Disciplinary Tribunal Panel Hearing

16, 17, 18, 19 and 20 July 2018

The International Dispute Resolution Centre, 70 Fleet Street, London, EC4Y 1EU

Respondent:	Robert Amos Oketch FIA (Present by video link – no legal representative present)
IFoA Case Presenter:	Fiona Horlick, of Counsel, instructed by Kingsley Napley LLP, solicitors.
Panel Members:	Paul Housego (Chair/Lay Member) Peter Aspinall (Lay Member) Graham Clay FIA (Actuary Member)
Legal Adviser:	James Palmer
Judicial Committees Secretary:	Pauline Wharton

References

This determination uses the following abbreviations:

The Act	The Retirement Benefits Act 1977 passed by the Government of Kenya on 22nd August 1977
The Regulations	The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000
Sponsor	The organisation whose employees were members of the pension fund
Scheme	The pension fund of the Sponsor ("the Fund" in the charges)
The Rules	The Rules of the Scheme
The Panel	The Disciplinary Panel of the Institute and Faculty of Actuaries
The Authority	The Retirement Benefits Authority set up pursuant to the Act
The RBA Tribunal	The Appeal Tribunal set up in accordance with section 47 of the Act
Reports	The report, in 3 editions, of Mr Oketch commissioned by and delivered to the Authority
The Actuary	The actuary retained from time to time to advise the Scheme (in the charges referred to as "the Fund's Appointed Actuary")
The Firm	The firm with whom the Actuary worked

Introduction

1. The case stems from the Reports prepared by Mr Oketch, the Respondent, who while resident in South Africa was commissioned in 2012 by the Authority to prepare an independent actuarial report relating to a Kenyan pension scheme for presentation to the RBA Tribunal. The relevant terms of the Service Level Agreement were:

"4.1 The Service Provider shall provide the following actuarial services to RBA for purposes of the matter:

4.1.1 review the Trust Deed and Rules and the Actuarial Valuation reports provided in order to understand the applicable retirement benefits.

4.1.2 review the data applied for specific exit calculations in respect of all 134 members of the Scheme.

4.1.3 review the actuarial valuation and assumptions prevailing at time of calculations and provide an opinion on consistency and relevance in application for exit calculations.

4.1.4 determine the benefits that need to be reviewed and assess whether the original calculations and those performed by the appellants actuary were adequate and in line with best practice.

4.1.5 where either of the calculations in 4.1.4 above is adequate, provide a report identifying the appropriate calculations, noting any differences in the calculated values between the respective actuaries and provide the rationale for the supported benefit calculation methodology and assumptions.

4.1.6 if neither of the calculations in 4.1.4 above is adequate, review each individual member's exit data and provide calculations on an alternative basis to provide an independent estimate of each individual members' benefits, and

4.1.7 communicate the findings in an actuarial report to aid the Tribunal in its decision making in the matter.

4.2 The service provider may provide any other observations or recommendations including high level recommendations arising from the exercise that may impact on RBA rules and regulations and hence industry practice and any other observation not specifically stated above but which arises from the findings of the exercise and the Service Provider deems it suitable to provide a comment."

2. Paragraphs 3 and 4 of Mr Oketch's three editions of his report state there will be two separate reports, but subsequent paragraphs interleave factual findings (relevant to 4.1) with comments (relevant to 4.2). The Panel is not aware of any second report. The issues under consideration by the Panel relate mainly to professional conduct rather than technical actuarial matters, both in the Reports and in subsequent correspondence.

Preliminary Issues

3. There were three preliminary issues raised by or on behalf of Mr Oketch.

4. First, it was said that the matter was *sub judice*, as there was a judicial review in the High Court in Kenya (case number 85 of 2017) of the decision of the RBA Tribunal No 8 of 2010 (itself on appeal from the Retirement Benefit Authority ("the Authority"), that hearing due to start on 17 July 2018. It was said that the applicants for the judicial review sought a decision from this Tribunal to use for litigation purposes. It was said to be a breach of the professional duty of Mr Oketch's representative for the representative to participate in this hearing. Mr Oketch had decided to, and did, appear in person without representation, as he felt that he did not want to let the hearing pass without being heard.

5. The Panel decided that the issues before it were about the manner Mr Oketch had conducted himself and about his preparation for, and the content of, the report and were not the same as the decision of the RBA Tribunal. In any event the RBA Tribunal had accepted the calculations of Mr Oketch (subject to the limit on commutation and the 3.75% and unisex factors). Further, where there is a Court hearing that Court is often appreciative of the decision of a professional regulatory

panel such as this, which Courts regard as expert in the field of professional regulation. The Panel confines itself only to matters relating to regulation. Accordingly the Panel rejected the submission that a judicial review in Kenya meant that the hearing should be adjourned. There was nothing to support the suggestion that Mr Oketch's representative was professionally embarrassed by any proceedings in Kenya. The point was raised very late without explanation. Neither Mr Oketch nor his representative requested an adjournment to seek representation from outside Kenya.

6. The Panel considered whether in the circumstances it should continue with the hearing and concluded that:
   (i) the issue of Mr Oketch's conduct before the Panel was distinct from any issue of judicial review of the decision of the RBA Tribunal, and
   (ii) it could not be said to be *sub judice* and
   (iii) if necessary, any concern that a finding by the Panel could have a collateral purpose in relation to the RBA Tribunal proceedings could be addressed by considering whether it was appropriate to delay publication of the Panel's decision.

7. Accordingly the Panel decided to proceed.

8. The Panel also indicated that it would review the position at the conclusion of the hearing. At the end of the hearing, Counsel for the IFoA informed the Panel that the hearing on 17 July 2018 had been a *"mention",* but no more was known. The Panel informed Mr Oketch that it proposed to give a period of two weeks for him (or his legal adviser) to raise any objection there might be to publication of the reasons for its decision. Mr Oketch stated that this would not be necessary, and that there was no reason why the decision should not be published. Nevertheless, the Panel did not issue this determination immediately in case Mr Oketch or anyone advising him reconsidered this matter.

9. Secondly it was said that Mr Oketch was immune from a hearing such as this as an expert witness. This Panel is run under the laws of England and Wales, and of Scotland. The law in these jurisdictions is that an expert witness is not immune from professional regulatory proceedings. In any event the appointment of Mr Oketch was as an independent actuary to advise the Authority (and the RBA Tribunal) as to which of two competing actuarial reports should be followed, and/or to make other

recommendations. Consequently he was not, in any event, acting as an expert witness, but an actuary to the RBA Tribunal. For both reasons this jurisdictional challenge was rejected.

10. Thirdly it was said that this matter was *res judicata* as the Actuarial Society of South Africa (ASSA) (the South African body regulating actuaries there) of which Mr Oketch was a member had already investigated the complaint and decided to take no action. The Panel did not accept this submission. Mr Oketch had chosen to belong to the IFoA. While ASSA had investigated and eventually [Pages B 758-763] decided to take no formal action, that did not mean that the IFoA was precluded from doing so. It is expected that the IFoA takes action where there is action by ASSA (otherwise someone expelled from ASSA would remain a member of the IFoA). There is therefore no objection in principle to the IFoA taking action.

11. The ASSA decision not to take action cannot, in the Panel's view, preclude the IFoA from doing so. While there is a degree of overlap in membership, and presumably a memorandum of understanding, these are not interconnected bodies. More fundamentally the Panel noted that nothing has been decided judicially or quasi judicially by ASSA, as there has been no hearing by them, and the merits of the matter had not been considered and decided.

12. The case brought by the IFoA could not be regarded as an abuse of process, for the decision of another (separate) organisation to which Mr Oketch belongs that it would not take action cannot bind the (separate) IFoA.

13. The Panel noted in any event that the disciplinary rules of the IFoA expressly provide that a decision as to misconduct made by ASSA would justify disciplinary proceedings and, more importantly, under its Disciplinary Rules a finding by such a professional disciplinary panel (of ASSA) constitutes proof for the purposes of the IFoA's own Disciplinary Scheme. The IFoA is entitled to form its own view of the seriousness of matters put before it.

14. The Panel decided that there was no *res judicata* / double jeopardy / abuse of process reason to dismiss the charge.

15. Accordingly the charge was put to Mr Oketch, section by section. In doing so it became apparent that one of the subparagraphs had a mistake, which the Panel

corrected, as Mr Oketch had no issue with it. This is in 1.1.3, the change being shown by the striking through of the word removed and the substitution of the correct word in bold.

