

<p>The Pensions Regulator</p>	<p>COMPULSORY REVIEW FINAL NOTICE Pursuant to Section 99(4) of the Pensions Act 2004 (the “Act”)</p> <p>Brownberrie Pension Scheme Bucephalus Pension Scheme Cranborne Star Pension Scheme DGK Pension Scheme Grosvenor Parade Pension Scheme LJK Ventures Pension Scheme PPF Management Pension Scheme Queensbury DF Pension Scheme Tallton Place Pension Scheme Lancaster Pension Scheme Portman Pension Scheme The RJS Pension Scheme Woodcroft House Pension Scheme</p> <p>(the “Schemes”)</p>	<p>The Pensions Regulator case ref:</p> <p>C4177180</p>
-----------------------------------	---	--

1. Introduction

- 1.1. On 28 July 2011 the Determinations Panel (the “**Panel**”) met to conduct a compulsory review, on behalf of the Pensions Regulator (“**the Regulator**”), of the initial determination (the “**Initial Determination**”) to appoint an independent trustee (an “**IT**”) to the Schemes. The Initial Determination followed a request by the Regulator for such an appointment (the “**Request**”) on 27 May 2011.
- 1.2. The Initial Determination provided that Dalriada Trustees Limited (“**Dalriada**”) be appointed as IT to the Schemes subject to the Panel reviewing the Initial Determination once the directly affected parties had been provided with an opportunity to make representations. Having carefully considered those representations we have determined to confirm the appointment of Dalriada as IT to the Schemes.

1.3. Section 99 of the Act requires the Panel to give reasons for its decision and we set that reasoning out below. Before we do so we will first set out the matters that we have to determine and the details of the directly affected parties and the Schemes in greater detail.

2. **Matter to be determined**

2.1. Having made the Initial Determination section 99 of the Act requires us to conduct a compulsory review (the “**Review**”) of our earlier decision. Pursuant to section 99 (3) of the Act we can, and do, approach the Review on the basis of a rehearing taking into account all the evidence and representations that are now available to us. This is in keeping with paragraph 15 of the Panel’s procedure.

2.2. The central issue to determine is whether to confirm Dalriada’s appointment as IT to the Schemes pursuant to section 7 of the Pensions Act 1995 (“**PA95**”). Specifically we were asked to confirm Dalriada’s appointment on the grounds that it was reasonable to do so in order to:

2.2.1. 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) of PA95;

2.2.2. secure the proper use or application of the assets of the Schemes pursuant to section 7 (3) (c) of PA95; or

2.2.3. otherwise to protect the interests of the generality of the members of the Schemes pursuant to section 7 (3) (d) of PA95.

2.3. In addition if we confirmed the appointment of Dalriada we were also requested to determine whether:

2.3.1. Dalriada’s powers or duties should be to the exclusion of all other trustees pursuant to section 8 (4) (b) of PA95;

2.3.2. Dalriada’s fees and expenses should be paid out of the resources of the Schemes pursuant to section 8 (1) (b) of PA95;

2.3.3. the property of the Schemes should vest in Dalriada pursuant to section 9 of PA95.

2.4. As we have already indicated we have decided to confirm Dalriada's appointment. We do so on the basis of all of the grounds set out at paragraph 2.2 above. We have also decided to uphold the consequential orders set out at paragraph 2.3 above. The practical effect of this is that Dalriada is now in charge of the Schemes and will be responsible for their ongoing administration until such time as the Regulator decides that Dalriada's appointment is no longer necessary.

2.5. We appreciate that the members of the Schemes will be concerned about the recent developments that have taken place in relation to their pensions. We understand that Dalriada have posted information on their website that explains the nature of their involvement with the Schemes as well as the other proceedings that Dalriada has instigated in relation to the Schemes (that we explain in further detail below). We would encourage the members to contact Dalriada or consult its website¹.

3. The Directly Affected Parties

3.1. We set out below the following parties and explain their relationship to the Schemes:

3.1.1. Athena Pension Services Limited ("**Athena**") was the sole trustee of the Bucephalus Pension Scheme, the Cranborne Star Pension Scheme, the DGK Pension Scheme, the Grosvenor Pension Scheme, the Lancaster Pension Scheme and the RJS Pension Scheme. The director of Athena is Mr Andrew Hields;

3.1.2. Minerva Pension Services Limited ("**Minerva**") was the sole trustee of the LJK Ventures Pension Scheme, the Portman Pension Scheme, the Tallton Place Pension Scheme and the

¹ <http://dalriadatrustees.co.uk/ark>

Woodcroft House Pension Scheme. The director of Minerva is Mr Carl Hanson;

3.1.3. Oracle Pension Services Limited (**“Oracle”**), was the sole trustee of the Brownberrie Pension Scheme, the PPF Management Pension Scheme and the Queensbury DF Pension Scheme whose director is the same as Minerva’s namely Mr Hanson (we refer to Athena, Minerva and Oracle collectively as the **“Trustee Companies”**);

