documents – self-evidently – will have influenced the evidence of the Defendants; equally, the fact that both Defendants would have had to have input into, and approve, the Defence, renders the similarity in their evidence unsurprising and entirely explicable. I have concluded that the witness statements of the Defendants represented their best, and honest, efforts independently to recollect what happened.

(3) *Other decisions made by the Defendants.* The issues before the court – in terms of pleaded allegations in support of defined causes of action – were actually reasonably narrow, if factually very obscure. They are the issues identified in paragraph 75 above. However, in addition to the decisions informing the pleaded issues, reliance was placed on other decisions of the Defendants, notably the decision to retain 5% pensions in payment increases for the Executive Members, but also in the treatment of Irish Members of the Scheme, where the cross-border implications of their membership had cost consequences for KeyMed. The essential point made by KeyMed was that in all matters not affecting them, the Defendants behaved properly in respecting KeyMed's interests. It was only when their own interests were engaged, that KeyMed's interests took second place. I consider that it would be extremely dangerous to place undue reliance on decisions other than those directly relevant to the Conspiracy. I reach this conclusion for the following reasons:

(a) The Conspiracy is alleged to have commenced "at the latest" by December 2005.[539] Whilst I am quite prepared to accord KeyMed a degree of flexibility in the time-frame for the commencement of the Conspiracy, it is clear

[539] See paragraph 74 above.

from the pleadings that the first, tangible, consequence of the Conspiracy alleged is the decision, in December 2005, to establish the Executive Scheme.

(b) It is not alleged that the April 2005 decision to maintain the 5% increase on pensions in payment (or, conversely, to degrade the entitlements of non-Executive Members) was either a part of the Conspiracy or a decision made in breach of the Defendants' duties to KeyMed. Indeed, this April 2005 decision does not feature in the Particulars of Claim.

(c) At no time, during the trial, was I taken to the detailed considerations relating to collateral decisions of this sort. Nor were such matters the subject of pleadings and of disclosure. Whilst, therefore, I accept that it is possible – by comparing decisions made pre-Conspiracy with post-Conspiracy decisions – to infer something about the Defendants' states of mind, such an inference can only safely be made where the basis for, reasoning behind, and conduct in relation to the anterior, pre-Conspiracy, decision is fully understood.

(d) That I do not consider to be the case here, and I consider that it would be an unfairness to the Defendants to draw any kind of inference from decisions made by or involving them that are not directly related to the Conspiracy alleged against them.

(4) *Other collateral matters.* The same goes for the various other collateral matters that were raised by KeyMed against the Defendants – for instance, the allegation that Mr Woodford deleted documents, and manner in which the Defendants were said to have interfered with a report by PriceWaterhouseCoopers on Mr Woodford's future remuneration package. These matters were all factually contentious; and, even if they were not, I am unpersuaded that they are the stuff out of which an inference of dishonesty against the Defendants in relation to the pleaded allegations and/or in relation to their testimony can be supported.

478. There is one final point that I need to address in relation to the evidence of Mr Woodford and Mr Hillman. I noted in paragraph 462(3) above that Mr Williams' propensity for not reading minutes of the Board and of ExCom that he felt did not concern him might have created an environment where the Defendants could have taken advantage of this habit in furtherance of the Conspiracy. Of course, this pre-supposes that Mr Williams was the only control or safeguard over the Defendants, which I have found not to be the case. In any event, both Mr Woodford and Mr Hillman denied any awareness of this approach of Mr Williams, and both expressed themselves disappointed in it.[540] I accept this evidence.

(3) Conclusions

479. Using the schema set out in paragraphs 448 to 452 above, I conclude as follows:

(1) *The establishment of the Executive Scheme and the removal or disapplication of the PIP Limit.* As to these allegations:

[540] See Day 6/pp.132 and 158-159 (cross-examination of Mr Hillman); Hillman 2/§2.2; Woodford 2/§9.

(a) My findings are stated at paragraph 267 above. I have concluded that the personal interest of both Defendants – as well as that of Mr Virgo – was properly declared to the Board on 20 December 2005. I have concluded that the reason for the creation of a new, and entirely separate, Executive Scheme was to obviate or eliminate the PPF Risk, but without otherwise enhancing the benefits of the Executive Members under the Staff Scheme, and that this was explained to the Board. Although no costings were placed before the Board, I have found that there was nothing improper in this.

(b) The establishment of the Executive Scheme was thus approved, in principle, by the Board on 20 December 2005. Thereafter, over a protracted period of time, the detail of the Scheme was worked out. This involved Mercer, Mr Hillman and Mr Rowe, at the very least. Apart from the issues arising in relation to the PIP Limit – which I turn to next – this was a detailed and complex process but was (after nearly two years) accomplished. The detailed documents establishing the Executive Scheme were presented to the KeyMed Board members in the week commencing 12 November 2007. I have considered the execution of the documents relating to the Executive Scheme principally in relation to the removal of the PIP Limit. However, in executing these documents, Mr Williams and Mr Calcraft not only approved the removal of the PIP Limit, but also approved the establishment of the Executive Scheme on the terms of these documents. Accordingly, the findings that I have made in Section F(5)*(c)(v)* support my conclusions in paragraph 479(1)(a) above.