Charge

16. Robert Amos Oketch, the charge against you is that, being at the material time a member of the Institute and Faculty of Actuaries:

Between September 2012 and March 2013, you acted on the instruction of the Kenyan Retirement Benefits Authority to prepare an expert opinion ("the Reports") on benefits to be paid to the former staff members of the ("the Fund"), in accordance with a ruling by the Retirement Benefits Appeal Tribunal ;

1.1 upon that instruction, you acted inappropriately in that you:

1.1.1 sent disrespectful and/ or derogatory emails to the trustees of the Fund and/ or the Firm in advance of and during the preparation of the Reports;

1.1.2 did not try to arrange a meeting with the trustees of the Fund prior to preparing your report of October 2012;

1.1.3 presented your report of October 2012 to the Retirement Benefits ~~Agency~~ **Authority** prior to obtaining sufficient information to allow you to prepare an opinion;

1.1.4 implied in the Reports that the Fund's Appointed Actuary did not review actuarial factors, and implied this led to the Appointed Actuary using incorrect factors within your actuarial valuations;

1.1.5 implied in the Reports that there was a conspiracy between the trustees and the Sponsor to the Fund to delay changes to the Fund Rules to deliberately disenfranchise existing members and/ or benefit the Sponsor to the fund;

1.1.6 implied in the Reports that the conspiracy led to the withdrawal benefits being inequitable;

1.1.7 made calculations not based upon the Fund's rules and legislation;

1.1.8 failed to state that the Trustees properly based their withdrawal benefits upon the Fund's rules;

1.1.9 made assertions in the Reports that the trustees and Sponsor to the Fund breached relevant Kenyan pensions law without making reference to the specific provisions which had been breached;

1.1.10 your actions in paragraphs 1.1.4, 1.1.5, 1.1.6, 1.1.8 and/ or 1.1.9, were in breach of the principle of Integrity in the Actuaries' Code version 1;

1.1.11 your actions in paragraphs 1.1.2, 1.1.3, 1.1.4, 1.1.5, 1.1.6, 1.1.7, 1.1.8, 1.1.9 and/ or 1.1.9 were in breach of the principle of Competence and Care in the Actuaries' Code version 1;

1.1.12 your actions in paragraphs 1.1.1, 1.1.3, 1.1.4, 1.1.5, 1.1.6, 1.1.8 and/or 1.1.9 were in breach of the principle of Communication in the Actuaries' Code version 1;

1.2 did not demonstrate appropriate knowledge and/or experience in that you:

1.2.1 based your analysis in the Reports upon South African legislation and general legal principles, instead of Kenyan legislation and legal principles which applied;

1.2.2 made an assertion in the Reports that the trustees could unilaterally have paid benefits outside the provision of the Fund's Rules when the trustees did not have discretion to do so;

1.2.3 implied in the Reports that the use of unisex commutation factors is legislatively mandated in Kenya when it is not;

1.2.4 applied a 3.75% increase in deferment to pensions in the reports which had no basis under the Fund Rules or legislation;

1.2.5 implied that members were not treated equitably on exit due to a deliberate intent by the trustees and the Sponsor to make a profit in the scheme;

1.2.6 made a statement in the Reports about inequitable treatment of the members of the Scheme without sufficient reference to the fact that the Trustees were constrained by the Fund Rules and/ or the relevant legislation;

1.2.7 recomputed benefits in the Reports by valuing benefits using unisex factors which were not provided for in the Fund Rules;

1.2.8 applied commutation factors and retirement benefits in the Reports in a sum exceeding Kshs 540,000, contrary to the Income Tax Act and the Income Tax (Retirement Benefit) Rules 1994;

1.2.9 your actions in paragraphs 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6, 1.2.7, and/ or 1.2.8 were in breach of the principle of Competence and Care in the Actuaries' Code version 1;

1.2.10 your actions in paragraphs 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.6, 1.2.7, and/ or 1.2.8 were in breach of the principle of Compliance in the Actuaries' Code version 1;

1.2.11 your actions in paragraphs 1.2.2, 1.2.3, 1.2.5, and/ or 1.2.6 were in breach of the principle of Communication in the Actuaries' Code version 1;

1.3 between March 2013 and May 2016, you:

1.3.1 made comments to ASSA and/or the IFoA about the conduct of the trustees and employees of the Firm which were inappropriate and/or unsubstantiated;

1.3.2 your actions at paragraph 1.3.1 above were in breach of the principles of integrity and/or communication in the Actuaries Code version 1 and/ or version 2;

1.4 your actions, in all or any of the above, constituted misconduct in terms of Rule 1.6 of the Disciplinary Scheme of the Institute and Faculty of Actuaries (Effective 1 August 2010, as amended 18 October 2012).

17. Mr Oketch denied all the allegations. He accepted some factual parts of the allegations, namely that:

18. In 1.1.6 it was that the Scheme was inequitable in its design in 1985.

19. In 1.1.9 it was factually correct that he had not referred to pensions legislation, but he maintained that his Reports were properly drafted for its audience.

20. In 1.2.4 it was accepted that he had recommended 3.75% as an annual increase in pensions in deferment, but this was reasonable under the legislation, which required fairness, even if the Rules did not give the power to do so.

21. In 1.2.6 it was denied that the trustees were constrained by the Rules where legislation conferred powers, the legislation taking precedence.

22. In 1.2.7 it was accepted that unisex factors were used by him, but that there was nothing in the Rules (or statute) to preclude this.

23. 1.3.1 was partly accepted in that he now accepted that the emails were inappropriate, but not that they were unsubstantiated.

24. In 1.4 while the emails were something he now regretted, they were not so bad as to be misconduct.

25. In general he denied that anything he had done amounted to misconduct.

The hearing

26. The Panel heard an opening of the case by Counsel for the IFoA. The Actuary and a lawyer from Kenya expert in relevant Kenyan law also gave evidence and were cross examined by Mr Oketch. A witness statement from the case manager for the IFoA as to the process followed was accepted by Mr Oketch and so his evidence was taken as unchallenged.

27. As Mr Oketch was unrepresented the Panel ensured that there were regular breaks, and endeavoured to assist him with the structure of his questioning, in order to

ensure that he had a proper opportunity to test the evidence of the witnesses for the IFoA and also, where appropriate, to clarify his questioning of the IFoA's witnesses.

28. At the conclusion of the case for the IFoA Mr Oketch elected, as is his right, not to give evidence but to rely on submissions. The Panel went to considerable lengths to make sure that Mr Oketch understood the choice that he was making, strongly recommending that he contact his lawyer for advice (which he did), and ensuring also that the legal adviser spelled out the difference between evidence and submissions. The Panel decided to draw no adverse inference from Mr Oketch's decision not to give evidence. He had engaged fully with the IFoA and with the Panel, including travelling to the UK in February 2016 to be interviewed by the IFoA's investigating actuary.

Preliminary observations

29. In this case the events occurred over a course of time and the law in Kenya changed during that period. The Panel was satisfied that the changes to the law were not material to the charges. This is a case primarily concerned with matters of professional behavior. The Panel makes its findings of fact about the relevant matters. The Panel was not required to (and so did not) go into the details of actuarial practice. Therefore the Panel limited itself to finding facts about what happened and understanding the consequences, because this is not a case about technical actuarial work, but more broadly based on professional behaviour. The RBA Tribunal appears to have been looking for actuarial opinion on the basis of the law and regulations applicable at each relevant time, and the RBA Tribunal plainly did not feel that it had received it.

30. The actuary member of the Panel has experience in South Africa, but professes no knowledge of Kenyan (or South African) law, and the Panel is reliant for matters of Kenyan law on the expert evidence of the Kenyan lawyer who gave evidence in this regard.

Facts found

<u>Background</u>

31. Mr Oketch is an IFoA member actuary who qualified in 2005. He works in South Africa for a firm. Further to a consent order made in the RBA Tribunal in early 2012 he was instructed by the Authority to prepare an actuarial report (the Reports) to assist the RBA Tribunal in determining an appeal against a decision made by the Authority in a dispute between some 134 former members of the Scheme and the Scheme.

32. The essence of the dispute was as follows. The Sponsor set up the Scheme in 1985. The Rules are dated 10 December 1985. The Scheme had a different name then, but there has only ever been one such entity. In Kenya there had never been a requirement for a scheme actuary and such schemes appoint actuaries as and when required, to carry out specific tasks. The Actuary performed that role at all material times.

33. In the late 1990's the Sponsor proposed and implemented a restructure which resulted in a substantial number of people leaving their employment. Some left through early retirement, others through *"retrenchment",* meaning compulsory redundancy. This amounted to about 1/5th of the workforce.