3.1.4. Dalriada Trustees Limited is the newly appointed independent trustee with exclusive powers;

3.1.5. The sponsoring employers of the Scheme (which are variously underlined or italicised for reasons that we explain below) are as follows:

3.1.5.1. Cranborne Star Limited – the Cranborne Star Pension Scheme;

3.1.5.2. Grosvenor Parade Limited – Grosvenor Parade Pension Scheme;

3.1.5.3. Tallton Place Limited – the Tallton Place Pension Scheme;

3.1.5.4. Lancaster TC Limited – the Lancaster Pension Scheme;

3.1.5.5. Portman TC Limited – the Portman Pension Scheme;

3.1.5.6. Woodcroft House Limited – the Woodcroft Pension Scheme;

3.1.5.7. *Brownberrie Limited – the Brownberrie Pension Scheme;*

3.1.5.8. *Bucephalus Equine Training Limited – the Bucephalus Pension Scheme;*

3.1.5.9. *DGK Investments Limited – the DGK Pension Scheme;*

3.1.5.10. *LJK Ventures Limited – the LJK Ventures Pension Scheme;*

3.1.5.11. *PPF Management Limited – PPF Management Pension Scheme;*

3.1.5.12. *Queensbury DF Limited – Queensbury DF Pension Scheme;*

3.1.5.13. *RJS (2010) Limited – RJS Pension Scheme.*

3.1.6. In addition we considered that the following parties were also directly affected, given their involvement in the promotion and governance of the Schemes, namely:

3.1.6.1. Ark Business Consulting LLP (“**Ark**”). The directors of the Trustee Companies are also directors of Ark along with Mr Mark Tweedley, Ms Rebecca Tweedley and Ms Amanda Clark;

3.1.6.2. Ark Commercial Retirement Planning LLP – administrator to some of the Schemes; together with

3.1.6.3. Ark Commercial Pension Planning LLP – administrator to some of the Schemes (the “**Ark Administrators**” and together with Ark the “**Ark Companies**”);

3.1.6.4. the members of the Ark Administrators are Bond Street Chambers LLP (whose members are Ms Rebecca Tweedley, Ms Sarah Kowalczyk, Ms Elizabeth Tweedley and Jeremy Giles LLP) and Sovereign Corporate Management Services (Ms Sarah Tweedley is the sole director).

4. Details of the Schemes and Principal Employers

4.1. The following table sets out the details of the Schemes all of which are ongoing defined contribution arrangements:

Scheme	Date Scheme established	Number of members ²	Date principal Employer incorporated
Brownberrie PS	6 April 2011	2	18 February 2011
Bucephalus PS	9 June 2010	3	25 May 2010
Cranborne Star PS	26 January 2011	17	26 January 2011
DGK PS	2 August 2010	2	15 July 2010
Grosvenor Parade PS	26 January 2011	5	26 January 2011
LJK Ventures PS	21 June 2010	2	10 June 2010
PPF Management PS	10 January 2010	2	16 September 2010
Queensbury DF PS	3 April 2011	2	5 November 2010
Tallton Place PS	26 January 2011	14	26 January 2011
Lancaster PS	12 May 2010	2	17 May 2010
Portman PS	12 May 2010	2	14 May 2010

² The current membership figures are uncertain. It appears from paragraph 22 of the note of the meeting held at the Ark Companies’ offices with HMRC on 22 February 2011 that only the Lancaster and Portman schemes are active and have approximately 90 members each.

RJS PS	30 April 2010	3	10 May 2010
Woodcroft House PS	26 January 2011	2	26 January 2011
PS = Pension Scheme			

4.2. All of the principal employers have failed to file any up to date information with Companies House to indicate that they are trading and accordingly they appear to be dormant companies.

5. Events subsequent to the Initial Determination

5.1. On 17 June 2011 Dalriada applied for, and obtained, a freezing injunction (the “**Injunction**”) against the Ark Companies. The effect of the Injunction is to prevent the dissipation of certain transfer fees (the “**Transfer Fees**³”) paid by the members of the Schemes to the Ark Companies.

5.2. Dalriada has also instigated the following legal proceedings:

5.2.1. a claim against the Ark Companies for the return of the Transfer Fees; and

5.2.2. a claim seeking directions from the court as to, amongst other things, the validity of the affairs of the Schemes and particularly, the legal position of the Maximising Pension Value Arrangement (MPVA).

5.3. In addition Dalriada has been attempting to obtain material information from the Trustee Companies and the Ark Companies (the “**Respondents**”) that it requires in order for an assessment to be made as to the validity and governance of the Schemes. Specifically Dalriada has requested that the Trustee Companies provide it with specified documents (such as trustee minutes and information relating to investments) but this information has not been forthcoming. To date the only information that Dalriada has been able to obtain was taken from the offices of the Ark

³ The Transfer Fees comprise of a 5% charge on the value of the fund transferred into any of the Schemes and a 1% annual charge on funds transferred into the XXXXXXXXXXXX XXXXXx Holdings (“H”). References below to Transfer Fees only relate to the 5% charge.

