

<p>The Pensions Regulator</p>	<p><b>Compulsory Review FINAL DETERMINATION NOTICE</b> <b>under Section 99(4) of the Pensions Act 2004</b></p> <p><b>The Optimum Retirement Benefit Plan ("the Scheme")</b></p>	<p>The Pensions Regulator case ref:</p> <p><b>C104020917</b></p>
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## A. Introduction

1. By a Request dated 9 February 2018 the Case Team of the Pensions Regulator ("**the Regulator**") asked the Determinations Panel ("**the Panel**") to make an order under section 7 of the Pensions Act 1995 ("**PA 95**") to appoint an independent trustee to the Scheme ("**the Request**"). The Request also sought ancillary orders under sections 8 and 9 of the PA 95, including that the trustee so appointed should exercise powers to the exclusion of the existing trustees.
2. The Request was made under the "Special Procedure" provided for by section 98 of the Pensions Act 2004 ("**PA 04**").
3. The Request asked the Panel to make an order under Section 7(3)(a), 7(3)(c) and/or 7(3)(d) to appoint an independent trustee if it was satisfied that it was reasonable to do so in order:
  - i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme pursuant to Section 7(3)(a) (the "**Knowledge Ground**");
  - ii. to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c) (the "**Assets Ground**"); and/or
  - iii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d) (the "**Members' Interest Ground**")

(together, the "**Grounds**").
4. The Request sought consequential orders that:
  - i. the powers or duties of any trustee so appointed be to the exclusion of the current trustees,
  - ii. for any fees and expenses of a trustee so appointed to be paid from the Scheme's resources under section 8(1) PA 95,
  - iii. for such amount to be treated as a debt due from the employer to the Scheme under section 8(2) PA 95, and
  - iv. for a vesting order under section 9 PA 95

(together, the "**Consequential Orders**").

5. The Request also asked the Panel to treat this matter as one where Section 97 of PA 04 applied and thus the use of the Special Procedure was appropriate.

## **B. The Initial Determination and the Compulsory Review**

6. The Panel met on 13 February 2018 to consider the Request. The Panel determined that the use of the Special Procedure was appropriate and that an independent trustee with exclusive powers should be appointed and certain related orders made (“**the Determination**”). A Determination Notice was given on 21 February 2018 giving the Panel’s reasons for the determination (“**the DN**”).
7. The Panel determined that all of the Grounds were made out, in summary, for the following reasons:
  - i. The Trustees either lacked or failed to exercise the necessary knowledge and skill having regard to (a) breaches of trustees’ common law and statutory investments duties, for example, by making high-risk and illiquid investments; (b) poor record keeping and documentation; and (c) the evidence of a lack of understanding of the operation of occupational pension schemes.
  - ii. The Scheme’s assets were at risk given (a) the breaches of investment duties in investing Scheme assets; (b) the apparent receipt by Mr Craig, one of the Trustees, of substantial personal payments of around £500,000 from Scheme assets; and (c) apparent misuse or misappropriation of assets in making certain payments including loans to entities that made loans to members.
  - iii. Certain individuals involved in establishing and operating the Scheme (or related other schemes) have been convicted of dishonesty offences, and Mr Craig, one of the Trustees, is under investigation for conspiracy to defraud as part of an investigation into pension fraud.
8. The Panel considered the Special Procedure was appropriate, in summary, for the following reasons:
  - i. The receipt by Mr Craig of substantial personal payments means that if he were provided with a warning notice there would be an immediate risk to Scheme assets and members’ interests.
  - ii. The ongoing substantial transfers of Scheme assets in breach of duty evidence an immediate and continuing risk to the security of Scheme funds justifying the special procedure.
  - iii. Certain investments were apparently due to be paid into the Scheme and the Case Team was receiving reports of members of other schemes wishing to transfer, indicating an immediate risk to assets.
9. Pursuant to section 99(1) of PA 04, in any case where the Special Procedure applies the Panel must review the determination to exercise the regulatory function. In advance of that review, those who appear to the Panel to be directly affected by the exercise of the regulatory function in question must have an opportunity to make representations in relation to the determination (section 98(2)(c) of PA 04).
10. The following are the parties identified by the Regulator that the Panel agreed are directly affected by the regulatory action sought in the Request.

- i. Mr Gordon Craig, a trustee of the Scheme immediately before 13 February 2018;
  - ii. Mr Martin Kelly, who held himself out as a trustee of the Scheme from 1 January 2017, who claims to have retired on 30 August 2017;
  - iii. Mr Gerard Reilly, who held himself out as a trustee of the Scheme from 1 January 2017, who claims to have retired on 15 November 2017 (together, with Messrs Craig and Kelly the “**Trustees**”);
  - iv. Optimum Financial Solutions Ltd (the “**Employer**”), the Scheme Employer; and
  - v. Dalriada Trustees Limited (the “**Proposed Trustee**”, “**Dalriada**”) as proposed independent trustee.
11. Messrs Kelly and Reilly, by their representations, stated they had resigned by emails purportedly to Mr Ivor Jenkins at the Employer on 30 August 2017 and 15 November 2017 respectively. Dalriada is seeking to clarify whether the resignations were effective but has not yet been able to provide a final position. The Case Team query whether these purported resignations were effective having regard to clause 25 of the Scheme Deed providing for notice in writing and the absence of clear evidence that the email was sent to or received by the Employer (there being no evidence of the Employer responding or, more broadly, of the email address being used being an email address used by the Employer). The Panel accepted that it was not clear whether any resignation of Messrs Kelly and Reilly was effective or not. The Panel determined that Mr Kelly and Mr Reilly should be Directly Affected Parties because of the rights such status gives them, and the Panel’s determination to that effect is not a determination that the (purported) resignations were effective or ineffective.
12. The Panel received the following written representations (the “**Representations**”):
- i. Short representations from Mr Kelly by email of 22 February 2018.
  - ii. Substantial representations from Mr Reilly by email of 5 March 2018, comprising (a) an email outline of his position, (b) an apparent report into Scheme affairs and assets, and (c) substantial documentation in support of the report.
  - iii. Representations from Dalriada dated 7 March 2018 containing the results of their investigations into the Scheme since appointment including records of meetings with various individuals involved with the Scheme.
  - iv. Representations from the Regulator’s Case Team dated 27 March 2018, commenting on the other representations, including certain evidence, and largely seeking the confirmation of the Order based on the original Request and the further information contained in Dalriada’s representations.
13. Mr Craig did not make any representations. However, the Regulator was advised on 12 March 2018 that correspondence to Mr Craig’s business address was being forwarded to his home but with delays, which Mr Craig confirmed the following day. The Panel granted Mr Craig an extension to 20 March 2018 to make any representations (and informed him of this by email). Notwithstanding this extension, Mr Craig made no representations, whether by 20 March 2018 or at all.