34. The employees contributed 5% of basic pay to the Scheme. The Sponsor was responsible for paying the balance of the cost of the Scheme.

35. The workforce fell into two groups: the unionised workforce and the salaried staff. There was however only one category of member of the Scheme. It was mainly the unionised workforce where the numbers employed were reduced. Unionised staff had allowances in addition to basic pay, but that was a small percentage of their total remuneration. Management had much larger allowances. Following a review by its advisers of market practice, particularly in the financial field, the Sponsor wanted the allowances, or most of them, consolidated into basic pay. This would mean the liability of the Scheme would increase and therefore the cost to the Sponsor would be greater than before.

36. While the main purpose of a Scheme is to provide a pension in retirement, the Rules provided for those who left the Scheme to have the choice to take a lump sum (capped at 540,000 Kenyan shillings by Kenyan law) instead of a deferred pension. If members leaving the Sponsor were entitled to more than 540,000 Kenyan shillings and elected to commute the pension to a lump sum there would be a deferred

pension funded by the remainder. Very few of those who left were entitled to more than 540,000 Kenyan shillings, but there were some who did. Almost all elected to take the maximum lump sum. If a deferred pension was taken it was of a fixed sum, and not increased however long it was deferred. It appears that only those taking early retirement had entitlements exceeding 540,000 Kenyan shillings.

37. The way the amount due to those who left was calculated was in essence a return of contribution. The solvency of the fund was strong, partly as the investment return had consistently been significantly above the valuation interest rate used throughout. However the formula set out in the Rules for calculating the amount due to a departing member meant that the assets held towards the liability to members was larger that that paid out to them on leaving before normal retirement. Therefore there was a surplus of assets held in the Scheme after each person left the Scheme. Because of the large number of people who left, these surpluses added up to a very significant sum.

38. There were actuarial reports dated 01st January 2000, 2003 and 2004.

39. The Scheme was running at 106% solvency in the 2000 report. That report stated that if the managers' allowances had already been consolidated, the solvency level of the Scheme would have dropped to about 85%. That would still have been above the Kenyan minimum legal requirement of 80%. The Sponsor subsequently consolidated much of the money paid to the managers as allowances into their salaries without a one-off employer contribution to the Scheme to reflect the increased liabilities which this created for the Scheme.

40. The 2003 report showed solvency at 120%. A substantial contributor to the large surplus emerging over the three year period was the effect of the payments out to those made redundant (or retiring early) being much less than the assets that had been accumulated towards meeting those liabilities. [See B137-160 – specifically 152 & 153]

41. The Act came into force on 08 January 1999. It provided for regulations to be made. The Regulations (the Retirement Benefits (Occupational Benefits Schemes) Regulations 2000 (119/2000) came into force in 2000. The Retirements Benefits Authority ("the Authority") was set up under Regulations, as was the RBA Tribunal, which hears appeals against decisions of the Authority.

42. The Scheme registered with the Authority, as it was required to do, and that was when it acquired its current name.

43. In 2004 the Scheme was redesigned to include a defined contribution scheme although it continued to have a defined benefit section with some active members.

44. In December 2007 [SR 26] a large number of former members of the Scheme received advice from an actuary. That advice was that they had been paid less than they should have been paid and they complained to the Authority. On 28 October 2010 the Authority decided against the former members. [B205].

45. The former members appealed to the RBA Tribunal (case 8 of 2010) [B213]. On 23 February 2012 the RBA Tribunal partly allowed that appeal, to the extent that the Scheme was ordered to provide a calculation of the amounts paid to each appellant. The Scheme and the representatives of the successful appellants could not agree the figures. Sometime between then, but well before 24 July 2012 the RBA Tribunal ordered [290a], by consent, that the Authority should appoint an independent actuary to consider and compare the calculations of both and report, that report to be submitted to the RBA Tribunal by 24 July 2012.

46. Mr Oketch was the independent actuary appointed, and he was responsible for the work carried out. The letter appointing Mr Oketch is dated 07 September 2012 [B293] and the retainer (a Service Level Agreement “SLA” with his firm) is dated 10 October 2012 [B297].

47. The task set out in paragraph 4.1 of the SLA was to review the Scheme’s Rules and actuarial valuations, review the data for the appellants, review the calculations and assumptions prevailing at the time of the calculations and provide an opinion on consistency and relevance in application for exit calculations. He was then to determine the benefits that needed to be reviewed and assess whether the original calculations and those performed by the Actuary were adequate and in line with best practice [302/303]. He was then to prepare an actuarial report, the detail of which would depend on the result of the investigation he had carried out.

48. The SLA also stated in paragraph 4.2 that the service provider (Mr Oketch in practice) might provide any other observations or recommendations including high

level recommendations that might impact on the rules of the Authority, and hence industry practice, and any other observation which arose from the exercise, where the service provider deemed it suitable to provide comment. It is this paragraph (4.2 [B303]) that is the genesis of this disciplinary matter.

49. After swiftly concluding an investigation, but without speaking to, or meeting, the trustees or the Actuary who had advised the Scheme throughout, Mr Oketch concluded that the Scheme had conducted the exercise in accordance with its Rules, and had done so arithmetically correctly apart from a few errors.

50. However he also came to other conclusions:

- The 5% contributions of all members (and the employer contributions) had been invested, and after inflation had realised a return of over 7% consistently. The employer contribution had been at around 15% of pensionable (basic) salary. Yet the money the redundant members had got on exit was only about double the money they had put in – so in effect the 5% they put in and about 5% from the employer's contribution, both with 3.75% pa interest. When the other 10% of the employer's contribution was added up, and account taken of the investment return, the Scheme after the retrenchments were complete was therefore massively in surplus.

- This was at the expense of the appellants (and the rest of their cohort) and it was not fair or equitable.

- More, this surplus had made possible the incorporation of the allowances into the basic (pensionable) salaries of the managers. Even after the surplus was taken into account the solvency level went down to 85% which gave an idea of the scale of the advantage being conferred on the Sponsor used to meet the cost of providing pensions based on managers' enhanced pensionable pay, made possible by the *"profit"* (as he described it) or *"surplus"* as the Scheme termed it.

- There was a change to the Rules in prospect, but it took some years to come to a conclusion.

- Looking at the chronology, because this change to allowances to managers was first proposed before the retrenchments took place, and because the Human

Resources Director of the Sponsor was a trustee of the Scheme, the matters were interlinked.

- The Actuary who prepared the reports knew of the retrenchments and the proposal to consolidate allowances for managers into basic pay, with consequences for the Scheme.

- From that combination of factors Mr Oketch concluded that this was in effect a conspiracy akin to defrauding the people who had been paid out by the Scheme by reason of the retrenchment process.

51. Mr Oketch set out this conclusion in trenchant form in his Reports, which went through 3 iterations from October 2012 to March 2013. He set out his opinions in emails of 12 and 13 December 2012 [B363 and 381], sent to a substantial number of senior people in the Sponsor and outside (some being trustees of the Scheme, some not). In the second email he said that *"any serious actuary"* could see the issues he raised. The unavoidable implication of this was that the Actuary was not competent in that he had failed, in the opinion of Mr Oketch, to recognise or remedy the issues.

52. The Reports (which are all identical save for the addition of more appendices) focus on the unfairness of the payment to those who had left the Sponsor and the asserted conspiracy. The fact that the calculations had been conducted entirely in accordance with the Rules is buried deep in the report (in a short paragraph 41), and even then is qualified by the statement that it *"seemed"* that they were so conducted, and then followed by the assertion in the next paragraph that this conduct was unfair.

53. Mr Oketch's views were not confined to the Scheme or to the Sponsor, as his report was required to go to the RBA Tribunal. It became public and resulted in considerable press interest, which was acutely embarrassing to the Actuary, because of the implicit suggestion that he had conspired with the Sponsor and the trustees of the Scheme effectively to defraud those being dismissed from the Sponsor (or taking early retirement), and that this was designed to the advantage of management, and to the financial advantage of the Sponsor.

54. The inference was that this constituted a preconceived plan (to which the Actuary was implied to be a willing participant), because of a deliberate delay in the alteration of the Rules which were introduced in 2003 after the retrenchments had taken place.

55. Mr Oketch said also that the members who had left should have their contributions increased by a compound interest rate of 3.75%, and that unisex calculations should have been used.

56. During the course of its hearing, when considering the report, the RBA Tribunal:
    - ordered that the more controversial parts of the report be expunged, presumably before publication,
    - did not accept that 3.75% pa should be added to deferred pensions, and
    - found that the gender specific bases of calculation were appropriate.