Companies on 2 June 2011 along with some further information that was received on 4 June 2011. The information currently in Dalriada's possession relates to individual member files, bank statements and a database recording transfer payments.

5.4. The Respondents have had ample time to furnish Dalriada with the information that it has requested but have failed to do so. In addition the Respondents have failed to respond to requests for information made by the Regulator pursuant to section 72 of the Act despite the Regulator extending the deadline for compliance with these requests. We were not provided with any suitable explanation as to why these section 72 requests had not been complied with.

5.5. This lack of information has greatly hampered us in our task of trying to fully understand the factual background and the weight to attach to a number of the points advanced in the Representations. However, the Representations do raise two important points that can conveniently be dealt with at this stage.

5.6. Firstly, the Representations make the point that it is for the Regulator to prove that Dalriada's appointment should continue. We agree with this point and emphasise that the burden on proving that Dalriada's appointment should continue rests with the Regulator. This is consistent with paragraph 24 of the Panel's procedures. However, the Respondents cannot expect us to accept the various points made by the Respondents in the Representations that are not supported by evidence. The Panel adopts the general principle that the party asserting a particular factual point should be in a position to prove it by reference to evidence – very little of which has been produced by the Respondents.

5.7. Secondly, the Representations submit that only 6 of the 13 Schemes operate what is known as the Pensions Reciprocation Plan (the "**PRP**"). The PRP is central to this matter and was the Regulator's initial prime concern. The Schemes that are subject to the PRP (the "**PRP Schemes**")

are set out at paragraph 3.1.5 and are underlined. The Schemes that are not subject to the PRP are italicised, and can be conveniently categorised as “Corporate Pension Trusts” (“the **CPT Schemes**”), which operate differently to the PRP Schemes (we explain the CPT Schemes in further detail below in paragraph 16).

5.8. The Representations invite the dismissal of the Request with respect to the CPT Schemes without further inquiry. However, we are of the opinion that the conduct of the Trustee Companies with respect to the PRP Schemes is highly material to whether Dalriada should also be appointed to act in relation to any other occupational pension schemes controlled by the Trustee Companies including the CPT Schemes. Therefore we will first consider Dalriada’s appointment in relation to the PRP Schemes before considering its appointment to the CPT Schemes.

5.9. Adopting that approach we now turn to consider the six specific concerns that the Regulator has listed in the Request in conjunction with Dalriada’s representations and evidence (the “**Dalriada Note**” and the “**Dalriada Evidence**”), the Representations and the Regulator’s comments on the Representations.

5.10. We do not propose to rehearse what we have already set out in the Initial Determination. However, we are mindful that some of the members of the Schemes may not have received the Initial Determination and therefore we explain the basic principles of how the PRP operates in paragraph 6 before going into greater detail of how the model works in paragraph 7.

6. **The PRP**

6.1. At the beginning of 2011 the Regulator became aware of the PRP. In summary the PRP can be explained as a method by which a member can obtain a loan against the value of his or her pension fund albeit that the loan is not paid from that member’s fund, but rather from an associated scheme. We note that the representations challenge the

classification of the payment to the members as a loan in favour of it being described as an investment. We deal with this distinction at paragraph 10.7 below.

6.2. In particular the model works by Member A transferring occupational scheme benefits into a new DC scheme (“Scheme A”), in relation to which one of the Trustee Companies is trustee. Upon transfer, Member A receives a loan of up to 50% of their transfer value from a different scheme, (“Scheme B”), in relation to which the same company, or one of the other Trustee Companies, acts as trustee. The balance of Member A’s transfer value is then invested by the trustee of Scheme A (we discuss the nature of these investments in greater detail at paragraph 7.6 below). Scheme B is able to make the loan to Member A because it has assets, sourced from another person, Member B, who has transferred their occupational scheme benefits into that scheme.

6.3. Ark made an application for a Community Trade Mark for the “PRP”, to the Office for Harmonization in the Internal Market (Trade Marks and Designs) on 28 March 2011. In a letter from Ark to HMRC dated 21 April 2011 Ark confirmed that they were the designers of the PRP.

7. The PRP Model in greater detail

7.1. We now turn to consider how the PRP works in greater detail. We have based our understanding from the information contained in the Request and the literature referred to within it.

7.2. Ark’s literature entitled “Maximising Pension Value” sets out how the PRP works. This confirms that Ark makes the PRP “available” to members, and that *“The PRP provides members with a special facility by which they can benefit from money held within UK pension schemes. Members using the PRP will receive a cash sum”*.