14. The Panel then met to conduct the review on 5 April 2018. No oral hearing was requested by the Parties, or held. In the course of the review, the Panel carefully considered all the Representations provided to it. In considering the Representations, the Panel noted three particular matters which informed its approach to the compulsory review:
- i. None of the information provided to the Panel in the Representations challenged or contradicted the main findings made by the Panel in the DN or the factual position as presented in the Request. Rather, there was more information evidencing more conduct of the same fundamental nature and certain clarifications on points of detail.
  - ii. None of the Trustees challenged the decision to appoint Dalriada as an independent trustee. Messrs Kelly and Reilly stated that they had resigned prior to the DN and neither objected to the appointment of Dalriada (with Mr Reilly positively welcoming Dalriada's appointment). Dalriada's representations include a meeting note recording Mr Craig's "*happiness to be rid of the [S]cheme*".
  - iii. The evidence on the Scheme is in places unclear and incomplete. Dalriada's investigation is ongoing and the pre-existing Scheme records are such that this determination is made on the position as currently ascertained.
15. In those circumstances, the Panel considered the best available evidence before it at this stage, but was conscious that this was not a complete or final picture. The absence of any dispute either of the material facts or as to the appropriate outcome further meant it was not necessary for the Panel, in this final notice, to recite underlying evidence in the detail required to explain making findings of fact contrary to one party's case. Further, since there are no rival contentions on the law of the Panel's exercise of discretion, it is not necessary for the Panel to set out any such submissions and instead the Panel deals with the Representations throughout its sections on facts and exercise of discretion below.
16. Pursuant to section 99(3) of PA 04, the Panel's powers on a compulsory review include power to:
- "(a) confirm, vary or revoke the determination,*
- (b) confirm, vary or revoke any order, notice or direction made, issued or given as a result of the determination,*
- (c) substitute a different determination, order, notice or direction,*
- (d) deal with the matters arising on the review as if they had arisen on the original determination, and*
- (e) make savings and transitional provision."*
17. When determining whether to exercise a regulatory function on a review under section 99 of PA 04, the Panel is to have regard to the interests of directly affected parties and of the generality of members of the relevant schemes (by section 100 of PA 04). The Panel had regard to those matters as well as the main objectives of the Regulator in exercising its functions, as set out in section 5 of PA 04. These include protecting the benefits under occupational pension schemes of, or in respect of, members of those schemes and promoting, and improving the understanding of, the good administration of work-based pension schemes.

18. As a result of its review, the Panel decided to confirm the decision to appoint Dalriada as an independent trustee. The remainder of this Final Notice sets out:
  - i. the factual position of the Scheme, as it appears to the Panel having regard to the Representations as well as the material in the request, including material changes in the information before the Panel as a result of the Representations;
  - ii. the applicable law; and
  - iii. the reasons for confirming the determination.

### **C. The Scheme and Relevant Facts**

19. The Panel finds the following facts from the information stated in the Request and the evidence supporting it, and the Representations (with supporting evidence), all of which has being provided to the Directly Affected Parties in this matter.
20. Following Dalriada's investigation, it appears the following is the position of the Scheme. It is a UK defined contribution occupational pension scheme with a current membership of 288. Its fund size is circa £13.4 million, and the Employer is the sole sponsoring employer. This is a sharp increase from the figures of 188 and circa £5 million included in the request taken from the Scheme's annual report for the period ended 30 September 2015. Two different versions of that report exist (albeit with the same figures), the reporting period of around three months is unusually short, the substance of the report is not as full as the Panel would expect, and in any event the information provided is well over two years old. The Panel noted the size of the Scheme was larger than included in documentation provided to the Regulator, and further noted that Dalriada's investigation was not complete so these figures were only the best available at this time.
21. The Scheme was, it appears, founded by a deed of 30 June 2015 (the "**Founder Deed**"). As set out in more detail below, the Scheme in due course received the assets of two other schemes by a merger deed dated 30 May 2016 (the "**Merger Deed**"). Those other schemes (the "**Previous Schemes**") were the "Ocean Equities Financial Occupational Pension Fund" (the "**Ocean Fund**") and the "Clear Financial Solutions Occupational Pension Fund" (the "**Clear Fund**"). Dalriada's representations also refer to certain deeds of amendments.
22. The Request stated, and the Panel accepted, that the Scheme is an occupational pension scheme within the meaning of section 1 of the Pensions Schemes Act 1993. The Scheme was founded by the Employer who is an employer of persons and the Scheme, by clause 7 is open to any member. The Scheme is unusual in that the Founder Deed refers to the Employer as an "Administrator" and not an "employer". However, the Panel considered that the Scheme was established for the purpose of providing benefits to or in respect of people with service in employments of a description and also other people:
  - i. The Merger Deed expressly refers to the Employer as "principal employer of the Scheme" consistent only with an occupational pension scheme;
  - ii. The Merger Deed described the Employer as the "Employer".
  - iii. Powers in the Founder Deed given to the "Administrator" are those typically granted to a principal employer, for example the amendment power at clause 8.1.

