

	<p>Special Procedure</p> <p>DETERMINATION NOTICE under section 98(2)(a) of the Pensions Act 2004 (“the Act”)</p> <p>The Graphex Limited Pension and Life Assurance Scheme (“the Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>TM6511</p>
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1. Summary

The Determinations Panel (the “Panel”), on behalf of the Pensions Regulator (the “Regulator”), met on 23 February 2009 to consider whether a trustee ought to be appointed to the Scheme with exclusive powers, pursuant to Section 7 of the Pensions Act 1995, and whether the use of the special procedure (the “Special Procedure”) was appropriate pursuant to Section 97 of the Act.

In summary the Panel determined that the use of the Special Procedure was appropriate, for the reasons set out in paragraph 6 (iii) below, and that a trustee ought to be appointed to the Scheme with exclusive powers for the reasons set out in paragraphs 6 (i), (ii) and (iv) below.

2. Matter to be determined

Pursuant to Section 97(2) of the Act the Panel was asked to use the Special Procedure, and therefore dispense with the giving of a warning notice, because there is, or the Regulator considers it likely, that if a warning notice were to be given there would be an immediate risk to:

- (i) the interest of the members of the Scheme; or
- (ii) the assets of the Scheme.

In addition the Panel was asked to issue an order under Section 7(3)(a), (c) and/or (d) of the Pensions Act 1995 to appoint a trustee to this Scheme 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);

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

and for the powers or duties of any trustee so appointed to be to the exclusion of other trustees and for any fees and expenses of a trustee so appointed to be paid from the employer's resources.

3. Directly affected parties

The following are the parties considered as being directly affected by the regulatory action as set out in paragraph 7 below.

- (a) Mr Mark Graeme Harrison – trustee
- (b) Mr Nigel Robert Ball – trustee
- (c) Mr Alan Clark – trustee (respectively “the Trustees”)
- (d) Graphex Limited – principal employer
- (e) Rivermeade Signs Limited – participating employer
- (f) Dalriada Trustees Limited – appointed independent trustee

4. Details of Scheme and the principal employer

An update given by the Scheme actuary to the Trustees stated that the preliminary results from the triennial valuation as at 6 April 2008 showed a deficit of £600,000 assuming equity out performance and £800,000 on a bonds-type basis. As at 19 September 2008 the asset value had fallen from £2.8 million to £2.5 million leading to an increased deficit. On a buy out basis the deficit was £1.4 million. The number and status of members is unknown.

The principal employer of the Scheme is Graphex Limited (“Graphex”). Graphex is a wholly owned subsidiary of Rivermeade Signs Limited (“Rivermeade”) which is a participating employer. Evidence was put before the Panel that Graphex was technically insolvent, albeit trading legally, due to the existence of a guarantee.

5. Background to application

- i. The Regulator had been provided with information that certain directors of Rivermeade and/or Graphex were intending to strip out assets of the existing principal employer and then buy back the principal employer's remaining assets in a pre-pack arrangement.
- ii. Mr Harrison and Mr Ball are both trustees of the Scheme and are also both directors of Graphex and in addition Mr Ball is the Company Secretary.

- iii. Mr Harrison and Mr Ball are both directors of Rivermeade. Mr Harrison is the majority shareholder in Rivermeade.
- iv. Mr Harrison is the Managing Director of both Rivermeade and Graphex. Mr Ball is the Group Finance Director.
- v. On 13 January 2009 John Barnsley (identified as an “adviser to the company” in the meeting minutes of 26 October 2005) emailed Mr Ball clearly identifying the aim of the directors as being to avoid liability to the Scheme: *“Nigel, one point that we need to check with the lawyers the main aim here is to get rid of the pension liability”*.
- vi. On 16 January 2009 Mr Ball emailed Mr Harrison setting out the directors’ aims in avoiding liability to the Scheme. The Regulator in particular noted the following comments:
 - *“I’m looking at stripping, reallocating assets out of Graphex for cash before the pre-pack. The assets being stock, trade debtors and the investment/shareholding in Lucid Signs Ltd.”*
 - *“The main creditors losing out are the tax man and the pension scheme.”*
 - *“[...] theory if everything goes to plan we’ll buy back the assets for @£150K but without the pension liability...”*
- vii. Action to trigger pre-pack and thus avoid the Scheme’s liability was thought to be taking place imminently. The Regulator noted the contents of emails dated 22 December 2008 and 16 January 2009 in this regard.