- 7.3. The payment of this cash sum is facilitated by what is referred to as “Maximising Pension Value Arrangement” (“**MPVA**”). The MPVA is issued over a fixed period and there are no requirements to make repayments during the term. It is commented that “*the MPVA is usually discharged in full at maturity*”.
- 7.4. Although not described as such, the MPVA is a loan from the trustees of the lending scheme to the member. It is not clear from the information in the Regulator’s possession whether the loans are made from (for example) the trustee of Scheme B to Member A, or whether there are intermediaries involved.
- 7.5. The amount of cash that can be released from the pension transfer amount will be dictated by reference to the “MPVA maturity period”. For example it appears that 25% of the transfer value amount could be released in cash if the term was 10 years. By contrast 50% of cash release would be allowed for a 25 year term. It is not clear how this “maturity period” is assessed, but it seems likely that it correlates to the period remaining until the member is able to receive authorised member payments from the scheme in accordance with the Finance Act 2004. It is not known whether the loans made to members by the Schemes actually correspond to this ratio.
- 7.6. The balance of each Scheme’s assets (not used to make loans to other Scheme’s members) is invested in other assets by the Trustee Companies. Under the “Trustee Investment Approach” section of the MPVA literature, the Trustee Companies are able to invest in the “XXXXXXXX XXXXX Fund” which is described as a “*specialist investment portfolio of property*” (see paragraph 7.13). However as noted below it is not clear whether the Trustee Companies actually invest in this fund or an alternative fund (or what the composition of these funds are).

7.7. Ark confirmed in their letter of 21 April 2011 to HMRC that Ark and XXXXXX XXXXXX XXXXXXXX act as introducers for the PRP / MPVA. A print off from XXXXXX XXXXXX XXXXXXXX' web site sets out that a PRP *“provides a mechanism to allow immediate access to a capital sum of up to the equivalent of 50% of the value of the pension fund transferred. Pension Reciprocation Plans do not give the client access to their own pension fund”*. This site also states *“A Pension Reciprocation Plan or PRP is a new facility from which you can access cash having transferred your UK pension fund”*.

7.8. On 22 February 2011, HMRC held a meeting with Ark's representative, Mr Craig Tweedley; XX XXXX XXXXXXXX, pensions advisor; and XX XXXXXXXX XXXX from XXXXXXXX XXXXXX XXXXXXXX. A copy of a note of this meeting has been provided to the Regulator (the **“Note”**). We understand that the Respondents allege that the Note is inaccurate and that XXXX XXXXXXXX did not use the term *“loan”*. However, the Representations have not offered an alternative version of the note, and given that we do not regard the distinction between the term *“loan”* and *“investment”* as material (as set out at paragraph 10.7 below), we will proceed on the basis that the Note is accurate.

7.9. At paragraph 5 of the Note XXXX XXXXXXXX is recorded to have said that the:

“trustees of the Master Trusts [as the Schemes are referred to by Ark] may decide (although there is no obligation) on other forms of investment which may include making loans to persons. These persons will not be members of the registered pension scheme but may be members of another registered Master Trust. Members are unable to withdraw funds from their own...” (words added)

7.10. At paragraph 6 XXXX XXXXXXXX explains that in relation to the funds released to members: *“Any funds come from another pension*

scheme which is unconnected with the member.” At paragraph 11 Mr Craig Tweedley states that “the PRP is designed to provide an income in retirement as well as maximising funds today without liberation.”

7.11. At paragraph 20 Mr Craig Tweedley states that no credit checks were conducted on individuals who wanted to receive loans. The “Membership Consideration Form” confirms this.

7.12. The PRP is advertised on a number of web sites, including a web site called XXXXXXXXXXXXXXXX. On this web site a document was available to be downloaded entitled “Guide to the Pension Reciprocation Plan”. The second bullet point down on page 3 of this document (which is set out in the Request) identifies that up to 50% of any transferred amount, is *“invested in a vehicle that will provide a secure investment return based upon a growth rate of 3% per annum simple.”* This is later identified as the MPVA. Also on page 3 of this document the balance of the fund is said to be invested:

“...at the discretion of the MPS trustees and will typically include the XXXXXXXXXXX XXXXXI Holdings Fund (XXH). The primary objective of the XXH is to protect capital whilst providing investors with attractive risk-adjusted returns through opportunistic finance-related investments with a residential real estate focus. The XXH where utilised will be on the basis of independent advice provided to MPS trustees.”

7.13 It is not clear whether the Trustee Companies invest in either the XXXXXXXXXXX XXXXX Holdings Fund or the XXXXXXXXXXX XXXXX Fund (or whether these are the same investments under different names). Notwithstanding this, the Regulator notes that the only investments that were referred to in the meeting of 22 February 2011 and in Ark’s literature relate to the MPVA (i.e. the reciprocal member loans) and property investments.

7.14 the Regulator has also obtained bank statements for the Lancaster Pension Scheme and the Portman Pension Scheme. These statements indicate that there have been a large number of transfers into the Schemes and payments out to individuals. This is consistent with the loan (or MPVA) arrangements set out in Ark’s own literature.