Mr Oketch's case: this summary is based on his submissions, and from his questioning of the witnesses and on previous responses made by him to IFoA

57. The Rules of the Scheme had to be read in the light of the legislation. His report was to deal with best practice. Fairness was an overarching concept. While the Rules did not contain discretion, Kenya is a common law heritage country, and in carrying out a fiduciary duty, which was what the being a trustee of a pension fund involved, concepts of equity applied. It was unconscionable for the members that left to leave behind a massive surplus, which was then applied to the benefit of section of those members who remained. The Scheme should compensate those who had lost out.

58. He had felt this was a very great wrong, and that the Actuary should have advised about it at the time. While he regretted the tone of the emails and would write them differently now, this was a reflection of the seriousness of the injustice done.

59. As to the cap of 540 Kenyan shillings, the figures he was asked to check were shown in a table which did not limit the amount to 540 Kenyan shillings, and hence there was no reason for him to do so either, because the cap had been applied by the Scheme after the calculation had been made, and so would be done automatically in the same way on his calculations. His calculations were to check the size of each person's *"pot",* not to deal with whether it was wholly or partly commuted to cash or retained for a deferred pension. That was a matter for the individual to select, so that capping at 540,000 Kenyan shillings would have been confusing, as not everyone might choose to commute the whole 540,000, or at all.

60. Unisex factors were to be made compulsory for pensions from an unspecified future date by the Regulations that were introduced in 2000. While industry practice had always been to use gender specific factors, including at the time these payments were made, the industry was moving to unisex calculations because they were fairer – it was difficult to see that it was fair that a man and a woman with the same levels of service should get different amounts. He had been asked to look at fairness. The Actuary was very experienced and must – or should – have known of the trend towards unisex factors and it was wrong of him not to tell the trustees.

61. His report had not been criticised by the RBA Tribunal for not citing specific provisions of law.

62. Matters had to be judged taking account of the Act and the Regulations. Regulation 19 specifically referred to fairness and equity.

The Actuary's evidence

63. The Actuary gave his evidence in the measured and professional way that has characterised his input to this process from the beginning. In the face of what the Panel found (after hearing all the evidence and considering the submissions) to be utterly extraordinary allegations from Mr Oketch, he restricted himself to reasoned refutation of the contentions of Mr Oketch and an expression of how distressing it has been for him to be traduced in this way.

64. The Actuary pointed out that there was no "scheme actuary" in Kenyan pensions law, and that schemes bought in actuarial services as necessary. The Scheme administered payments themselves in accordance with pre-set actuarial factors.

65. The Panel found the Actuary's evidence utterly reliable, and accepted him as a witness of truth. He said that this has been a great strain for him over many years, because he is a leading actuary in Kenya and elsewhere in East Africa, and yet from what Mr Oketch had written (to many in the Sponsor, and in the Reports to a public Tribunal) the Actuary was supposed to have participated in, even planned, a scheme to defraud many people who left the Sponsor in order to provide a *"profit"* to be utilised to fund the augmentation of managers' entitlements, so saving the Sponsor a large sum in contributions to the Scheme. This was manifest nonsense.

John Ohaga's (expert Kenyan lawyer) evidence

66. Mr Ohaga was tendered as a legal expert in Kenyan law of pensions. His background means that he is such. He was a witness who engaged with the questions asked of him, and responded in a thoughtful way. He readily accepted good points put to him by Mr Oketch, and gave logical replies and responses where he disagreed with Mr Oketch. The Panel accepted his evidence in its entirety. Relevant parts are set out below.

Matters where Mr Ohaga and Mr Oketch agree and disagree

67. Mr Ohaga accepted that the following is the case:

    67.1. The extent of the cumulative amount of the excess of the funds attributable to liabilities of those who left over the amount paid out to them was considerable, so as to confer an appreciable advantage to those who remained, and that this was not fair to those who left.

    67.2. He accepted that the surplus generated by the retrenchments was clearly to be anticipated.

    67.3. He accepted that there was no bar on the application of unisex factors by the trustees.

    67.4. He accepted that there was a growth in the investments, in real terms of about 7% or more each year, and that inflation was in excess of the 3.75% applied by Mr Oketch in his report.

    67.5. He also talked about the lack of training of trustees at the time

68. Mr Ohaga did not accept the following:

    68.1. He did not accept that there was any evidence of a conspiracy. With 20/20 hindsight the unfairness could have been mitigated by seeking, in advance, a change to the Rules, or by seeking additional funds from the Sponsor to compensate those leaving.

68.2. It was not now possible to say that the Scheme could properly reimburse the appellants, for this was long in the past and the RBA Tribunal had found (and Mr Oketch agreed) that the appellants had been paid in accordance with the Rules. Many, or most, of the appellants were not in receipt of a pension, and so were no longer members. It was not possible for the Scheme lawfully now to pay them more, because they had been paid out in accordance with the Rules. Even if the application of the Rules resulted in unfairness to them, that gave rise to no claim as the Rules were lawful.

68.3. It was the case that the investment returns achieved by the Scheme were not applied to the appellants, and the use of 3.75% was not unreasonable as a measure to offset inflation (which from 2000 onwards had exceeded that amount), but the difficulty was that the Rules contained no provision to add such an amount to members' entitlements to deferred pensions. The sums had been calculated in accordance with the Rules, as the trustees were obliged to do. The Sponsor might be asked now to remedy what had been an unfairness, but that was wholly different to requiring the trustees of the Scheme now to pay to the appellants more than they were entitled to at the time they left. That now, over a decade later, it was considered (rightly) that the application of the Rules had resulted in a cumulative unfairness to them in the past did not alter the facts. If there was to be any recourse for past members of the Scheme it would have to be compensation direct from the Sponsor, not from the Scheme.

68.4. While statute or secondary legislation would take precedence over a Rule that conflicted with it, there was no such conflict here, and the use of words in Regulation 19 that required fairness did not give the trustees a discretion where there was none in the Rules, and the Rules contained specific provisions setting out what the Trustees should do. In any event the payments all predated the coming into force of the legislation, and so could not apply to these payments.

68.5. The Reports should have stuck to the task set, and then taken up the issue in a separate section, or separate report, pointing out the issues that he had raised. The invitation to do so was a generic one to assist in nationwide matters, not specific to the Scheme.

69. As indicated above the Panel accepted this expert evidence.

Panel's Determination

70. The Panel was aware that the burden of proof rests on the IFoA, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that the facts will be proved if the Panel is satisfied that it was more likely than not that the incidents occurred as alleged. There is no requirement for the Respondent to prove anything.

71. Mr Oketch's submissions to the Panel have two difficulties. First the emails cannot be regarded as anything other than intemperate. While noting that in all his written output Mr Oketch tends to use capitals to emphasise, so that capitalising may not be *"shouting"* as is the convention, nevertheless it is to emphasise what is being said, and words like *"deceit"* and *"fraud"* and *"conspiracy"* are highly emotive and are serious words to use. There is nowhere to be found in the thousands of pages put before the Panel any evidence of a conspiracy, or any intention to take advantage of people who left the Scheme. These were Rules drawn in 1985, when there was a very different landscape. Mr Oketch had noted a time line, and arrived at a conspiracy theory with no factual or evidential basis, which he then asserted as factually correct. Lots of members left the Scheme, the terms on which they left meant that there was a large surplus left in the Scheme, the Scheme intended all the time to consolidate management allowances into basic pay, then did so, and the surplus made this easier, and the Rules were changed subsequently. To extrapolate from this that the whole thing was planned in advance to *"defraud"* those leaving and to assert as a fact that this happened, was (at best) unwise.

72. Secondly, Mr Oketch correctly identified that the application of the Rules had led to unfairness. He was applying actuarial skills in so concluding. Throughout the hearing, Mr Oketch was at pains to point out that he is not a lawyer. However his Reports, his answers to the IFoA's investigating actuary, his posing of questions to IFoA's witnesses and his submissions to the Panel were founded on his legally unsupported interpretation of the law.

73. Overall, the Panel finds that in preparing his Reports, and in making his concerns felt Mr Oketch did not have regard to the situation at the time of the events upon which he was commenting. Instead, he applied the standards of 2012, and the culture of

South African pensions (seemingly somewhat ahead of Kenyan law at the relevant time to matters that arose in Kenya in the late 1990s and early 2000s).

74. The observation of the legal expert witness, that Mr Oketch should have stuck to the fact that the payments were correctly calculated (save for a few accidental arithmetical issues), and separately pointed out why this was unfair, leaving others to work out solutions, or at most suggesting some himself, is an accurate assessment.