- iv. The Scheme's application form states the Scheme is established for the sole purpose of providing members with benefits at their chosen retirement age.
23. Further, the Founder Deed referred to the possibility of contributions by employers (clause 4.1.2) and to certain provisions of PA 95 that apply only to occupational pension schemes (clauses 8.2, 22.1 and 33.6). In those circumstances, construing the Founder Deed objectively, the Scheme was intended to be an occupational pension scheme and so intended for the purpose of providing benefits as described above.
  24. The Scheme also has a statement of investment principles (the "SIP") which provides for three different investment profiles, with a default "balanced" investment profile. The SIP states that the Trustee (sic) will seek advice from its investment consultant on the investments and states *inter alia* that the investments would be subject to an "evidence-based review at least every year". There is no evidence of either advice from an investment consultant or any evidence-based review.
  25. There is a separate deed purporting to found an auto-enrolment scheme called the "Optimum Auto-Enrolment Pension Scheme" dated 30 May 2015. However, the Request did not seek any action in respect of this Scheme and so the Panel did not consider it further in the original DN. Further information from Dalriada indicates that 18 potential companies may have signed up and contributed to the Scheme (rather than any separate auto-enrolment scheme) on the basis it is an auto-enrolment scheme, and that three members may be doing the same. Insofar as Dalriada's representations relate to the Scheme, the governance issues arising from this auto-enrolment issue form part of the matters taken into account by the Panel, but the Panel does not (and has not been asked to) take any steps in relation to any purported scheme under the separate deed.
  26. The Trustees' backgrounds are as follows:
    - i. Mr Craig was appointed as a Trustee of the Scheme from its inception. He is an insolvency practitioner in a firm known as xxxxxxxx xxxxxxxxx xxx ("xxxxxxx"); and
    - ii. Both Mr Kelly and Mr Reilly were stated to have been appointed as Trustees from 1 January 2017. Dalriada's representations confirm there is a signed deed of appointment of that date in the Scheme files.

### **The Former Schemes and the Merger Deed**

27. In order to understand the position of the Scheme and particularly of Mr Craig, the Panel needed to consider briefly the Previous Schemes.
28. In respect of the Ocean Fund:
  - i. The principal employer was Ocean Equities Financial Ltd ("Ocean"), established on 6 February 2013 as "an investment vehicle specialising in pensions".
  - ii. Ocean established the Ocean Fund (which was not registered with the Regulator). The original trustee of the Ocean Fund is unclear, but from the evidence available it appears to be either a Mr Winstanley (sole director of Ocean) or a Mr Jones.
  - iii. In June 2013, Ocean's bank account was frozen.

- iv. Mr Craig was appointed as administrator to Ocean on 4 July 2013.
  - v. Funds of £396,913.32 were released to Mr Craig on 30 September 2013.
  - vi. Mr Craig has stated that he invested £350,000 in “xxxx xxxx xxxxxxxxxxxx” on the instruction of the “Trustee”, it being unclear whether that was Mr Winstanley or Mr Jones.
  - vii. Dalriada understood the size of the investment in xxxx xxxx xxxxxx to be in total some £850,000.
29. In respect of the Clear Fund:
- i. Emfire Consulting Limited (“Emfire”) was a company established on 6 June 2013 as an “investment vehicle specialising in pensions”. xx xxxxxx xxxxxx was sole director of Emfire.
  - ii. Emfire established the Clear Fund, which appears to have been registered with the Regulator (albeit with errors as to name and date), stating Emfire was trustee of the Clear Fund.
  - iii. On 20 December 2013, Mr Craig was appointed as administrator to Emfire.
30. By the Merger Deed (of 30 May 2016) the Ocean Fund and Clear Fund were transferred into the Scheme and wound up.

### **Companies Investigation, Criminal Proceedings and the Regulator’s Involvement**

31. The Regulator first became aware of concerns regarding the Scheme on 18 May 2016, when documents were passed to the Regulator in connection with a police investigation. The Regulator offered support to that investigation.
32. The Regulator was approached by a different police force on 9 June 2016 in relation to a bail variation application to be heard at Woolwich Crown Court on 13 June 2016. The hearing concerned an application by a Mr Martin Dowd for the lifting of his bail conditions and the return of his passport, to enable him to carry out his employment as business development manager for the Scheme. In connection with this application, Mr Craig provided a letter of support for Mr Dowd dated 7 June 2016 stating that Mr Craig had purchased 60% of the share capital of Optimum.
33. Mr Craig stated in this letter that, “*Mr Dowd’s role is to visit and cultivate strong relationships with introducing Financial Advisors and as such he is required to travel abroad as by [sic:my] business interests are mainly in Spain and Mauritius*”. He continued:

*“Mr Dowd is a valuable employee who has shown great work ethic and is an asset to my company and as such I do offer to the Court a pledge of sureties in the sum of £125,000.00 in order to offer a guarantee to the court of Mr Dowd’s safe return to the UK after his international travel via work and to appear at court.*

*I, Gordon Craig will put up and or provide proof of my shares in xxxxxx Group shareholder funds which hold in excess of £500,000.00 as way of guarantee for Martin Dowd.”*

34. Mr Dowd's application for variation of bail was refused. The trial concluded in August 2017, when Mr Dowd was convicted for money laundering offences. Mr Winstanley and Mr Jones were also convicted. As stated above, both Mr Winstanley and Mr Jones were associated with Ocean and the Ocean Fund. Mr Craig appeared as a witness. Mr Dowd was sentenced to five years and three months' imprisonment, Mr Winstanley to three years' imprisonment, and Mr Jones given a two-year suspended sentence.
35. The Employer has been investigated by the Insolvency Service who has issued a petition to wind up the Employer. The Request referred to and relied upon the witness statement of xxxxx xxxxx filed in support of that petition.
36. In the course of the Insolvency Service investigation, Mr Kelly stated that he and Mr Reilly had been appointed only because it was considered the Scheme needed three trustees as a result of new regulatory requirements. There is no evidence of either Mr Kelly or Mr Reilly being involved in any decisions taken by the Trustees in the course of 2017, whether before or after their apparent retirement.

