

<p>The Pensions Regulator</p>	<p><b>DETERMINATION NOTICE under Section 96(2)(d) of the Pensions Act 2004 (“the Act”)</b></p> <p><b>Dalton Power Products Limited Staff &amp; Works Retirement and Death Benefit Scheme  (“the Scheme”)</b></p>	<p>The Pensions Regulator case ref:</p> <p><b>TM9967</b></p>
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1. The Determinations Panel, on behalf of the Pensions Regulator, met on 26 May 2011 to decide whether to exercise a reserved regulatory function in relation to the issues in the Warning Notice dated 28 March 2011. The Pensions Regulator considered under Section 10(2) of the Act that the exercise of the two reserved regulatory functions detailed below was appropriate.

**2. Matter to be determined:**

The functions the Panel were asked to exercise were the applications made by the Regulator:

- i. to appoint a Trustee under Section 7(3)(a) of the Pensions Act 1995 (“the 1995 Act”);
- ii. under Section 7(5)(b) of the 1995 Act to require that the Trustee appointed be paid fees and expenses out of the Scheme’s resources;
- iii. under Section 8(4)(b) of the 1995 Act to make provision for the powers or duties of a Trustee appointed under Section 7 of the 1995 Act to be exercisable by a Trustee to the exclusion of other trustees; and
- iv. under Section 9 of the 1995 Act to make an order vesting any property in, or transferring property to, a Trustee appointed under Section 7 of the 1995 Act.

**3. Parties**

The Warning Notice specified the following parties as being directly affected by the regulatory action outlined in the Warning Notice:

- i. Julie Brown – current trustee
- ii. Stephen Martin – current trustee;
- iii. and further to the hearing Capital Cranfield Trustees Limited as the newly appointed independent trustee

#### 4. Background

- i. The Scheme is a defined contribution scheme which was established under trust with an effective commencement date of 18 December 1987. It is governed by a trust deed and rules dated 8 February 1993 as there is no evidence that a deed of amendment to replace the rules, which was prepared in 2006 by AEGON Trustee Solutions (“AEGON”), was ever executed by the trustees of the Scheme.
- ii. The most recent membership information the Regulator holds shows that there are sixteen members.
- iii. Dalton Power Products Ltd (the “Principal Employer”) was the Principal Employer of the Scheme. It entered into a Voluntary Creditors Liquidation with effect from 16 April 2007 and Crawfords Accountants LLP (the “Liquidator”) was appointed as its liquidator. The Principal Employer was dissolved on 3 December 2008.
- iv. The Scheme commenced wind up with effect from 6 November 2007.
- v. According to the documentation held by the Scheme’s administrator, AEGON, and the Liquidator’s pension adviser, Alexander Forbes Trustee Services Ltd (“Alexander Forbes”), the current trustees of the Scheme are Julie Brown and Stephen Martin (the “Trustees”), who were appointed on 31 December 1999 and 4 December 1997 respectively.
- vi. AEGON contacted the Trustees in March 2010 to remind them of their responsibilities as trustee and to establish whether there was a project plan in place to wind up the Scheme. Stephen Martin advised AEGON that he resigned as trustee in April 2001. AEGON was informed by Julie Brown that she was made redundant in August 2003 and had been under the impression that this had also terminated her trusteeship.
- vii. The Regulator sought to establish whether the current Trustees had the required trustee knowledge and understanding to oversee the wind up of the Scheme, and wrote to each of the Trustees on 19 July 2010 and the Regulator received a response from each of the Trustees.
- viii. Stephen Martin confirmed that he resigned from his duties as trustee in April 2001 when he left the employ of the Principal Employer and that his resignation was submitted in writing to the managing director of the Principal Employer. Mr Martin stated that he was under the impression that Anton Weingaertner took over as a trustee of the Scheme at this time.
- ix. Julie Brown confirmed to the Regulator that she was made redundant by the Principal Employer in August 2003 and did not have the opportunity to resign as trustee of the Scheme. She indicated that she had assumed that the Principal Employer would make arrangements for the appointment of a new trustee upon her leaving its employment. Mrs Brown also confirmed that she has had no dealings with the Principal Employer since this time and so could not be of assistance with the wind up of the Scheme. It is clear from Mrs Brown’s response that she was

also under the impression that her fellow trustee at this time was Anton Weingaertner.

- x. The Regulator contacted Anton Weingaertner requesting confirmation of his status as a trustee to the Scheme. It is clear from Mr Weingaertner's response that he was also under the impression that he had been a trustee of the Scheme and that this role had ceased upon his ceasing employment with the Principal Employer in August 2004.
- xi. Alexander Forbes, on behalf of the Liquidator, and AEGON have both confirmed that they do not hold copies of any documentation relating to the removal or resignation of the Trustees from the Scheme, or to the appointment of Anton Weingaertner as a trustee to the Scheme. Both organisations have, however, confirmed that Anton Weingaertner is a trustee of an executive scheme sponsored by the same Principal Employer. It is possible, therefore, that both the Trustees and Mr Weingaertner wrongly assumed that he had also been appointed to act as trustee to the Scheme.
- xii. Although Clause 6 of the Scheme's trust provisions permits the resignation of a trustee if there is only one trustee remaining, section 39 of the Trustee Act 1925 provides that a trustee may retire without being replaced only if at least two trustees or a trust corporation remain in office. Accordingly, even if there were evidence that Mr Martin had resigned as a trustee to the Scheme, the fact that there is no evidence that Mr Weingaertner was ever appointed as his replacement suggests that, by operation of section 39 of the Trustee Act 1925, Mr Martin's resignation as a trustee was invalid as there would not have been two trustees remaining.
- xiii. Although both of the Trustees appear to still hold valid appointments as trustees of the Scheme, neither of them has shown a willingness to continue in this role. As mentioned above, both were under the impression that they had ceased to be trustees when their respective employments ceased and have not indicated a desire to assume responsibility for the Scheme's wind up.
- xiv. In addition, as neither of the Trustees has had any involvement in the Scheme for a number of years, it is not clear that the Trustees possess the requisite level of knowledge and understanding to oversee the wind up of the Scheme. In this regard, AEGON confirmed to the Regulator that Mrs Brown specifically acknowledged that she was not fully aware of the trustee's role in winding up a scheme and how she would go about fulfilling it.
- xv. Clause 6(b) of the Scheme's trust provisions provides that the Principal Employer has the power to appoint trustees and the appointment of any new or additional trustee must be in writing. However, since the Principal Employer is dissolved, it cannot therefore exercise its power to appoint a replacement trustee.
- xvi. Where the person nominated under the trust deed to appoint a trustee does not exist or is unable/unwilling to act, then section 36(6) of the Trustee Act 1925 permits the existing trustees to appoint a new trustee.