6. Reasons for decision

In making its decision the Panel had regard to the objectives of the Regulator as set out in section 5 of the Pensions Act 2004 and to the matters mentioned in Section 100, as set out in **Appendix 1**.

On the evidence before it, the reasons for the Panel’s decision were:

- i. two of the directors of Graphex and Rivermeade are trustees of the Scheme and both hold important positions in these companies. This gives rise to a conflict of interest when trying to agree on, and deal with, financial matters which will affect both of the companies, particularly Graphex, and the Scheme. The Regulator considers that Mr Ball and Mr Harrison are therefore conflicted and that furthermore they have failed to manage these conflicts appropriately;
- ii. there seems to be an intention to strip out certain assets from the principal employer and then buy back the remaining assets in a pre-pack arrangement but without the pension liability. Some of the

discussions in relation to this arrangement were being led by some of the Trustees;

- iii. it would seem that action to put the pre-pack arrangement in place is imminent and the Panel felt that it was necessary to exercise the regulatory function in question, namely to appoint a trustee, by using the Special Procedure because if a warning notice was given there would be an immediate risk to the interests of the members of the Scheme or the assets of the Scheme. Accordingly the Panel felt that the use of the Special Procedure was appropriate;
- iv. the Panel felt, given the above, that it was reasonable to appoint a trustee in order to:
 - (a) 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 the proper use or application of the assets of the Scheme;
 - (c) protect the interests of the generality of the members of the Scheme.

7. Decision

The Panel granted the application for an order to be issued pursuant to section 7 of the Pensions Act 1995. The Panel determined that an order be issued in the following terms:

1. Dalriada Trustees Limited of Chamber of Commerce House, 22 Great Victoria Street, Belfast BT2 7BA is hereby appointed as trustee of the Graphex Limited Pension and Life Assurance Scheme (the "Scheme") with effect on and from 23 February 2009.
2. This order is made because the Pensions Regulator is satisfied that it is reasonable to do so, pursuant to the relevant provisions of the Pensions Act 1995 as set out below, in order to:
 - i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme pursuant to Section 7(3)(a);
 - ii. to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c); or
 - iii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).
3. The powers and duties exercisable by Dalriada Trustees Limited shall be to the exclusion of all other trustees of the Scheme pursuant to Section 8(4)(b) of the Pensions Act 1995.

4. Dalriada Trustees Limited's fees and expenses shall be paid by the employer pursuant to Section 8(1)(a) of the Pensions Act 1995 as amended by Section 35 of the Pensions Act 2004.
5. This order:
 - i. will take immediate effect on the date of this order;
 - ii. may be terminated, or the appointed trustee replaced, at the expiration of 28 days notice from the Pensions Regulator to the appointed trustee, pursuant to Section 7(5)(c) of the Pensions Act 1995.

8. Important Notices

This Determination Notice is given to you under Section 98(2)(a) of the Act. The following statutory rights are important.

9. Representations to the Pensions Regulator

Take notice that you have the opportunity to make representations to the Pensions Regulator which will make up your defence to the allegations.

In your reply to this notice, please say whether you accept that the Determination Notice is accurate and if you intend to oppose it. You may believe that:

- the determination is wrong in some particular detail; or
- the Regulator should not have used its power in this case.

In any of these circumstances you will need to provide evidence to support your argument.

10. Compulsory review

This determination is subject to a compulsory review by the Regulator under section 99 of the Act. Any representations received will be considered by the Regulator before a determination is made on review. This review must be determined as soon as reasonably possible.

The Regulator's powers on a review under this section include power to:

- i. confirm, vary or revoke the determination;
- ii. confirm, vary or revoke any order, notice or direction made, issued or given as a result of the determination;

- iii. substitute a different determination, order, notice or direction;
- iv. deal with the matters arising on the review as if they had arisen on the original determination, and
- v. make savings and transitional provision.

You will be informed of the outcome of the review by way of a “Final Notice”.

11. Referral to the Pensions Regulator Tribunal

After the compulsory review, you will have the right to refer the matter, to which this Determination Notice relates, to the Pensions Regulator Tribunal (“The Tribunal”) under Section 99(7) of the Act. The Final Notice will give more details regarding referrals to the Tribunal.

Signed: *Dianne Hayter.....*

Chairman: Dianne Hayter.....

Dated: **26 February 2009....**

Section 5 of the Pensions Act 2004
Regulator's objectives

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

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

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

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