(c) So far as the removal of the PIP Limit from application to the Executive Scheme is concerned, my findings are stated at paragraphs 293, 313, 352-361 and 362-370 above:

(i) As one of the Revenue Limits, the PIP Limit fell away after A-Day, unless a decision was taken by the trustees and by KeyMed voluntarily to continue these limits.

(ii) A decision to this effect was made by Mr Rowe, without reference to either the Staff Scheme trustees or anyone else in KeyMed. Mr Rowe did not appreciate the implications of his decision, and the decision to retain the PIP Limit was made unconsciously by both the trustees of the Staff Scheme and by KeyMed itself.

(iii) The fact that the PIP Limit had been retained without due consideration came to the attention of the Defendants in about July 2006. From that time on, the Defendants were of the view that the decision needed to be revisited and – with the involvement of Mercer, Mr Rowe, Mr Williams and Mr Calcraft – the provisional decision was made to remove the PIP Limit from the Executive Scheme, and Mercer prepared the Scheme documents on that basis.

(iv) The final decision regarding the establishment of the Executive Scheme and the removal of the PIP Limit from operation in that Scheme was made by the directors of KeyMed in November 2007.

The informed assent of both Mr Williams and Mr Calcraft was obtained.

(d) Inevitably, the process of establishing the Executive Scheme could have been better documented. KeyMed have identified a number of issues with that process, which I set out in paragraph 372 above. Mercer's concerns regarding the cost of the PIP Limit, the failure to obtain legal advice and the fact that Mercer (wrongly) linked the removal of the PIP Limit with certain tax consequences caused by A-Day are all significant matters, and the question is whether they cause me to alter the conclusion that I have otherwise reached that the decisions to establish the Executive Scheme and remove the PIP Limit were honestly and properly made. They do not. If there was more material suggestive of the dishonesty of the Defendants, it might be possible to use these failings to buttress a finding of dishonesty. But I do not consider that there is any evidence of dishonest or improper conduct on the part of the Defendants, and in my judgment the failings that KeyMed has identified are just that: failings. They are not evidence of dishonesty: they are instances where – recognizing that this was a busy company, and the protagonists (including the Defendants) busy people – things that could have been done better, but where the failure is attributable to an innocent failure of process.

(e) In these circumstances, I find that the Defendants acted honestly and did not breach the duties listed in paragraph 449 dishonestly or at all. I appreciate that I have found that KeyMed's alternative case is not open to it, and that therefore it is unnecessary for me to make a finding as regards non-dishonest breach of duty. Nevertheless, I consider that it is important for me to record my finding in this regard.

(2) *The amendment of the spousal benefit rule.* My conclusions are at paragraphs 395 to 399 above. I have found that the Amending Deed, which was not a complex document, was executed by all knowing and understanding its terms and knowing that Mr Hillman would directly benefit (given his plans to remarry) and that Mr Woodford, as a member of the Executive Scheme, derived a contingent enhancement to his rights. I find that the Defendants acted honestly and did not breach the duties listed in paragraph 449 dishonestly or at all.

(3) *Conservative funding and investment strategies.* My conclusions are at paragraphs 446*ff* above. I have found that both the funding and investment strategies were in KeyMed's interests and that KeyMed knew and approved of them. I find that the Defendants acted honestly and did not breach the duties listed in paragraph 449 dishonestly or at all.

(4) *Failure to report misconduct and Conspiracy.* It follows from my conclusions so far that there was no misconduct on the part of the Defendants for them to report, and that this alleged breach of duty must fail for that reason. Similarly, because the Conspiracy alleged is an unlawful means conspiracy, there being no unlawful means, that allegation also fails.

(5) *Breach of duty of the Defendants as trustees*. I have found no such duty to exist. Had I done so, however, then – for the reasons already given – I would have found no breach of that duty.

480. For all the reasons I have given, the allegations advanced by KeyMed against the Defendants all fail.

J. QUANTUM AND OTHER MATTERS

481. Given the conclusion that I have reached in paragraph 480 above, questions of quantum do not arise. Nor do I consider that it would be appropriate to determine such matters on a contingent basis. It seems to me that there is a material relationship between an established breach of duty or duties and the quantification of the losses said to flow from such breach or breaches.

482. Equally, although the question of the effect of the Compromise Agreement on such causes of action against Mr Woodford as succeeded was before me, having found no dishonest breaches at all, I prefer not to grapple with this question, which (as I see the issue) would require me to make some findings at least as to what Mr Woodford knew when the Compromise Agreement came into force.