7.13 From an analysis of these bank statements the Regulator has identified various transfers of funds into the Schemes by members who then receive a transfer in return but from a different scheme. The amounts transferred back to these members are just below half of what each of them originally transferred in. This analysis is set out below:

Member	Amount in (£)	Receiving Scheme	Date received	Amount out (£)	Paying Scheme	Date paid
XX	119,458.17	Lancaster	18/11/10	59,975.00	Portman	26/11/10
XX	25,483.85	Lancaster	23/11/10	12,475.00	Portman	14/12/10
XX	58,280.65 & 53,561.40	Lancaster	24/11/10 25/11/10	54,975.00	Portman	13/12/10
XX	48,397.59	Lancaster	07/01/11	22,475.00	Portman	19/01/11
XX	125,444.16	Portman	05/10/10	62,475.00	Lancaster	07/10/10
XX	39,346.84	Portman	19/11/10	18,475.00	Lancaster	15/12/10
XX	36,406.06	Portman	13/12/10	16,175.00	Lancaster	12/01/11
XX	19,117.28	Portman	21/12/10	9,125.00	Lancaster	12/01/11
XX	43,434.10	Portman	23/12/10	18,525.00	Lancaster	28/01/11
XX	34,830.99	Portman	24/12/10	14,975.00	Lancaster	12/01/11
XX	56,062.41	Portman	17/01/11	26,375.00	Lancaster	23/02/11
XX	31,369.80	Portman	18/01/11	14,975.00	Lancaster	01/02/11

8. The Specific Concerns of the Regulator

8.1. The Request raises six key points that, in the opinion of the Regulator, justify Dalriada’s appointment. In summary these concerns are:

8.1.1. There appears to be a systematic breach of trustee investment duties by the Trustee Companies both in terms of (i) the statutory duty of diversification imposed by the Occupational Pension Schemes (Investment) Regulations 2005 (the “**Investment Regulations**”) and (ii) the common law duty to exercise their investment powers prudently and in the best interests of the members;

8.1.2. The Trustee Companies are not exercising their powers of investment for the purposes for which those powers were granted. This constitutes a fraud on the power of investment, since the investment powers are being exercised for the purpose of providing loans to facilitate the PRP which is not a bona fide investment purpose;

8.1.3. By restricting each of the Schemes to 99 members the Trustee Companies are pursuing a deliberate strategy to avoid the provisions contained within regulation 4 of the Investment Regulations. These provisions exist to protect members of the Schemes;

8.1.4. The high level of the Transfer Fees;

8.1.5. The irregular transfers from the Schemes to a travel agent and to an unregistered overseas company;

8.1.6. The inconsistencies between the information provided by the Trustee Companies to the Regulator and that provided to their bankers.

8.2. We now turn to consider each of these issues in detail with respect to the PRP Schemes only (and references below to “Schemes” should be construed accordingly).

9. Investment Duties

9.1. As set out in the Request, the Trustee Companies are under two separate, but substantively overlapping, duties concerning how they exercise their powers to invest the assets of the Schemes.

9.2. Firstly, they are under a statutory duty, as set out in the Investment Regulations. Since the Schemes are all restricted by design to 99 members or less (we return to this in greater detail below) a significant proportion of the Investment Regulations do not apply to the Schemes. However, Regulation 7 (2) (b) does apply and provides that the Schemes’ assets must be invested having regard to the need for diversification in so far as is appropriate to the circumstances.

9.3. Secondly the Trustee Companies are under a common law duty to exercise their power of investment “prudently” and with singular regard to the best interests of the members. Acting prudently and having regard to the best interests of the members includes, in our opinion, ensuring that the assets of the Schemes are diversified.

9.4. We regard the way in which the Schemes’ assets have been invested as being in breach both of the Investment Regulations and the common law since they cannot properly be described as being appropriately diversified for the following reasons.

9.5. The Schemes’ assets were invested in only two asset classes namely loans to members of other PRP Schemes (in order to facilitate the PRP) and property backed investments such as the XXXXXXXX XXXXX Fund;

9.5.1. With regard to the first class of investment, namely the loans to other members of the Schemes, it is evident that:

9.5.1.1. the loans are for terms of up to 25 years and usually only redeemable at maturity. The Trustee Companies were therefore committed to inflexible investments;

9.5.1.2. there were no credit checks on the recipients of the loans which were unsecured and at a poor rate of interest (namely 3%);

9.5.1.3. it is evident from the Note that a substantial number of loans had been advanced before insurance had been taken out to protect the Trustee Companies in the event of the death of a recipient before a loan was redeemable. Paragraph 22 records that a majority of the 90 members in each of the two schemes had taken loans at the time of the meeting and; paragraph 18 records Craig Tweedley saying that a separate insurance scheme was then being finalised to cover the eventuality of premature death.

9.6. In respect of the investments in the property funds we find that:

9.6.1. the purpose and nature of these funds had not been properly explained to us despite the Trustee Companies having been given the opportunity to do so;

9.6.2. the recipient of a large amount of the PRP Schemes' assets, namely £4 million, has been paid to a company called XXXXX XXXXXXXX XXXXXXXX XXXXXXXX ("XXXXX XXXXXXXX") which is a Cypriot company. The purpose of this investment is to acquire the entire share capital in another Cypriot company called XXX (XXXXXX) XXXXXXXX XXXXXXXXXX XXXXXXXX ("XXX") that purportedly owns a plot of land near XXXXXXXX in Cyprus;

9.6.3. a further £2.6 million needed to be paid before the shares in XXX were transferred. Dalriada submit that it appears that the £4 million currently paid by the Trustee Companies is currently worthless;

9.6.4. the investment in XXX will not produce a rental income either now or in the foreseeable future since the land owned by XXX has not yet been developed, i.e. there are no properties to rent.