Findings on the charges

75. The charges are as follows, with the Panel's finding, with reasons in each case:

76. ***Robert Amos Oketch, the charge against you is that, being at the material time a member of the Institute and Faculty of Actuaries:***

Between September 2012 and March 2013, you acted on the instruction of the Kenyan Retirement Benefits Authority to prepare an expert opinion ("the Reports") on benefits to be paid to the former staff members of the Scheme in accordance with a ruling by the Retirement Benefits Appeal Tribunal;

1.1 upon that instruction, you acted inappropriately in that you:

1.1.1 sent disrespectful and/ or derogatory emails to the trustees of the [Scheme] and/or [the Firm], in advance of and during the preparation of the Reports;

77. At the start of the hearing Mr Oketch denied this allegation, but in his closing submission he accepted that they should not have been sent. The email of 12 December 2012 [B363] was setting out a position forcefully. The Panel has already noted that Mr Oketch has a tendency to use capital letters as a means of emphasis rather an as *"shouting",* and that of itself does not make the email derogatory or disrespectful. That email was in reply to a forceful email to him: itself generated by the Reports filed by Mr Oketch. Mr Oketch says in them things such as *"How any reasonable set of Trustees would want to calculate redundancy benefits by themselves beats logic."* These are derogatory and disrespectful comments. The email of 14 December 2012 [B381], with a wide circulation, says that *"any serious*

actuary" would know what he says was so. This could only have been a reference to the Actuary, and it was disrespectful and derogatory. The allegation is proved.

1.1.2 did not try to arrange a meeting with the trustees of the [Scheme] prior to preparing your report of October 2012;

78. There is there no documentary evidence of any attempt by Mr Oketch to meet the Actuary or the trustees. There was evidence of the Actuary and Mr Oketch trying to speak to one another without success, but there is no suggestion of them meeting. The trustees say in their complaint to the IFoA that they were expecting a meeting on 19 October 2012 [B492], but Mr Oketch filed the report without meeting them and did not attend that meeting. Mr Oketch did not, in any response to the IFoA, deny this. He did not try and arrange that meeting with the trustees, and even if the trustees suggested one and expected him to attend one, he did not attend. The allegation is found proved.

1.1.3 presented your report of October 2012 to the Retirement Benefits Authority prior to obtaining sufficient information to allow you to prepare an opinion;

79. Mr Oketch said in his submissions that he had enough information to file his Reports, although he had to get more information in order to add some appendices in the later versions to deal with requests from the Authority. Mr Oketch jumped to his very serious conclusions without asking the trustees or the Actuary anything. He could not have an accurate opinion without first assessing the views of the Actuary or the trustees, and he submitted the report without them. It is essential always to hear the views of all involved before coming to a conclusion. Nor did Mr Oketch have all the reports which he needed. If the Reports had said *"draft"* the situation might conceivably be different, but even then the Panel would expect the author to have knowledge of the views of those involved before coming to even preliminary conclusions. That his conclusion was that there was a bad faith conspiracy to deprive those exiting of funds legitimately due to them by following outdated rules, intentionally putting off the amendment of the rules to make this possible is so serious an allegation (made in a report to the Authority, for use in the RBA Tribunal (which deleted them from the version it (presumably) put on the public record) that it really ought to have been put to them for their response before being sent to the Authority.

80. Mr Oketch assumed that there was a scheme actuary, that is, a continuous appointment. There is no such requirement in Kenya, and the Scheme had none. Mr Oketch's Reports at paragraph 10.7 specifically assumed that there was a scheme actuary. While Mr Oketch had sufficient information to check the calculations (the first part of his task) he did not have sufficient information for the commentary that formed the bulk of his Reports. He should either have obtained legal advice to justify his concerns or set out the areas he was concerned about and suggested the Authority investigate those concerns. Before doing either he should have ascertained the opinions of the trustees and of the Actuary. This is found proved.

1.1.4 implied in the Reports that the Fund's [Scheme's] Appointed Actuary did not review actuarial factors, and implied this led to the Appointed Actuary using incorrect factors within your actuarial valuations;

81. This is confusingly phrased, but by *"Fund's Appointed Actuary"* is meant the Actuary (as he was appointed for specific roles from time to time, and there is no evidence that any other actuary was employed by the scheme), and the reference to *"your"* should say *"his"* actuarial calculations.

82. Mr Oketch's Reports implies this. At paragraph 19 it is stated *"…it is however not logical to continue factors developed at inception of the scheme for calculations many years after the scheme has been in operation"*: this is critical of the Actuary, unjustly, given that paragraph 20 of the report set out that the valuation basis (including the financial assumptions which are relevant here) had not been changed. In fact they have not been varied since 1986, so that the continued use of the same actuarial factors was appropriate. There was the implication in the report as alleged. The allegation is found proved.

1.1.5 implied in the Reports that there was a conspiracy between the trustees and the Sponsor to the Fund to delay changes to the Fund Rules to deliberately disenfranchise existing members and/ or benefit the Sponsor to the fund;

83. This is absolutely what Mr Oketch implied.

84. In the conclusion to his report at paragraph 57 he wrote: *"The sequence of events 2000 to 2005 seems to have been designed to facilitate conversion and address the open ended employer liability of [the Sponsor] to the detriment of a large section of members and the result appears to have circumvented the spirit of the RBA Act and regulations."*

85. At 58: *"The trustees general responsibility is to ensure that the best interest of members and employer are well protected. The facts around the scheme from 2002 - 2005 points to the interests of the employer being prioritised to the detriment of one category of membership (those made redundant) and we recommend … be addressed as set out above."*

86. This conclusion is founded on paragraph 27 through to 36: *"27. The sequence of events relating to the transition from the old rules to the new rules registered in 2005 suggest a deliberate intent (unless there is convincing alternative proof) to ensure that the extensive exits were accommodated within the previous original rules which were designed way back in 1985 and was inequitable in design when considering early exit and retirees."*

87. Paragraph 36: *"What the Trustees or their advisors missed was that in such exercises the issue of EQUITY is paramount as one may end up favouring one group from the next and a direct reading and interpretation of rules may not cure this. In my opinion, the TRUSTEES FAILED their FIDUCIARY responsibilities to the exits and the Fund should make good to the disenfranchised members."*

88. While this paragraph contains the word *"missed"* which is not consistent with a conspiracy, it is plain that Mr Oketch was so implying, as elsewhere Mr Oketch said the Sponsor's human resources director was a trustee and plainly knew there was to be a retrenchment. The key word in the document is in the conclusion – it seemed to have been *"designed"* to advantage the employer: that is exit a large number of people, generate a foreseeable surplus and use that to fund a change to the benefits of managers, in the meantime holding off a change of the Rules for 5 years until the exits had taken place. This is never put as a concrete allegation, but it is innuendo throughout the report, and the charge alleges that he *"implied"* a conspiracy.

89. Conspiracy is a strong word, requiring two or more to act in concert (usually in secret or by subterfuge) to the disadvantage of others. It is suggested by Mr Oketch in his

Reports that the trustees had breached their fiduciary duty and were in concert with the Sponsor to achieve something at the expense of those leaving, (the trustees said to be being tools of the Sponsor in this regard). This was said to be to the disadvantage of those leaving the Sponsor's employment who withdrew from the fund on disadvantageous terms. The purpose implied was to generate a surplus to fund the future change of the Scheme, which was then subsequently undertaken. This process is outlined in the seven subparagraphs of paragraph 14 of the Reports. The combination of these sections of the Reports was to imply a conspiracy. It can be read no other way. There was no evidence of any of this. There was only a series of dates from which Mr Oketch extrapolated.

90. While it is not in the Reports, in an email to the ASSA investigator of 12 August 2013 [B678-683 at 681] Mr Oketch stated: *"THEY IN MY VIEW INTENTIONALLY TIMED THE RESTRUCTURE OF THE FUND TO BE AFTER THE RETERENCEMENT EXERCISE SO THEY COULD EXTRACT THE SURPLUS AND APPLY IT TO SOLVE THE EMPLOYER'S LONG STANDING PROBLEM OF MANAGING THE DEFICIT OF THE FUND! VIA A CONVERSION FROM DB TO DC…"* (*sic*). This is clearly to assert a conspiracy to disadvantage those retrenched or leaving.

1.1.6 implied in the Reports that the conspiracy led to the withdrawal benefits being inequitable;

91. This inevitably follows from 1.1.5 and is proved.

1.1.7 made calculations not based upon the Fund's [Scheme's] rules and legislation;

92. This refers to three specific calculations: the use of 3.75% augmentation, unisex factors and omitting the 540,000 Kenyan Shillings cap on commutation.