### **Relevant Facts Relating to the Operation of the Scheme**

37. Dalriada's investigations as summarised in its representations has revealed a different and worse position to the Scheme investments than was the case in the Request. As to the Scheme's investments dealt with in the DN, as updated by the new information made available in the Representations, the Panel found as follows:
  - i. The investment in xxxx xxxx xxxxxx xxxxxxxx has been presented by Mr Craig and in the Scheme documentation as a five-year bond which the Scheme is due to receive (as successor to the Ocean Fund) on its maturity. However, the position according to Dalriada, which the Panel accepts as the best evidence in the absence of any representations to the contrary, is that there had been a settlement between xxxx xxxx xxxxxx and Mr Craig some three years previously (so in around early 2015). This resulted in a transfer of xxxx xxxx xxxxxx PPI book to the Scheme in settlement of its liability to the Scheme. Any investment whether in xxxx xxxx xxxxxx or directly in the PPI book is high-risk, illiquid and unregulated.
  - ii. Substantial investments have been made into xxxxxxxx xxxxxxxx xxxxxxxx ("xxxxxxx") and xxxxx xxxxxxxx xxxxxxxx ("xxxxx"). An offer document for xxxxxxxx states that the investment is high risk, with limited or no liquidity for at least ten years, and with the risk of loss of the entire investment. The Panel found that any investment in xxxxx has those same risks because (i) the names are similar (using plant names); (ii) the companies had common directors; and (iii) there is a specimen offer document warning of the same risks.
  - iii. At least £240,000 was invested in xxxxxxxx in November 2015. Mr Craig approved that investment at the request of Mr Dowd, and the payment was made to a Czech bank account. The current register of shareholders for xxxxxxxx does not include the Scheme, although there is evidence of a share certificate that the Scheme holds 240,000 shares.
  - iv. By contrast, the Scheme is listed as a holder of over 1 million shares in xxxxx with a par value of £1, from which the Panel found there had been a substantial investment in xxxxx.

- v. There is no evidence before the Panel of any due diligence carried out by Mr Craig or financial advice received in making the investments into xxxxxxx and xxxxx, and he has expressly stated (by letter of 18 April 2017 in the course of the Insolvency Service Investigation) that he acted on the instructions passed to him by the Employer.
  - vi. Both companies are dormant and there is no detail as to what the purported intangible assets held by the companies are. In those circumstances, this is a high risk unregulated investment in shares in a dormant company.
  - vii. The Scheme annual report indicated that £150,000 of Scheme assets have been invested in the Employer, but the nature of the investment is unclear. By contrast, Dalriada's reconciliation of the Scheme bank account shows that some £1.421 million had been paid to the sponsoring Employer.
38. The Representations (particularly of Dalriada) referred to various other purported investments of the Scheme which show a pattern of unregulated investment in shares in private companies, that is, investments not admitted to trading on regulated markets. Further, several of the companies invested in have been subject to a winding up process:
- i. There was apparently a share purchase in Malta Boxing Commission Limited valued at £200,000. This was a UK based company with the same registered address as that of the Employer. The company was dissolved on 17 October 2017. Accordingly, it was an unregulated investment in shares in a limited company. Further, Mr Reilly's representations emphasise the absence of any share certificates in relation to this investment.
  - ii. There have been numerous purchases in "xxxxxxxx xxxxxxx xxxxxxxx xxx" ("xxx"), a Madagascan company apparently specialising in the exploration and development of precious metals and gemstones. The company was at some point AIM-quoted, but a notice of cancellation of admission to trading on AIM was issued on 17 February 2017 and the company is currently in liquidation following a Court-made winding-up order. The only potential value in these investments is any recovery in liquidation.
  - iii. There have been numerous investments in xxxxxxxxxx xxxxx xxxxxxxxxxxxxx xxx, apparently a property investment and development company. This is an unregulated investment, but is listed as active on Companies House and its website.
  - iv. There may be Scheme investments in xxxxx (xx) xxxxxxx ("xxxxx") through shareholdings of "Ocean Equities Financial Limited", which it is inferred is the Ocean Fund. xxxxx is apparently a company established in summary to operate an olive oil refinery.
  - v. There have been payments in the sum of around £470,000 to xxxxxxxx xxxxxx xxxxxxxx xxxxxxx, with an address at the same business park as the Employer. As at 27 February 2018, there was a Gazette notice for compulsory strike-off of the company. Dalriada has stated that it has obtained "xxxxxxxx xxxxxxxxxxxx vouchers" showing the above payments. Any investment would be an unregulated investment.
  - vi. Mr Craig by his email of 5 October 2016 referred to a loan of £25,000 to Nail Tech Limited, a UK based company over two years at a rate of 10%

per annum. There is no loan agreement or correspondence, and the company was dissolved on 27 February 2018.