9.7. Drawing these threads together, we are of the opinion that the PRP Schemes' assets are:

9.7.1. poorly diversified given that they are solely invested in only two asset classes;

9.7.2. risky given that:

9.7.2.1. the loans are unsecured, attract a relatively low rate of return and have not always been insured so the Schemes are exposed in the event of the death of the loan recipient;

9.7.2.2. the investment in the property funds is uncertain and of questionable value as the Dalriada evidence demonstrates;

9.7.3. not invested solely for the interests of the members given that the purpose of the loans is to facilitate the PRP model so as to

ensure that members of the other Schemes may receive immediate payments.

9.8. The Representations point out that the Trustee Companies' powers of investment are broad and that they were exercised in the interests of the members. We return to whether the investments were in the interests of the members below, but we should point out that the fact that the Trustee Companies enjoy broad investment powers does not excuse them from the need to have regard to diversification. Rather the Trustee Companies must exercise their investment powers subject to the requirements of the Investment Regulations and the common law. We stress that the diversification is important because it protects the members' pensions from volatile fluctuations in the Schemes' assets that in turn protects the security of members' pensions.

9.9. For the reasons that we set out above, we are of the opinion that the investments were uncertain, inflexible and of high risk. As such they did not constitute a proper diversification of the Schemes' assets within the meaning of the Investment Regulations and the common law duty imposed on the Trustee Companies.

10. Fraud on the Power of Investment

10.1. As we have already noted, the Schemes' powers of investment are broad. However, notwithstanding the broad nature of these powers we accept the Regulator's submissions in the Request that the powers have to be exercised for the purposes for which they are given.

10.2. In the Request the Regulator submits that the Trustee Companies commit a fraud on the powers of investment if they exercise those powers with an intention beyond the scope of, or not justified by, the powers in question. In reality this means that the Trustee Companies must observe the spirit and purpose of the investment powers when they exercise them.

- 10.3. We are of the opinion that the true purpose of the investment powers is to productively invest the Schemes' assets so that they achieve appropriate growth in order that the members may receive a pension on retirement.
- 10.4. Having regard to our findings, at paragraph 9 above, we find that the Trustee Companies have committed a fraud on the power by pursuing an investment strategy that jeopardises the prospects of assets being available to members on retirement to fund their pensions given the uncertain, concentrated and risky nature of those investments.
- 10.5. In particular we are of the opinion that the use of the investment powers to make loans to members of other pension schemes so that they can receive immediate payment is not within the purpose of the powers. Rather the purpose of the loans is to facilitate the PRP model and this does not fall within the proper purpose of the investment powers.
- 10.6. The Representations challenge the characterisation of the money lent from one of the Schemes to a member of another as a "loan". The Representations submit that the appropriate characterisation of this transaction is to describe it as an "investment" and that as such these "investments" must fall within the scope of the investment powers. The Representations also allege that the use of the term "loan" in the Request may have led us to prejudge the appropriateness of the PRP.
- 10.7. We do not consider that the nomenclature is relevant. Nor do we consider the concept of a loan and an investment to be mutually exclusive. What we are concerned with is the substance of the position. In this case we consider that loans were made by the Trustee Companies to members of other pension schemes. The loans were

interest bearing and in that sense were designed to be a form of investment.

10.8. However, for the reasons that we have set out above, we are of the opinion that, irrespective of the nomenclature, the provision of funds to those who were not members of the lending scheme was not a proper exercise of the powers of investment. As set out in the Initial Determination, the purpose of exercising the power of investment is to ensure the best result for the members of the scheme in question and to give exclusive priority to their interests⁴. The provision of funds to members of borrowing schemes compromised this purpose and cannot be said to have been in the interests of the members of the lending scheme. Rather the purpose was to facilitate the PRP.

11. Restricting the membership of the Schemes

11.1. We have mentioned in paragraph 9 above that the Schemes were all specifically designed to ensure that the membership was less than 100. Indeed Mr Craig Tweedley, at the meeting with HMRC on 22 February 2011, stated that four of the Schemes had been established to effectively operate as “overflows” to the Portman and Lancaster schemes in the event their membership reached 100. The significance of this figure is that the Schemes would not be caught by the full effect of the Investment Regulations until their membership exceeds 100.

11.2. We are satisfied that the overriding objective of the Trustee Companies was to facilitate cash advances from an associated scheme rather than from their own (which is expressly disallowed save in limited circumstances expressly prescribed by the Finance Act 2004). The only purpose in setting up numerous schemes was, as Mr Craig Tweedley admitted, to ensure that the membership never

⁴ In *Cowan v Scargill* 1985 Ch 270 at 287 Megarry VC stated: “The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust holding the scales impartially different classes of beneficiaries....they must put the interests of the beneficiaries first.”

reached 100 with the deliberate intention of circumventing the requirements laid down in the Investment Regulations.