93. The 3.75% was a factor put in by Mr Oketch to try to offset inflation. It was a reasonable concept, as the legal expert agreed. The problem is, as the legal expert pointed out, that it is not permitted by the Rules. The trustees did not have any discretion under the Rules to do this. The most that can be said is that there might arise a duty on the trustees to consider seeking an amendment to the Rules, but the argument that common law duties of equity and fairness override the Rules is not one that can succeed. The Panel observes that the common law duty of fiduciary

obligation requires the trustees to comply with the Rules, not go behind them. The Rules were clear as to how the entitlement for members who ceased pensionable service were to be compensated. It is in Scheme Rule 16 (a)(i) or (ii) as the person involved may elect. The trustees could not pay more if they thought it fair to do so, even though it may be so, as Mr Oketch said. This limb of the charge is proved.

94. As to unisex factors, gender based mortality assumptions had always been used by the trustees and generally in Kenya *to this point in time*. There is no prohibition in the Rules on the use of unisex factors. There is no prohibition in the legislation on the use of unisex factors. Later unisex factors were to become compulsory in Kenya. This would not have been relevant to return of contributions. That the RBA Tribunal rejected the use of unisex factors recommended by Mr Oketch is not to the point. This limb of the charge is not proved. There was nothing to stop the trustees using unisex factors if they wished.

95. As to the 540,000 Kenyan shillings cap, the documentation provided showed that the calculations that Mr Oketch's Reports were to check were the total entitlement under the scheme. That was what he did. Whether it was then left as a right to a deferred pension or drawn in whole or in part as a commuted sum was not the point Mr Oketch was commissioned to deal with. The cap was not on the spread sheet supplied to him to check, and since the check was on the entitlement, it was not unreasonable of Mr Oketch to state the total entitlement (which was what the Authority and the RBA Tribunal were interested in) without referring to the cap. This limb of the charge is not proved.

1.1.8 failed to state that the Trustees properly based their withdrawal benefits upon the Fund's rules;

96. The Panel takes this as being an allegation relating to the Reports only. The Reports set out various matters in paragraphs 1-13. At paragraph 14 Mr Oketch set out *"General Observations".* This set out what he thought unfair. It did not mention that the calculations were in accordance with the Rules – and that the unfairness was precisely *because* the Rules were applied literally.

97. He does say at 41 *"The accumulated withdrawal calculations seem to have largely been calculated correctly save for a few members who had underestimates;"* but

then follows that with 42 *"However the basis of calculations is inequitable and these need to be revised in line with Column E of Appendix 2."*

98. The combination of the use of the word *"seems"* in paragraph 41 and the undermining of 41 by 42 means this allegation is proved. He does not say that the trustees *"properly based"* their calculations on the Rules and so this charge is proved.

1.1.9 made assertions in the Reports that the trustees and Sponsor to the Fund [Scheme] breached relevant Kenyan pensions law without making reference to the specific provisions which had been breached;

99. There is no specific provision mentioned in the report, and this allegation is proved.

100. When the panel considers seriousness, it will take note of Mr Oketch's submission that neither the Authority nor the RBA Tribunal made any point of this, and of Ms Horlick's submission that there are multiple audiences for the Reports (which were of Kenyan national interest), and the reader should not have to seek out the law for her or himself. It preferred Ms Horlick's submission.

1.1.10 your actions in paragraphs 1.1.4, 1.1.5, 1.1.6, 1.1.8 and/ or 1.1.9, were in breach of the principle of Integrity in the Actuaries' Code version 1;

101. This states: *"1.1 Members will show respect for others in the way they conduct themselves in their professional lives."*

102. This is made out in all of the headings charged, save 1.1.9. Not mentioning specific provisions of Kenyan law is not within this principle.

1.1.11 your actions in paragraphs 1.1.2, 1.1.3, 1.1.4, 1.1.5, 1.1.6, 1.1.7, 1.1.8, 1.1.9 and/ or 1.1.9 were in breach of the principle of Competence and Care in the Actuaries' Code version 1;

103. This states: *"Members will perform their professional duties competently and with care."* There are various sub clauses to this principle, including 2.2 a) *"Members will not act unless … they have an appropriate level of relevant knowledge and skill"* and

2.3 *"Members will consider whether advice from other professionals and other specialists is necessary to assure the relevance and quality of their work."*, and 2.4 *"Members will take care that the advice or services they deliver are appropriate to the instructions and needs of the client, including the legal and other rules which may govern the matter, having due regard to others,… or… persons whose interests are affected by the work of the member."*

104. The whole thrust of his contention is that common law and principles of equity conferred power on the trustees not contained within the Rules, and that there were fiduciary obligations upon the trustees compelling them to do other than the Rules dictated. These are legal matters.

105. Mr Oketch did not get the legal advice or identify the need for the advice that plainly he needed in order to justify the conclusions to which he came. Had he obtained that advice his Reports should have been very different. Key to the report he was asked to prepare was the legal framework in Kenya, and his conclusions were based on Mr Oketch's legal assertions. In the hearing Mr Oketch repeatedly made clear that he is not a lawyer, and does not have legal expertise.

106. Mr Oketch's Reports referred to a separate report to deal with the *"high level"* matters, but he did not provide one, instead interleaving the commentary with the report on the task he was to undertake, to the extent that the original task was not performed as specified. Not specifying which parts of Kenyan law are said to be infringed leaves the reader of the report with only the conclusion, without showing the basis for it. Even if based on common law, there would have to be authority cited for the opinions and conclusions expressed. The report is assertion only. All the other matters set out in this allegation are self evidently breaches of this principle. This is found proved in all particulars.

1.1.12 your actions in paragraphs 1.1.1, 1.1.3, 1.1.4, 1.1.5, 1.1.6, 1.1.8 and/or 1.1.9 were in breach of the principle of Communication in the Actuaries' Code version 1;

107. This states *"Members will ensure that their communication … is clear … and that their method of communication is appropriate, having regard to …the intended audience … the significance of the communication and its intended audience."*

108. At 5.2 *"Members will take such steps as are sufficient and available to them to ensure that any communication with which they are associated is accurate and not misleading, And contains insufficient information to enable its subject matter to be put in proper context."*

109. The Panel finds this principle breached as charged. The report was misleading. It did not clearly state that the benefits payable to the appellants had been properly calculated in accordance with the Rules. It focused on unfairness and on an unwarranted inference of a conspiracy to disadvantage those leaving, to the advantage of the Sponsor and of the managers whose pensions were to be enhanced.

1.2 did not demonstrate appropriate knowledge and/or experience in that you:

1.2.1 based your analysis in the Reports upon South African legislation and general legal principles, instead of Kenyan legislation and legal principles which applied;

110. The Panel noted the reference in Mr Oketch's Reports to a *"Scheme Actuary"* and his assumption (without checking) that this was the case in Kenya (paragraph 10.7 of his Reports), to the extensive references to South African law and practice in his lengthy response to the complaint made about him by a senior person within the Sponsor [B535 *et seq*], for example at B612 and 613 *"It is also common knowledge that in locations where legislation was limited or lacking completely,* [the Firm] *would, as a matter of proper GOVERNANCE require its own Actuaries from head office to use the proper South African governance practices as a standard".* There is, in this document frequent reference to South African practice. This allegation is found proved.

1.2.2 made an assertion in the Reports that the trustees could unilaterally have paid benefits outside the provision of the Fund's Rules when the trustees did not have discretion to do so;

111. The Rules contain no discretion (as Mr Oketch accepted) but his Reports stated that the trustees had a fiduciary duty to pay equitably. Paragraph 36 of the report

asserted that the trustees breached their fiduciary duty by paying to the leaving members only the amount due under the Rules. This is found proved.

1.2.3 implied in the Reports that the use of unisex commutation factors is legislatively mandated in Kenya when it is not;

112. He did so imply: but neither is it prohibited. This is proved but is not a matter of criticism.

1.2.4 applied a 3.75% increase in deferment to pensions in the reports which had no basis under the Fund Rules or legislation;

113. The Rules do not contain such a provision. The allegation is therefore proved. The way the Rules were drafted was to lay out a specific method of calculation of deferred pension (Rule 16 (a) (i), which does not include such an increase. Paragraph 39 of the report does so recommend. While it may not have been fair to have fixed levels of deferred pensions, that was what the Rules dictated. The unfairness could have been (but was not) dealt with in a *"high level"* separate report.