- vii. There are apparently 4,484 1p shares held in "xxxxxxxx xxxx xxxxxxx". Any such investment as a scheme investment would be an unregulated investment in shares.
  - viii. A corporate account has apparently been opened with xxxxxx xxxxxxx xxxxxxx, but there is no evidence of what if any investments have been made.
39. Dalriada's representations, which the Case Team effectively relied upon, are that the investments discovered to date are collectively non-compliant with the regulatory requirements for occupational pension scheme investments.
40. As to Scheme bank accounts and payments out of the Scheme:
- i. Until late 2016, the Scheme did not have a separate bank account and Mr Craig used an estates account he operated as an insolvency practitioner for the Scheme, such that the same bank account was used for Scheme payments and other payments relating to Mr Craig's insolvency practitioner business. This risked making Scheme payments difficult to identify and understand by anyone other than Mr Craig. This has proven to be the case, as Dalriada has not been able to obtain a full reconciliation from Mr Craig.
  - ii. There are multiple payments to Mr Ivor Jenkins, the owner of and a director of Optimum, the Employer of the Scheme, including a payment of £50,000 on 13 November 2015. Other payments were made on 19 February and 24 March 2016.
  - iii. As can be seen from the Scheme bank accounts, there have been repeated payments to Mr Craig himself totalling nearly £500,000 in little over a year. Most of these payments are in the range of £20-30,000. These are unusually high payments for trusteeship of a Scheme of this size and there is no apparent justification for them.
  - iv. There have also been payments to xxxxxx, Mr Craig's firm (for example on 22 January and 9 March 2016) and to Mr Dowd, who worked as "business manager" for Optimum.
  - v. To the extent the various payments to companies identified by Dalriada are not in fact investments but payments, those payments have no explanation or legal basis.
41. On the current evidence, there is a structure of investments in certain companies: Shawhill Securities Limited, Shawhill Limited, and Shawhill Securities Seychelles Limited ("**SSL**" "**SL**" "**SSSL**" respectively, and the "**Shawhill Companies**" collectively) who also make loans to members, the members then instructing the loans to be repaid from their Scheme assets at age 65. Dalriada's representations state this evidences pensions liberation, with the outcome in substance that members receive the benefit of their pension funds before they are entitled to. The Panel finds the facts of these loans to have occurred in the manner set out by Dalriada, subject to the caveats that (a) Dalriada's own investigations are incomplete and (b) neither the members involved nor any of the Shawhill Companies have had the opportunity to make representations or put in evidence. In those circumstances, the Panel considered there to be current evidence of pensions liberation. The use of the term "pensions liberation" in this determination notice is for the purposes of

determining whether to appoint an independent trustee and make consequential orders. It does not and is not intended to amount to a final determination of fact or law about whether the payments are pensions liberation, in the sense of unauthorised payments for the purposes of the Finance Act 2004, such matters not being for the Panel on this Request.

42. As a matter of fact, the pensions liberation structure operated as follows with each of the Shawhill Companies:

- i. Mr Craig was sole director and shareholder of SSL, a UK company which was dissolved in March 2016. There are multiple loan documents between SSL and members, and a sample document was provided. A letter addressed to Mr Craig provided for him to arrange for the balance to be repaid on the member's 65th birthday. The example member transferred some £64,000 odd into the scheme on 11 September 2015, and received a loan of 75% of the transfer value.
- ii. SL is a Seychelles company, which Dalriada understands Mr Craig to be the ultimate beneficiary of. The structure of loan documentation is, on the example provided, the same as with SSL with the same instruction. The example member information provided shows a loan of 75%.
- iii. The detail of ownership of SSSL is unknown, but the same loan documentation structure has been adopted. The example member information provided shows a loan of 60% to that member.
- iv. More generally, the Request contained an email of 28 November 2016 referring to loans to be made to members listing loans in respect of 12 members as "complete" going via inter alia "Shawhill". This is consistent with the pensions liberation structure identified by Dalriada: showing loans from the Scheme to members via entities including the Shawhill Companies.

43. Further, as to Scheme administration:

- i. Dalriada has been unable to reconcile all accounts, identify all Scheme assets and confirm with any certainty who the Scheme trustees are.
- ii. The Scheme accounts for 2015 have been provided in two similar but different forms.
- iii. There is no record or evidence of the Trustees taking advice on or overseeing investments, particularly the high-risk and illiquid investments in xxxxx, xxxxxxx and the other unregulated investments in private companies.
- iv. There is no evidence that the purported settlement of the investment in xxxx xxxx xxxxxx, as stated by xxxx xxxx xxxxxx, has been accounted for nor to support the Trustees' position that it is a scheme asset.
- v. More generally, there is an absence of clear documentation as to Scheme investments.
- vi. Mr Dowd, who was central to the running of the Scheme, has been convicted of money laundering. The Scheme staff stated that Mr Dowd managed the relationship with introducers and the wider documentation evidences that Mr Dowd was also involved with investments, including payment of a substantial salary to him and hiring expensive vehicles.

- vii. The Scheme has been involved in cold calling techniques and has paid fees to introducers of over £50,000.
- viii. There is no standard governance documentation: a risk register, annual business plan, administration reports, chairman's statement, up-to-date scheme accounts, and letters on the appointment of legal advisers.
- ix. The everyday administrators of the plan have no prior experience in pensions, or qualifications, nor receive guidance from the Trustees. There is no evidence the Trustees themselves have any pensions training or otherwise learnt about pension administration.
- x. It appears in relation to the scheme accounts that the Mr Craig (and/or the Trustees) are acting contrary to the legal advice of xxxxxx xxxxxxxxxx xxxxxxxxxx (email of 25 July 2016).
- xi. The Scheme application form is confused referring to auto-enrolment and various fees, which fees would not be met or required if the Scheme were in fact an auto-enrolment Scheme. It appears certain companies and members may have joined as an auto-enrolment scheme.
- xii. Mr Craig has stated that Scheme reports and documentation have been held or prepared by others and sent out to members without his knowledge or oversight (letter of 31 March 2017 to the Insolvency Service page 3 point 5), and the issues about validity of documentation should be raised with the Employer (same letter, page 4 point 14).

#### **D. The Law**

44. Section 7(3) PA 95 allows the Regulator to appoint a trustee of a pension scheme. It provides:

*“(3) The Authority may also by order appoint a trustee of a trust scheme where they are satisfied that it is necessary to do so in order—*

*(a) to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the scheme,*

*(b) to secure that the number of trustees is sufficient for the proper administration of the scheme,*

*(c) to secure the proper use or application of the assets of the scheme, or;*

*(d) otherwise to protect the interests of the generality of the members of the scheme.”*

45. In addition to that general test, the following elements of pensions law are relevant:

- i. The common law duty to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own business, on behalf of those for whom he felt morally bound to provide (and not merely as if he were acting for himself)(Speight v Gaunt (1883) 22 ChD 739 and Re Whiteley (1886) LR 33 Ch D at 355 per Lindley J). Specifically, a trustee should not invest scheme assets in a manner which exposes the scheme to excessive risk.
- ii. The common law duty to manage Scheme assets in the best interests of members, and the equivalent duty under regulation 4(2) of the

Occupational Pension Schemes (Investment) Regulations 2005 (the “Investment Regulations”).