In accordance with this provision, it would appear that the Trustees have the power to appoint other trustees.

- xvii. However, the Regulator would expect that any trustee appointed would wish to be paid and notes that Rule 18(e) of the Scheme's rules provides that a trustee may with the written consent of the Principal Employer be remunerated for their services and that Clause 3(b) of the trust provisions provides that the costs of administering the Scheme are to be paid by the Principal Employer. Given that the Principal Employer is dissolved in this instance, it is unclear how the Trustees would be in a position to obtain the consent required to remunerate a trustee for their services and how the trustee can be paid.
- xviii. In view of this uncertainty, the apparent reluctance of the Trustees to have any further involvement in the Scheme and the uncertainty as to whether they have the necessary knowledge and understanding to oversee the Scheme's wind up, the Regulator considers that the appointment by the Determinations Panel of an independent trustee to this Scheme under Section 7(3)(a) of the 1995 Act is the more appropriate action in the circumstances.

## 5. Decisions

The Panel agreed that it was appropriate to make the following orders:

- i To appoint a Trustee under Section 7(3)(a) of the 1995 Act;
- ii under Section 7(5)(b) of the 1995 Act to require that the Trustee appointed be paid fees and expenses out of the Scheme's resources;
- iii under Section 8(4)(b) of the 1995 Act to make provision for the powers or duties of a Trustee appointed under Section 7 of the 1995 Act to be exercisable by a Trustee to the exclusion of other trustees; and
- iv under Section 9 of the 1995 Act to make an order vesting any property in, or transferring property to, a Trustee appointed under Section 7 of the 1995 Act.

The Pensions Regulator hereby orders that:

### **Appointment of Trustee under Section 7**

- i. Capital Cranfield Trustees Limited of 5<sup>th</sup> Floor, New Liverpool House, 15-17 Eldon Street, London EC2M 7LA is hereby appointed as trustee of the Dalton Power Products Limited Staff & Works Retirement and Death Benefit Scheme ("the Scheme") with effect on and from 26 May 2011.
- ii. 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 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);

- iii. The powers and duties exercisable by Capital Cranfield 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.
- iv. Capital Cranfield Trustees Limited's fees and expenses shall be paid out of the Scheme's resources pursuant to Section 7(5)(b) of the Pensions Act 1995.
- v. 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.

#### **Vesting Order under Section 9**

- i. The Pensions Regulator hereby orders the vesting in, and the assignation and transfer to Capital Cranfield Trustees Limited of 5th Floor, New Liverpool House, 15-17 Eldon Street, London EC2M 7LA, as trustee of the Dalton Power Products Limited Staff Works Retirement and Death Benefit Scheme, appointed under Section 7 of the Pensions Act 1995 by the Pensions Regulator, of all property and assets of the above scheme, heritable and moveable, real and personal, of every description and wherever situated.
- ii. This order is made by the Pensions Regulator pursuant to section 9 of the Pensions Act 1995, as amended.
- iii. This Order will take immediate effect on the date of this order.

#### **6. Submissions of the parties**

In making the determination the Panel took into account the evidence and submissions included in the Warning Notice. No representations to the Warning Notice were received.

#### **7. Statutory issues**

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

#### **8. Reasons for decision**

The reasons given by the Panel for their decision were as listed below:

- i. The Panel considered, on the evidence available to it, that there is some uncertainty as to who the other trustee is apart from Julie Brown.

- ii. The current trustee(s) have shown a reluctance to get involved in matters concerning the Scheme's administration and winding up.
  - iii. As there is currently no trustee working on behalf of the interests of the members of the Scheme, there is a risk that members' benefits will be depleted by the annual management charges applied whilst the Scheme remains in wind up.
  - iv. Appointing an independent trustee to the Scheme will ensure that the necessary knowledge and skill is available to secure the winding up of the Scheme as soon as possible.
9. **Appendix 2** to this Determination Notice contains important information about the rights of appeal of the parties against this decision.

Signed: *Suzanne McCarthy*.....

Chairman: **Suzanne McCarthy**.....

Dated: 8 June 2011.....

**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
    - (ii) 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.



**Referral to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)**

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under section 103 of the Pensions Act 2004 (“the Act”) you have 28 days from the date this Determination Notice is given 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 Determination Notice. The Tribunal’s address is:

The Tax and Chancery Chamber of the Upper Tribunal  
45 Bedford Square  
London  
WC1B 3DN  
Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act 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 Support  
The Pensions Regulator,  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW.

Tel: 01273 811852