1.2.5 implied that members were not treated equitably on exit due to a deliberate intent by the trustees and the Sponsor to make a profit in the scheme;

114. This is necessarily implicit in the findings above, and is found proved.

1.2.6 made a statement in the Reports about inequitable treatment of the members of the Scheme without sufficient reference to the fact that the Trustees were constrained by the Fund Rules and/ or the relevant legislation;

115. The Reports do not deal with how the trustees might have been expected to deal with the problem that the Rules did not permit what Mr Oketch said that they were obliged by their fiduciary duty to do. This allegation is proved.

1.2.7 recomputed benefits in the Reports by valuing benefits using unisex factors which were not provided for in the Fund Rules;

116. The Rules are silent. This was a matter of choice by the trustees made at the time the payments were made. Mr Oketch said in his Reports that it was best practice, and the Panel understands that it was best practice at that time. However it was not a breach of duty by the trustees to use the permitted gender specific criteria when they did. Accordingly the report should not have suggested that any calculation ought to be reworked on unisex bases. There are some technical considerations in this allegation by reason of its drafting. They could have been cured by amendment. The Panel decided to find this proved: but as the trustees could have chosen to use unisex factors it is not a matter of criticism.

1.2.8 applied commutation factors and retirement benefits in the Reports in a sum exceeding Kshs 540,000, contrary to the Income Tax Act and the Income Tax (Retirement Benefit) Rules 1994.

117. Mr Oketch's task was essentially to check how big was the *"pot"* for each person leaving, and that was what he did. How it was to be paid was a matter subject to the Income Tax Act and was a subsequent, different, and person specific, matter dependent in part on elections that would made by each individual whose entitlement exceeded 540,000 Kenyan shillings. This is proved, but is not a matter of criticism.

1.2.9 your actions in paragraphs 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6, 1.2.7, and/ or 1.2.8 were in breach of the principle of Competence and Care in the Actuaries' Code version 1;

118. This has been set out above. All but 1.2.8 are a breach of this principle.

1.2.10 your actions in paragraphs 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.6, 1.2.7, and/ or 1.2.8 were in breach of the principle of Compliance in the Actuaries' Code version 1;

119. This has also been set out above. While the Panel has made negative observations about Mr Oketch's work, it has not found that there is any legal or regulatory or professional obligation breached in any of the matters set out in the specific allegations set out above. This is found not proved.

1.2.11 your actions in paragraphs 1.2.2, 1.2.3, 1.2.5, and/ or 1.2.6 were in breach of the principle of Communication in the Actuaries' Code version 1;

120. The communication was not appropriate because of the unjustified critique of the trustees. Nor was Mr Oketch clear about the basis for his assertions. This allegation is proved for all the allegations 1.2.2, 1.2.3 (as he implied that unisex was to be applied), 1.2.5, and 1.2.6.

1.3 between March 2013 and May 2016, you:

1.3.1 made comments to ASSA and/or the IFoA about the conduct of the trustees and employees of [the Firm] which were inappropriate and/or unsubstantiated;

121. At the start of the hearing Mr Oketch, while regretting some matters, denied the allegation. In his closing submissions he accepted that the whole of allegation 1.3 was made out.

122. This allegation is found proved. There is a litany of baseless allegations in the documentation. Mr Oketch's Reports contain implied assertions. In his subsequent communications both with ASSA and the IFoA Mr Oketch became more and more strident in his accusations, which became explicit allegations of collusion to defraud those who had left to enable the Scheme to advantage salaried staff who remained. One example is set out above, and there are very many more. Mr Oketch accepted that the emails were things he regretted. In his interview in February 2016 he resiled a little from this position. However as he still maintained the basis of his assertions of improper behaviour by the trustees as his defence, this is a confusing and not entirely logical position for him to try to take.

123. The Panel found the Actuary's observations well founded: *"… I am shocked at Mr Oketch's continued false, baseless and unsubstantiated allegations. I am most taken aback by the ferocity of his attacks on my professional integrity, professionalism and technical competence… As before he continues to use a sensationalist approach to his attacks."* (A166) and (A: 201) *"Mr Oketch has made weighty, defamatory and damaging allegations against me, the [Sponsor] and the Trustees in his reports, submissions to ASSA and in his latest opinion. He may be entitled to his opinion, but with the greatest respect to Mr Oketch, I do find his allegations which are based on mere innuendo, suspicion and without any backing facts to substantiate them, unbecoming to a member of the actuarial profession."*

124. The Panel considers the Actuary's comments entirely correct.

1.3.2 your actions at paragraph 1.3.1 above were in breach of the principles of integrity and/or communication in the Actuaries Code version 1 and/ or version 2;

125. Version 2 of the Code is the same as version 1 when dealing with respect: *"1.1 Members will show respect for others in the way they conduct themselves in their professional lives."* The communications of Mr Oketch were not respectful of others. Mr Oketch, at the end of the hearing accepted this was the case.

126. The 2013 Code as to Communication applies and contains at 5.3 *"… any communication with which they are associated is accurate and is not misleading, and contains sufficient information to enable its subject matter to be put in proper context."* The communications from Mr Oketch do not meet this part of the Code. This is found proved.

1.4 your actions, in all or any of the above, constituted misconduct in terms of Rule 1.6 of the Disciplinary Scheme of the Institute and Faculty of Actuaries (Effective 1 August 2010, as amended 18 October 2012).

127. In considering the charge of misconduct, the Panel took account of the definition of Misconduct, for the purposes of the Disciplinary Scheme, which is any conduct by a Member, whether committed in the United Kingdom or elsewhere, in the course of carrying out professional duties or otherwise, constituting failure by that Member to comply with the standards of behaviour, integrity, competence or professional judgement which other Members or the public might reasonably expect of a Member having regard to the Bye-laws of the Institute and Faculty of Actuaries and/or to any code, standards, advice, guidance, memorandum or statement on professional conduct, practice or duties which may be given and published by the Institute and Faculty of Actuaries…, and to all other relevant circumstances.

128. For breaches of the Code to be misconduct the matters found proved must be a serious falling short. There needs to be blameworthy conduct. The definition of misconduct is in Disciplinary Rules at 1.6. The Panel finds these matters found

proved collectively to be misconduct. Many of the allegations would, on their own, be professional misconduct (such as 1.1.5) but there is nothing to be gained by setting them out one by one, as overall the matters found proved are plainly misconduct.

129. In summary the Panel found:

1.1.1-1.1.9	all proved. 1.1.7 was found proved solely concerning the allegation relating to 3.75%, and not in relation to the unisex factors or the 540,000 Kenyan shillings.
1.1.10	proved save in relation to 1.1.9.
1.1.11	proved
1.1.12	proved
1.2.1	proved
1.2.2	proved
1.2.3	proved, but as the use of unisex factors is not prohibited this is not a matter of criticism
1.2.4	proved
1.2.5	proved
1.2.6	proved
1.2.7	proved, but it is not a matter of criticism
1.2.8	proved, but it is not a matter of criticism
1.2.9	proved save for 1.2.3, 1.2.7 and 1.2.8
1.2.10	not proved
1.2.11	proved
1.3.1	proved on the facts and by admission
1.3.2	proved on the facts and by admission
1.4	proved – misconduct.

Sanction – submissions

Submissions by Counsel for the IFoA

130. Ms Horlick referred to the IFoA's Indicative Sanctions Guidance. Sanction is a matter for the Panel. There is no burden or standard of proof. The aim of sanction is not to be punitive. It is to maintain the reputation of the profession and declare and uphold professional standards. The Panel should start at the least restrictive sanction. In addressing seriousness there is a table set out at page 9: but the Guidance is only

guidance and is not mandatory. Here there were aggravating factors to be drawn to the attention of the Panel. The first category was the circumstances of the report. This was a matter of gravity, in litigation of wide impact. This imposed a great responsibility on the actuary who was appointed (Mr Oketch), and required him to base his opinion on ascertained facts. Most of the matters alleged had been found proved, both as to competence and unprofessional allegations.

131. There were three reports October 2012 to March 2013, and ample opportunity for Mr Oketch to correct matters, which opportunities he declined to take. This was a further aggravation.

132. Interlinked was the behaviour and communication with, and about, fellow professionals. This persisted over some years. He had many opportunities to draw back, but instead of doing so his allegations and correspondence became increasingly more strident. Even after the February 2016 interview with the IFoA investigating actuary, after which he might have thought to reflect, but he then went on to accuse others of serious criminal offences.

133. Throughout he had displayed a worrying lack of insight. At the beginning there was no real admission and the cross examination he undertook of the witnesses of the IFoA had not shown any insight. No explanation or apology had been extended to the Actuary, even though Mr Oketch had admitted in his closing submissions that his allegations had been inappropriate and unsubstantiated.