- iii. The regulatory duty under regulation 4(5) of the Investment Regulations that the assets of the scheme must consist predominantly of investments admitted to trading on regulated markets (and by regulation 4(6) in any event be kept to a prudent level).
  - iv. The regulatory duty to exercise the powers of investment to ensure the security, quality, liquidity and profitability of the portfolio as a whole (pursuant to regulation 4(3) of the Investment Regulations) and for assets to be diversified (regulation 4(7)).
  - v. The statutory duty to obtain and consider “proper advice” in relation to whether a proposed investment is “satisfactory” pursuant to section 36 PA 95. By section 36(7), trustees shall not be treated as having complied with this duty unless the advice was given or has subsequently been confirmed in writing.
  - vi. The prohibition under section 40 PA 95 for any loans to a scheme employer and for an investment of more than 5% of scheme assets in an employer.
  - vii. Regulations 12 and 13 of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 require trustees to keep proper books and records, including of meetings.
  - viii. The statutory duty to exercise powers of investment with a view to giving effect to the SIP so far as reasonably practical, pursuant to section 36(5) of PA 95. The SIP itself is a statutory requirement pursuant to section 35 of PA 95.
46. Section 100 of PA 04 requires the Panel to have regard to the following matters when determining whether to exercise a regulatory function, and the Panel so had regard:

*“(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and*

*(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.”*

#### **E. Reasons for Confirming the Decision**

47. The Panel considered whether to confirm its decision to appoint an independent trustee under section 7 of PA 95 by reference to each of the Grounds.

#### **Independent Trustee Appointment**

48. The Panel was satisfied that it was reasonable to appoint an independent trustee on each of the Grounds. The further information that has been provided through the Representations since the DN have strengthened the case for Dalriada’s appointment.

#### *The Knowledge Ground*

49. The Panel considered, on the information and evidence before it that the knowledge and skill of the Trustees was such that section 7(3)(a) was satisfied and the appointment would be reasonable to secure that the trustees as a whole

have, or exercise, the necessary knowledge and skill for the proper administration of the scheme.

50. As to Mr Craig, the Panel relied on the following matters. In this paragraph, where reference is made to a statement by Mr Craig, that statement was made to the Insolvency Service in the course of its investigation unless otherwise stated:
- i. The permission of activity that appears to be pensions liberation strongly suggests that Mr Craig, if he has the knowledge and skill of a pensions trustee, is not exercising it properly.
  - ii. Similarly, the highly illiquid and high-risk investments, several of which appear to have failed, is consistent only with Mr Craig not having or exercising the necessary knowledge and skill. The breaches of investment duties arising from this (dealt with in the section on the Assets Ground) only reinforce this conclusion.
  - iii. The absence of any evidence of oversight over the Scheme's investments, including any lack of investment advice. This is particularly egregious where, as here, the investments are clearly stated to be high risk and highly illiquid.
  - iv. Mr Craig's attitude to records in relation to the scheme indicate a lack of knowledge, skill or both in respect of his duties as a trustee. He has stated (in a letter of 31 March 2017) that Scheme documentation is held by others and that others have communicated with members without his knowledge. This shows a lack of skill in the exercise of his duties regarding record keeping.
  - v. The poor quality of documents that exist: (a) there are two versions of the Scheme accounts; (b) those accounts do not provide clear or accurate information as to the Scheme investments; and (c) the reference to "auto-enrolment" and the payment of fees for the Scheme in the application form, which are inconsistent in that such fees would not be payable were the Scheme an auto-enrolment scheme.
  - vi. The Request referred to the apparent concentration of investment in the Employer. This appears to be less than 5% of the assets and it is unclear whether this was an investment or a loan. However, the Dalriada figure of payments of £1.4 million to the Employer clearly shows a lack of trustee knowledge and skill in the making of those payments.
  - vii. Mr Craig's apparent failings to understand the nature of the various pension funds with which he has been involved. Specifically, he has repeatedly stated that he assumed trusteeship of the Previous Schemes because they "would otherwise have transferred into the Government toxic scheme" (in cross-examination at the trial of Dowd and others, letter of 31 March 2017, and email of 15 December 2016). This statement appears to refer to the Pension Protection Fund ("PPF"). The Previous Schemes were not defined benefit funds and so could not transfer into the PPF. It accordingly shows a severe lack of appreciation of the difference between a defined contribution and a defined benefit pension scheme. This same lack of understanding is shown by the statement the Scheme is "in surplus" (letter 31 March 2017), a state which any competent trustee would appreciate could not exist in a defined contribution scheme such as the Scheme.