483. Similarly, there was a question of whether the causes of action alleged by KeyMed were time-barred. That, too, is a question that does not arise on the findings that I have reached; and which, like quantum and the Compromise Agreement, would be coloured by the nature of the breach of duty that I had found.

484. Accordingly, I say nothing about any of these issues.

K. DISPOSITION

485. For the reasons I have given, KeyMed's claims all fail.

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(Judgment, footnote 1)

TERM OR ABBREVATION	FIRST REFERENCE IN THE JUDGMENT
A-Day	§60
Administrator	§29
Amending Deed	§373
Annual Allowance	§60(3)
Associated Company	§7
Board	§150
Bowie 1	§178(1)
Bowie 2	§178(4)
Boyle 1	§178(3)
Boyle 2	§178(6)
Brown 1	§169(3)
Category 1 Member	§38(1)
Category 2 Member	§38(1)
Cherry 1	§168(6)
Claims	§7
Clerk & Lindsell	§122 (footnote 104)
Compromise Agreement	§5
Conspiracy	§73 (in quotation)
Debenture	§343(5)
Deed of Participation	§343(3)
Defence	§319
Defined Benefit	§50
Defined Benefit Member	§50
Defined Contribution	§50
Defined Contribution Member	§50
duty of good faith	§94
Effective Date	§7
ERA	§6 (in quotation)

ET Proceedings	§6 (in quotation)
Executive Member	§41
Executive Section	§41
Executive Scheme	§14(1)(a)
Executive Scheme Interim Deed	§68
ExCom	§154
Finn	§119(3) (footnote 97)
Hillman 1	§170
Hillman 2	§170
Item 53	§68
Joint Statement	§178(7)
Kaufmann 1	§168(1)
Kaufmann 2	§168(1)
KeyMed	§1
KeyMed (Ireland) Limited	§1(2)
Letters	§343(4)
Lifetime Allowance	§59(2)
LPI	§45 (in quotation)
McBrearty 1	§168(5)
Member	§38
Mercer	§32
Mortimore	§86 (footnote 64)
Olympus	§1
Olympus Corporation	§1(1)
Olympus Europa Holding GmbH	§1(1)
Olympus Europa SE & Co KG	§31
Olympus Industrial America Inc	§1(2)
Olympus KeyMed Group Limited	§1(1)
Oro 1	§169(2)
Particulars of Claim	§73
Pension Protection Fund	§58(2)
PIP Limit	§55
PPF Risk	§58(2)
proper purpose rule	§86

RFIAD	§389 (in quotation)
Revenue Limits	§52
Rowe 1	§168(3)
Rowe 2	§168(3)
RPI	§45 (in quotation)
Saito 1	§169(1)
Scale Pension	§40
Scheme Rules	§35
Scott 1	§178(2)
Scott 2	§178(5)
Service Agreement	§7
Specified Claims	§8 (in quotation)
Specified Matters	§8 (in quotation)
Staff Members	§41
Staff Section	§41
Staff Scheme	§14(1)(a)
Takeuchi 1	§168(4)
Transfer Agreement	§343(2)
Trust Deed	§35
Williams 1	§168(2)
Williams 2	§168(2)
Woodford 1	§171
Woodford 2	§171
1992 Rules	§23
1992 Trust Deed	§23
2000 Staff Scheme Definitive Deed and Rules	§23

ANNEX 2

REFERENCES TO NATURAL PERSONS IN THE JUDGMENT

(Judgment, footnote 2)

PERSON	FIRST REFERENCE IN THE JUDGMENT
Bowie, Ronald	§178
Boyle, Philip	§178
Brown, Ewan	§169(3)
Brundrett, James	§32(1)
Calcraft, (Richard) Luke	§65
Cherry, Richard	§168(6)
Claisse, Glenn	§32(2)
Clark, Philip	§32(3)
Craig, (John) Hugh	§25
Girdharlal, Rakesh	§32(4)
Goswami, Raj	§32(5)
Greengrass, Stuart	§151(2)
Hillman, Paul	§2
Kaufmann, Stefan	§168(1)
MacLeod, Sarah	§343(2)(2)(a)
Maggs, James	§32(6)
McBrearty, Sally	§158
McWhinney, Deborah	§32(7)
Morishima, Haruhito	§152
Okubo, Masaharu	§151(3)
Osa, Tatsuro	§169(2)
Osenton, Kendra	§32(8)
Pound, Teresa	§32(9)
Read, Karen	§32(10)
Reddihough, Albert	§1
Reynolds, Richard	§30
Robson, Tim	§32(11)
Rooprai, Akash	§32(12)

Rowe, John	§28
Saito, Kuniaki	§169(1)
Scott, Bob	§178
Spinner, Sonja	§32(13)
Takeuchi, Yasuo	§168(4)
Virgo, Paul	§63
Williams, Nick	§31
Woodford, Michael	§2
Wright, Mel	§32