134. Mr Oketch had brought the profession into disrepute and his actions had a profound effect on others, especially the Actuary. Rhetorically it had to be asked – was this a person who should continue in this profession? The IFoA should uphold proper standards of behaviour. Membership was voluntary, but there is a Code of conduct. There are real benefits to membership. Mr Oketch had signed the reports as a member of the IFoA. The documented value of membership was set out at page 147. It is a great privilege to belong to a body – now global – which endorsed and upheld high standards. Respected and respectable is what membership of IFoA required and bestowed and that imposed obligations, which Mr Oketch had signally failed to meet.

135. In Africa there was a particular context. Local associations were looking to develop the profession in Africa, and IFoA assisted such associations. This year the IFoA's

first Africa Roadshow was held in Kenya, Mauritius and Nigeria. The maintenance of high standards was essential to the health of the profession.

136. There were many aggravating factors and no mitigation. In considering sanction the Panel should consider that none of the lesser sanctions were applicable. Suspension did not deal adequately with the case where there was such grave misconduct. The public interest and the maintenance of the reputation of profession were at the forefront of this case. As to expulsion, where there is a case of such gravity the submission was that the reputation of profession or public interest required it. This was submitted to be such a case. The retention of this member's name on the register would have an effect on the reputation of the profession.

Mr Oketch's submissions on sanction

137. Mr Oketch addressed the Panel in mitigation. First he accepted that he had failed the test for integrity in the nature of his communications. He accepted that he should not have replied to the trustees in the way that he did, and nor should he have sent the emails, despite the provocation of allegations others had made against him. He accepted that he had failed the integrity test.

138. Mr Oketch asked the Panel when considering sanction to consider the effect of allegations made against him before the complaint to the IFoA was made. He had tried to ask the IFoA to investigate those allegations against him, but it was he who had been investigated.

139. When he submitted his first Report there was a deadline set by the RBA Tribunal. For the second the Authority had specifically asked questions leading to the addition of appendices.

140. He had been asked to make comparisons with the first actuarial report which had led to the claim being made by the appellants to the Authority and to the appeal to the RBA Tribunal, and so the Reports served that purpose as well. After full discussions the Authority asked for a full list and that went into the final edition of the Reports. There were a lot of inconsistencies in the first actuary's report. There were difficult questions asked of him by the Authority.

141. He had been to Nairobi several times. When he attempted to talk to colleagues the reception he had received had been so cold that there was not even a handshake. But he had no problem apologising to the Actuary, even though the Actuary would not shake his (Mr Oketch's) hand.

142. The Panel should note the IFoA's comment that he had not criticised the Actuary's technical report. He did not want to criticise a fellow professional. Because he was defending himself he had to come out and say so, but in everyday work he did not criticise others, and he had not done so in this hearing.

143. When preparing the Report what he thought would happen was that one opinion would be considered against the other, and the RBA Tribunal would decide between them. He had not anticipated this series of events, and if he could roll back time he would not have accepted the appointment had he known that it would lead to criticisms of him. What was intended was an independent opinion, there being two competing opinions before the RBA Tribunal.

144. He had not been provided with all the necessary information. He was called in by the Authority and given a Service Level Agreement, and he had tried to report in line with it.

145. He stressed that for the last 5 years it had not been easy for him every day, and he had learned deeply, and learned about judgment and communication and not just to actuaries but to others. In normal mail he used to use capital letters as a matter of course, just to draw attention to things. He now understood that capitals meant loud, so he had learned lessons from this case.

146. The exercise he had been asked to undertake was to advise the regulator – which was interested in best practice – and what was before him did not show that. So it reached a point when he felt he had to say so. He had told the regulator that there were issues, and if they believed equity was not an issue then there was no redress. However if they were to be addressed, they must be addressed. The regulator had asked his view and he had said that there needed to be redress. That was why he said there should be redress. Whichever way the regulator went it was ok by him. They wanted his view and he put it to them, as he was asked to do.

147. There had been some very tough lessons for him with this process. It was up to the Panel to reach its decision bearing in mind the situation he was in at the time. He was deeply remorseful for the personal comments he had made.

Decision on Sanction

148. The Panel accepted the advice of the legal adviser, and it applied its own judgment, there being no burden or standard of proof. Sanctions have a punitive effect but their purpose is to declare, maintain and uphold professional standards and the reputation of the profession and of the IFoA as its regulator.

149. Ms Horlick had set out the aggravating factors accurately. Most importantly this was a course of behaviour extending over several years, involving repeatedly implying, and then asserting, breach of fiduciary duty by trustees and a premeditated plan to deprive a large number of people of substantial sums of money to generate a surplus in the Fund in order to advantage the Sponsor, with no evidence to support such an assertion, other than a time line. Nor did he seek the opinion of anyone before making this allegation. The whole matter was in the context of a case of national importance in Kenya, and involved the reputation of the Actuary being traduced. Mr Oketch displayed no insight through the more than five years since his first report in October 2012. While at the start of the hearing he accepted (for the first time) that the two emails of 12 and 13 December 2012 should not have been sent and that he regretted them, he had offered the Actuary no apology, and even in closing submissions while saying that he *"had no problem"* with apologising to the Actuary he did not do so.

150. Even now, he had not said that he should have reported that the calculations were all in line with the Rules, but the effect of the application of the 1985 Rules to the exit of so many people was to leave a great surplus behind. This was to their disadvantage and to the advantage some of those who remained and got better pensions (because of the advantage of the Sponsor which was relieved of the obligation to contribute an equivalent amount to such surplus). The point of general regulatory supervision he should have been raising was that he felt this to be an institutional unfairness, and the Authority might like to explore how this unfairness could be prevented from reoccurring, and whether those who had lost out might be recompensed. Mr Oketch has no real insight into this matter.

151. The Panel was unable to determine any mitigating factors. If the timescale for the Report was too short the commission should not have been accepted. His mitigation was in effect regret at the position he found himself in. Mr Oketch did not say (but it is the case and the Panel takes note of it) that he was motivated by a sense that a great injustice had been done – that those leaving the Scheme had been deprived of the surplus arising from their service and the Sponsor had been the beneficiary. The legal expert agreed that it was an unfair outcome. None of that excuses what Mr Oketch did, or the way he did it.

152. The Panel followed the course set out in its Indicative Sanctions Guidance. It commenced at the lowest end of sanctions, and only after considering that sanction to be inappropriate did it move on to the next most serious sanction. The Panel considered that were no conditions that could be devised to deal with this matter.

153. The Panel bore in mind the well known passage from Bolton v Law Society [1993] EWCA Civ 32, in paragraph 16, as applicable to actuaries as it is to solicitors:

*"**The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."***

154. Having completed this process the Panel determined that the only appropriate and proportionate sanction was expulsion, no other sanction reflecting the damage to the reputation of the profession (and to another of its members) caused by the actions of Mr Oketch. This is the appropriate sanction because the Panel determined that the Misconduct found proved was of such gravity that the reputation of the profession and the public interest required that the Member should no longer able to practise or claim membership of the profession.

155. The Panel decided that Mr Oketch may not apply for readmission for a period of four years.

156. If Mr Oketch does so apply, those considering the application would be assisted by evidence of insight of Mr Oketch into the matters found proved.

Application for costs

157. The IFoA applied for costs in the sum of £146,059.74. Mr Oketch did not dispute the work done or the cost of it. The Panel bore in mind the IFoA's Guidance as to costs and noted that the case was brought primarily to protect the reputation of the profession. The costs fall on the profession if not on Mr Oketch. Mr Oketch is unlikely to be able to earn in future what he now earns. The economics of life in South Africa are otherwise than in the UK. Mr Oketch has provided some limited information about his finances. While the principle is that a costs application should succeed where the charge is proved, the reality is that Mr Oketch's future may well be uncertain. Accordingly even though Mr Oketch has brought this case upon himself, and his conduct of it has caused the costs to be so high, the Panel does not feel that it would be just to make an award of costs in the amount sought. To award a lesser amount, the Panel would have to make so many assumptions about matters about which it has insufficient or no information that it considers the possibility of injustice to be so great that it does not feel able to make an order for costs in this particular case. The cost of the case is, in this instance, the price for the profession for the maintenance of its reputation.

Publication

158. The Panel orders publication in accordance with its Guidance of April 2018. The determination will be published and remain on the IFoA's website for a period of five years from the date of publication. A brief summary will be published in the next available edition of *The Actuary* magazine.

Right to appeal

159. The Respondent has 28 days following receipt of this written determination in which to appeal the Panel's decision.

Conclusion

160. That concludes this determination.

Date of Publication: 15 August 2018