- viii. Further, Mr Craig's belief that the Previous Schemes were "unregulated" schemes, and that the Regulator would therefore be unable to appoint a trustee (letters 12 January and 31 March 2017) demonstrate a lack of knowledge of how pension schemes operate in the statutory framework. Such a statement is also internally inconsistent with the belief that the Previous Schemes would otherwise be transferred to the PPF.
  - ix. Mr Craig's statement that he would "act upon the instructions passed to him by Optimum" in making investments (letter 18 April 2017). Notwithstanding the qualification that he would refuse to make investments which did not appear to him to be bona fide, Mr Craig's apparent belief that it is for someone other than the trustee to make investment decisions demonstrates a lack of understanding of the (a) legislation governing pension schemes and their investment, (b) the common law principles governing the role of a trustee, and (c) the express powers of the trust deed he cited.
  - x. The absence of any review or advice as provided for in the SIP.
51. As to Mr Kelly, it appears he was appointed only out of necessity and there is no evidence of him exercising or having the necessary knowledge and skill to act as a trustee. For the reasons stated above, in circumstances where there is doubt about the validity of Mr Kelly's resignation, the Panel considered it appropriate to treat him as a Directly Affected Party in that to do so gives him rights to challenge the Panel's determinations should he wish to. The Panel have had regard to his representations and referred to his purported resignation. The email seeking to resign referred to his being frustrated in his attempt to arrange meetings and otherwise secure trust assets, and proposing putting the scheme into administration. There is no evidence of Mr Kelly taking any steps (whether by reporting to or engaging with the Regulator or otherwise) to ensure the Scheme assets were secured or that he as trustee performed his duties. Instead, he (apparently) resigned. In those circumstances, the Panel considered that, whatever the position as to Mr Kelly's having the necessary knowledge and skill, he did not exercise it in respect of this Scheme such that it was appropriate for the appointment of an independent trustee to ensure such knowledge and skill. The Panel noted, as stated above, that Mr Kelly made no objection to the appointment.
52. Mr Reilly was appointed and purportedly resigned in similar circumstances to Mr Kelly. However, he apparently prepared a substantial report with supporting documentation indicating significant concern with the scheme administration, investments, conflicts of interests, and unauthorised payments. Mr Reilly in terms in his representation referred to funds he considered "*misappropriated*". He purportedly provided this report to Mr Craig, the very person involved in these activities with Mr Dowd. According to Mr Reilly, Mr Craig failed to provide the necessary information and he "*therefore resigned*". Despite references to making a report to "the Regulator", there is no evidence that any steps were taken to report this to any regulator. It appears, therefore, that, despite being aware of misappropriation of funds and being obstructed by a fellow trustee to whom the attention of that misappropriation was drawn, Mr Reilly's response was not to inform the Regulator or take any other steps to act in the best interests of members, but simply to resign.
53. In those circumstances, Mr Reilly did not exercise the necessary knowledge and skill of a pension trustee and the Panel considered it appropriate in those circumstances to appoint an independent trustee. Again, Mr Reilly did not object to and in fact welcomed the appointment.

54. For the avoidance of doubt, the Panel's reference to Mr Reilly's report is not a finding that the report's contents are accurate or that it was ever finalised and provided to any person or body.

#### *The Assets Ground*

55. The Panel considered, on the information and evidence before it, that the use and application of the Scheme assets was such that section 7(3)(c) was satisfied and the appointment would be reasonable to secure the proper use or application of the assets of the Scheme.
56. The Request relied on three reasons to make out the Assets Ground, each of which the Panel accepted. The information provided by the Representations, particularly those of Dalriada, supported those grounds.
57. First, that Mr Craig has breached the statutory, regulatory and common law investment duties and accordingly that it is reasonable to appoint a trustee to secure the proper use or application of the assets of the Scheme. The Panel relies on the following matters:
- i. The large investments made in xxxxxxx and xxxxx. These are illiquid high-risk investments contrary to the Trustees' common law and regulatory duties. The same is true for the other apparent investments, such as xxx: a Madagascan-based company trading in gems and precious metal. Nor is the investment in xxxxx, essentially in an olive oil refinery, prudent or appropriate.
  - ii. The xxxx xxxx xxxxxx investment has either been compromised for a book of PPI claims or is no longer a Scheme asset. In either case, the investment is not appropriate as a high-risk illiquid and unregulated asset.
  - iii. Similarly, there is no evidence of an appropriately diverse portfolio: the vast majority of investments are in illiquid privately-traded unregulated shares, in breach of the duty under regulation 4(5) of the Investment Regulations to invest primarily in investment admitted trading on regulated markets.
  - iv. More generally, the nature of the investments made is in breach of the common law and regulatory obligations to invest in the best interests of members, prudently, and to ensure the security, quality, liquidity and profitability of the portfolio as a whole.
  - v. A substantial number of the investments appear to have failed in that there are either insolvency proceedings or the company is dormant. There has been real prejudice to the members' interests and the assets of the Scheme arising from the type of investments made contrary to the common law and regulatory obligations.
  - vi. For a substantial number of the investments, there is no evidence of it being made. This is not consistent with prudent and careful investment or the keeping of proper books and records as required.
  - vii. The absence of any advice on the investments made, which is a breach of the section 36 obligation to take (and receive or record in writing) investment advice. The only evidence is that Mr Craig made them on the instructions of Optimum as per the letter of 31 March 2017.
  - viii. The investments have not been made or reviewed in accordance with the SIP.

- ix. Mr Craig made a payment to a Czech bank account in respect of xxxxxx without making any checks or carrying out any due diligence (in circumstances where the Investment Memorandum referred to UK account for payment). This is in breach of his duties as trustee to act prudently and take care in making investments.
58. Secondly, that Mr Craig has received very substantial payments. Mr Craig has received nearly £500,000 from the Scheme in little over a year. This is not a prudent use of scheme assets and an independent trustee is necessary to secure the proper use of those assets. There is no reasonable justification for payments of such size. The situation is compounded by further payments to xxxxxx (as Mr Craig's firm) and Mr Dowd (his employee and business manager), for example by payments in respect of Mr Dowd's vehicles.
  59. Thirdly, there is apparent misuse or misappropriation risking Scheme assets such that it is reasonable to appoint an independent trustee to secure their proper application. The principal area of such misuse is the pensions liberation payments and loans made by the Shawhill Companies. The combination of (a) payments to SSL and RMJ Solicitors, (b) references in the email of 28 November 2016 to those entities being involved in making loans to members, and (c) Dalriada's representations supported by evidence of loan documentation with members consistent with pensions liberation shows clear risk to the assets of the Scheme and, given the tax consequences to members if pensions liberation is made out, the interests of the members in securing their benefits for their retirement.
  60. There are other areas of misuse or misappropriation of funds:
    - i. Payments to introducers stated by Dalriada.
    - ii. The payments of around £1.4 million to the Employer is a misuse of Scheme assets: if it is an investment it is prohibited and unlawful, if not it is a payment away of Scheme funds. The same is true for certain of the other apparent investments should they turn out not to be investments but payments out.
    - iii. The existence of substantial payments with no reference other than "Optimum" or "Urgent Tfr" (for example the payment on 31 October 2016) gives further concern over the application of Scheme assets in the context of the other payments referred to in this section.