11.3. This attempt to circumvent the Investment Regulations manifests a troubling disregard for the governance of the Schemes and a lack of knowledge and understanding of their duties as trustees. It reinforces the point made at paragraph 10.8 above that the Trustee Companies were so focused on the need to facilitate the PRP that they failed to have regard to the interests of the individual schemes and their respective members whose interests they were bound to protect.

11.4. The Trustee Companies should not behave in such a way so as to deliberately avoid exposing the Schemes to the safeguards that the Investment Regulations provide. This amounts to a tacit admission that the PRP would not satisfy the requirements of the Investment Regulations were they to apply. This further serves to demonstrate that the Schemes' assets have not been appropriately invested.

12. Fees

12.1. Fees charged by the Schemes, in accordance, with the terms in the trust deeds, must be properly incurred and reasonable in amount. The central points made by Dalriada and the Regulator in respect of the Transfer Fees are that they do not seem to have been properly incurred and are unreasonably high in relation to the amount of work that seems to have been performed.

12.2. The Representations do not dispute that Transfer Fees were charged to the members of the Schemes. Rather the Representations seek to persuade us that the Transfer Fees were in fact "administration charges" that were:

12.2.1. agreed with the members of the Schemes in a transparent way; and

12.2.2. do not fall within either the jurisdiction of either the Regulator or the Panel since administration charges do not fall within the matters set out in section 5⁵ of the Act.

12.3. What the Representations do not do is explain why the Transfer Fees are justified. In the absence of any meaningful justification for what appear to us to be high charges, we are of the opinion that there is significant doubt about the appropriateness of the Transfer Fees.

12.4. In particular, we find it hard to understand why a charge of 5% is appropriate at the date the member in question transfers his or her assets into one of the Schemes since the transfer will not require much work. In these circumstances we do not consider that the Transfer Fees are either justified or appropriate.

12.5. Section 5 of the Act includes protecting the interests of members of occupational pension schemes. Given the concern that we have about the Transfer Fees we are of the opinion that protecting the members' interests includes protecting them from high and unjustified fees.

13. Transfer of Scheme Funds

13.1. The Request identifies two instances in which there have been questionable transfers of the Schemes' assets to companies in this jurisdiction and Cyprus. With the benefit of the Dalriada Note and Dalriada Evidence we now understand that, as described above, some £4 million has been invested in XXXXX XXXXXXXX with the aim of securing the share capital of XXX.

13.2. However, despite being given an opportunity to explain the nature of this investment, the Representations are characteristically silent, and have provided us with no comfort that the investment is an

⁵ Section 5 of the Act is set out in full at Appendix A.

appropriate one. The Representations do state that XXXXX XXXXXXXX is a registered company, but that does not allay our concerns.

13.3. As discussed in fuller terms at paragraph 9 above, we are of the opinion that the investment in XXXXX XXXXXXXX is risky, uncertain and concentrates the Schemes' assets in one particular investment class. In particular, Dalriada submits that the investment currently appears to be worthless and will not generate any income for the foreseeable future given that no properties have been developed on the site.

13.4. We have also had regard to the investment in a company known as XXX XXXXXXX XXXXXXX. The Representations state the £250,000 has now been returned with interest. We accept that this is the case, but the Representations then fail to explain the nature of the investment and its terms. In the absence of more information we regard this information as questionable.

14. Failure to provide accurate Scheme details

14.1. the Regulator has submitted that the Trustee Companies have failed, in breach of section 62 of the Act, to provide the Regulator with "registerable information" including the name and address of each of the trustees of the Schemes. Certain banking documents in the Regulator's possession provide information that conflicts with information previously provided by the Trustee Companies. The Representations deny that inaccurate information has been provided to the Regulator.

14.2. While there may be force in what the Regulator says on this point we do not think it takes the matter very far and, given our findings, we do not propose to address the issue of conflicting information further.

15. Grounds for confirming Dalriada's appointment

15.1. Section 7 of PA95 sets out three grounds for appointing an IT, which we have listed in full at paragraph 2.2 above. We now turn to applying the findings we have made in the preceding paragraphs to each of these headings with respect to the PRP Schemes.

15.2. Knowledge and Skill:

15.2.1. We are satisfied that the investment strategy employed by the Trustee Companies was in breach of both the Investment Regulations and the common law. We have found the investments were poorly diversified, risky and uncertain. We also have found that the loans were not made for the benefit of the members, but rather to facilitate the PRP, which is not in their interests;

15.2.2. We are also satisfied that the deliberate design of the Schemes to avoid the effect of the Investment Regulations displays a lack of knowledge and understanding about trustee functions;

15.2.3. By reason of the above, we are of the opinion that the Trustee Companies do not have the necessary knowledge and skill for trusteeship and therefore it is reasonable to confirm Dalriada's appointment.

15.3. Proper use or application of the Schemes' assets:

15.3.1. We are satisfied that the assets of the Schemes are being utilised for making loans to members of other pension schemes, which is a fraud on the powers of investment. The purpose of those powers is to invest on behalf of the members of the scheme in question and not to facilitate the PRP so that members of other schemes can receive payments. Further, we are satisfied that the investments in XXXXX XXXXXXXX and XXX are uncertain, risky and have not been properly explained in the Representations.