#### *The Members Ground*

61. In view of the criminal convictions of Mr Dowd, who worked for the Scheme and according to Dalriada was centrally involved in the running of the Scheme, and Messrs Jones and Winstanley, who were involved in the establishment of the Former Schemes, and Mr Craig's decision to seek to continue Mr Dowd's involvement in the Scheme, the Panel agreed with the Request that it was reasonable to safeguard benefits for members by appointing an independent trustee with exclusive powers. The evidence in support of the Request included a letter from the police that Mr Craig was being investigated for conspiracy to defraud as part of an investigation into pension fraud. Further, the Panel noted that Mr Craig disavowed parts of his letter in support of Mr Dowd's under cross-examination. However, Mr Craig, knowing Mr Dowd was accused of money laundering on charges on which he was in due course convicted, sought to have him continue working for the Scheme. In those circumstances members' interests were served by the appointment of an independent trustee.

62. The Panel further considered that the apparent pensions liberation was, for the reasons stated, sufficient risk to members' benefits that an independent trustee should be appointed.

### **Independent Trustee, Consequential Directions and Provisions**

63. The Request asked that Dalriada be appointed as an independent trustee. The Panel were provided with tender analysis setting out the reason Dalriada was selected. The Panel accepted those reasons.
64. The Panel was asked to make consequential directions under sections 7, 8 and 9 PA 95 if it considered it reasonable to appoint the Proposed Trustee under section 7.
65. Sections 7 to 9 PA 95 allow the Regulator to make various orders and directions which may allow the trustees of a scheme properly to protect members' benefits. These include directions regarding matters such as the payment of fees and expenses, the powers and duties of the appointed trustee, and whether those powers or duties are to be exercised to the exclusion of other trustees.
66. The Panel did consider it reasonable to provide for Dalriada's fees and expenses to be paid out of the resources of the Scheme, pursuant to s.8(1)(b) PA 95.
67. Finally, the Panel considered whether to order that the powers and duties exercisable by Dalriada should be exercised to the exclusion of all other trustees, under s.8(4)(b) PA 95, and whether to order the property of the Scheme to vest in the Proposed Trustee as trustee of the Scheme under s.9 PA 95.
68. The Panel decided to make those orders on the grounds that they were reasonably consequential on the appointment of Dalriada and its discharge of its functions as an independent trustee in the factual circumstances set out above. On the compulsory review, having regard to the Representations, the Panel determined that the Consequential Orders should be maintained in order to give full effect to the appointment of Dalriada as independent trustee.

### **F. Conclusion**

69. For those reasons, the Panel considered the Order appointing an independent trustee and the Consequential Orders should be confirmed and confirmed the Order in full.

#### ***Appointment of an independent trustee***

- (1) *Dalriada Trustees Limited ("the New Trustee") is hereby appointed as trustee of the Scheme, with immediate effect.*
- (2) *The order at (1) is made because the Pensions Regulator is satisfied that it is reasonable to do so pursuant to the relevant provisions of the Pensions Act 1995 as set out below, in order:*
- (i) *to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Schemes pursuant to section 7(3)(a);*
  - (ii) *to secure the proper use or application of the assets of the Schemes pursuant to section 7(3)(c);*

- (iii) *otherwise to protect the interests of the generality of the members of the Schemes pursuant to section 7(3)(d).*
- (3) *The powers and duties exercisable by the New Trustee shall until further order be to the exclusion of all other trustees of the Scheme pursuant to section 8(4)(b) of the Pensions Act 1995.*
- (4) *The New Trustee's fees and expenses in respect of the Scheme shall be paid out of the resources of the Scheme pursuant to section 8(1)(b) of the Pensions Act 1995 (as substituted by section 35(2) of the Pensions Act 2004) and an amount equal to the amount paid out of the resources of the Scheme in accordance by virtue of Subsection (1)(b) is to be treated for all purposes as a debt due from the employer (being Optimum Financial Solutions Ltd, the sponsoring employer of the Scheme) to the trustees of the Scheme, pursuant to section 8(2) of the Pensions Act 1995 (as amended by Section 35 of the Pensions Act 2004).*
- (5) *To the extent that the New Trustee's fees and expenses in relation to the Scheme are not met out of the Scheme's resources under (4), above, the shortfall is to be paid to the New Trustee by the employer of the Scheme, pursuant to section 8(1)(a) and (c) of the Pensions Act 1995.*
- (6) *Pursuant to section 9 of the Pensions Act 1995, it is hereby ordered that all property and assets of the Scheme, heritable, moveable, real and personal, of every description and wherever situated and all rights pertaining to that property be vested in, assigned to and transferred to the New Trustee as trustee of the Scheme.*
- (7) *The appointment of the New Trustee may be terminated, or the New Trustee replaced, at the expiration of 28 days' notice from the Pensions Regulator to the New Trustee, pursuant to section 7(5)(c) of the Pensions Act 1995 and such power to terminate or replace the appointment shall be exercised by the Pensions Regulator in accordance with its delegation policy.*
- (8) *This Order having been made under the Special Procedure provided by sections 97 to 98 of the Pensions Act 2004, it shall be reviewed by the Pensions Regulator as soon as reasonably practicable in accordance with section 99 of the Pensions Act 2004. Details of the said review shall be provided to directly affected persons pursuant to section 99(4) of the Pensions Act 2004."*
70. **Appendix 1** to this Determination Notice contains important information about the Directly Affected Parties' rights to challenge this decision.

**Signed:** 

**Chair:** **David Latham**

**Date:** **20 April 2018**

## Referral to the Tax and Chancery Chamber of the Upper Tribunal

You have the right to refer the matter to which this Final Notice relates to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”). Under Section 99(7) of PA 04 you have 28 days from the date this Final Notice is sent to you to refer the matter to the Tribunal or such other period as specified in the Tribunal rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Final Notice.

The Tribunal’s address is:

Upper Tribunal  
(Tax and Chancery Chamber)  
Fifth Floor  
Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in Section 103 of PA 04 and the Tribunal Rules.

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

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

Tel: 01273 811852

A copy of the form for making a reference, FTC3 ‘Reference Notice (Financial Services)’, can be found at:

[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=3043](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043)