15.4. Protecting the interests of the members:

15.4.1. We are satisfied, by reason of the findings that we have already made, that the interests of the members of the Schemes are at risk. In particular, the loans that the Trustee Companies have made are inflexible, unsecured and were made not in the interests of the lending scheme but in order to facilitate the PRP. This was not, as we have set out above, in the interests of the members of the lending schemes;

15.4.2. As a result, the interests of the members under each of the Schemes are at risk notwithstanding the fact that the members may receive a loan from one of the other Schemes. The key point is that the receipt of the loan does not offset the risk to a member's interest under that member's scheme;

15.4.3. In addition, we find that the investments in XXXXX XXXXXXXX and XXX are uncertain and risky and place a large proportion of the Schemes' assets in a particular class of investment. This ignores the need for diversification of the Schemes' assets;

15.4.4. Finally, we have not been comforted by the failure of the Trustee Companies to provide any evidence or information to support the various points made in the Representations. The failure to provide straightforward information suggests to us that the administration of the Schemes is not in good order and that there is a serious question mark over the Trustee Companies' ability to explain their position.

15.5. It would be sufficient to justify Dalriada's appointment if one of the three grounds set out in section 7 of PA95 were met. However, we find that all three grounds are met, and therefore we confirm Dalriada's appointment as IT to the PRP Schemes on the basis of section 7 (3) (a), (c) and (d).

15.6. Given the conduct of the Trustee Companies we are also satisfied that it is appropriate for Dalriada to act with exclusive powers pursuant to section 8 (4) (b) of the 1995 Act. Further we order that Dalriada's fees should be paid from the Schemes and that the Schemes' assets should vest with Dalriada.

15.7. In reaching this decision we have taken into account the various letters that certain members have sent to the Regulator supporting the Trustee Companies and opposing Dalriada's appointment. Having carefully considered the contents of those documents (all of which seem to follow a prescribed form) we are nonetheless satisfied that it is appropriate to confirm Dalriada's appointment.

15.8. We now turn to consider whether Dalriada's appointment should be confirmed in respect of the CPT Schemes.

16. The CPT Schemes

16.1. As we have stated above the Representations point out that only 6 of the 13 Schemes operate the PRP whereas the remainder operate the CPT. The Representations do not explain what the CPT is, but the Dalriada Note does.

16.2. From the Dalriada Note we understand that the CPT scheme is established for a particular company and then accepts a transfer, or a contribution, from that company that typically attracts a 10% charge payable to Sovereign Corporate Management (that is a member of the Ark Administrators).

16.3. The CPT scheme then purchases unlisted preference shares in a different company using a substantial proportion of its funds to finance the share purchase. The Dalriada Note demonstrates that there are clear connections between the sponsoring employer and/or members of the CPT Schemes and the companies in which the CPT Schemes purchase shares.

- 16.4. In summary we understand, in the absence of any explanation from the Trustee Companies, that the CPT Schemes enable the release of pension funds to companies associated with the members of the CPT Scheme. In substance the CPT Schemes appear to be designed to achieve the same result, albeit by different means, as the PRP Schemes.
- 16.5. In itself the model that the CPT Schemes operate is a cause for concern and gives rise to the sorts of considerations that we have already discussed in relation to the PRP Schemes.
- 16.6. However, we are also of the view that the conduct of the Trustee Companies in relation to the PRP Schemes is highly material to their suitability as trustees of the CPT Schemes. We have already set out the extensive concerns that we have about the Trustee Companies with respect to the PRP Schemes at paragraph 15 above and elsewhere.
- 16.7. We are of the opinion that the findings we have made with respect to the conduct of the Trustee Companies, in relation to the PRP Schemes, is sufficiently serious so as to justify Dalriada's appointment with respect to the CPT Schemes.
- 16.8. In particular, we are concerned that the interests of the generality of the members are at risk in relation to the CPT Schemes and that the assets of the Schemes are not being applied for their proper purpose. In addition we are concerned that the use of the CPT model to achieve the same result as the PRP model displays a lack of the proper knowledge and understanding that we would expect from trustees in the Trustee Companies' position.
- 16.9. For these reasons we are satisfied that it is reasonable to uphold the appointment of Dalriada as IT to the CPT Schemes

pursuant to section 7 (3) (a), (c) and (d) of PA95. We are also of the opinion that Dalriada's appointment should be to the exclusion of the Trustee Companies with respect to the CPT Schemes pursuant to section 8 (4) (b) of the 1995 Act.

17. Referral to the Tax and Chancery Chamber of the Upper Tribunal

17.1. 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 103 of the Act 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: The Upper Tribunal, Tax and Chancery Chamber, 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.

17.2. 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 at The Pensions Regulator, Napier House, Trafalgar Place, Brighton BN1 4DW.

Signed:



Chairman: John Scampion, on behalf of the Panel

Dated: 10 August 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.