

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under Section 98(2)(a) of the Pensions Act 2004 (“the Act”)</p> <p>The George & Harding Group Pension Scheme (“the Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>C3341371</p>
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1. The Determinations Panel (“the Panel”), on behalf of the Pensions Regulator (“the Regulator”), met on 22 November 2011 to decide whether to exercise a reserved regulatory function in relation to the issues in the Request to exercise a Regulatory Function (“the Request”) dated 18 November 2011. The Regulator considered under Section 10(2) of the Act that the exercise of a reserved regulatory function was appropriate.

2. **Matters 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 the Regulator considered it likely that if a warning notice were to be given there would be an immediate risk to:

- i. the interests 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), 7(3)(c) and/or 7(3)(d) of the Pensions Act 1995 (“the 1995 Act”) 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);

The Panel was also asked to issue a vesting order under Section 9 of the 1995 Act to vest the scheme property in any appointed independent trustee.

3. Directly Affected Parties

The Request specified the following parties as being directly affected by the regulatory action outlined therein.

- (a) Mr Colin Harding – trustee
- (b) Mr Barry Milburn – trustee
- (c) Dalriada Trustees Limited – an independent trustee

4. Details of Scheme and the principal employer

The complex corporate structure of the companies connected to the Scheme and the Trustees is set out in detail in the Request. The key relevant facts however are:

1. The Scheme was set up in July 1992 to accept a bulk transfer from the BEC Pension Scheme, an industry-wide scheme for non-associated employers, and closed with effect from 31 March 1996. All active members became deferred.
2. On 20 June 2002 Zejwa (then called George & Harding Limited) became principal employer. The Trustees of the Scheme at this time were as follows:
 - (a) Mr Colin Harding;
 - (b) Mr Barry Milburn;
 - (c) Mr Colin Read, who the Regulator understands was the only trustee not connected or associated with the management of any of the entities within the Group. After the resignation of Mr Colin Read in 2007, Mr Colin Harding was appointed as a member-nominated trustee in order to comply with legislative requirements.
3. It appears that from at least 2006 onwards the Scheme was in substantial deficit on a buy-out basis.

5. Background to Application

1. The Regulator was contacted by a member of the Scheme who raised certain initial concerns in relation to the Scheme.
2. The Regulator has carried out its own investigation into the Scheme and, in particular, into the purchase by the Scheme from parties related to the Trustees and/or from one of the Trustees of a property known as “Sunburst House”. The Panel understands that the investigation into the purchase of Sunburst House has been based predominantly on information and documents that are in the public domain or which have been provided by the member of the Scheme that initially contacted the Regulator.

Zejwa Limited

3. Zejwa was incorporated in May 1975. Zejwa is owned and controlled by Mr Colin Harding and xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, who are also directors and between them own or control at least 98.5% of the shares.
4. Zejwa was initially set up to act as the holding company for the original George & Harding Group. By 2005, Zejwa relied heavily on the business operations of another entity within the Group, George and Harding Construction Limited (referred to below as "Construction").
5. Zejwa entered Creditors' Voluntary Liquidation on 10 November 2009 and was dissolved on 30 December 2010.

Construction

6. Construction was incorporated in December 2000. Construction is owned and controlled by Mr Colin Harding (also a director) and xxxxxxxxxxxxxxxxxxxxxxxx, who between them own or control at least 80% of the shares
7. Construction entered into voluntary liquidation on 29 January 2009. The liquidation does not yet appear to have been completed because of potential outstanding litigation.

Chelaberd

8. Chelaberd Limited was incorporated in October 1981 apparently as a vehicle for holding shares in other entities in the Group. Chelaberd is owned and controlled by Mr Colin Harding and xxxxxxxxxxxxxxxxxxxxxxxx, who are also directors and between them hold or control 82% of the shares.

The purchase of Sunburst House by the Scheme

9. Sunburst House was purchased by Chelaberd on 21 March 1990. The Request confirms that the freehold interest was subject to a long leasehold interest which, by Deed of Substitution dated 30 November 2006, was registered in the names of Mr Colin Harding and xxxxxxxxxxxxxxxxxxxxxxxx, for the remainder of a period of 99 years from 25 February 1976 (the "Head Lease").
10. There was a further short leasehold interest granted by the owners of the Head Lease to Construction for a term of 21 years from 1 August 2005.

11. In around August 2007, it was proposed, apparently by senior directors within the Group including Mr Harding, that the Scheme should purchase Sunburst House.
12. The minutes of the Trustees' meeting on 8 August 2007 record that Mr Colin Read was concerned that he had been excluded from prior discussion that must have taken place regarding the proposed purchase.
13. In the minutes of the Trustees' meeting on 8 August 2007 Mr Colin Harding is recorded as having explained, in response to Mr Colin Read's concerns, that the impetus for the sale being made was the critical need for working capital for Construction:

"Hence the suggestion last week that CH and xx [Colin Harding and xxxxxxxxxxxxxxxxx] sell Sunburst House to raise short term cash to carry G&H C [Construction] over until its cash flow is back into positive".
14. The Scheme purchased the freehold and head leasehold titles to Sunburst House for £965,000 on 24 October 2007. The Scheme took on the outstanding mortgage over the property with Nationwide of approximately £500,000 (the "Mortgage"). It is not clear whether Construction did in fact benefit from the proceeds of the sale.
15. Construction entered into voluntary liquidation on 29 January 2009 and the minutes of the Trustees' meeting on 14 September 2009 indicate that any rent being paid on Sunburst House would cease in November or December 2009. The Scheme sold Sunburst House during the year ending 31 March 2010 for £784,163, a capital loss of £180,837.
16. Because of past corporate transactions, the Panel understands that the Scheme does not have an "employer" within various relevant statutory definitions (including for the purposes of entry into the Pension Protection Fund ("PPF"), liability for any employer debt under section 75 of the 1995 Act and use of certain of the Regulator's powers). The PPF has refused entry of the Scheme for this reason. The fact that the Scheme does not have an "employer" and is therefore apparently ineligible for entry into the PPF is a complex legal matter which has given rise to public discussion and may result in amendment to the Financial Assistance Scheme ("FAS") regulations.

6. Decisions

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

"A. Appointment of Trustee under Section 7

Dalriada Trustees Limited of Chamber of Commerce House, 22 Great Victoria Street, Belfast, BT2 7BA is hereby appointed as trustee of the George & Harding Group Pension Scheme ("the Scheme") with effect on and from 22 November 2011.

1. This order is made because the Pensions Regulator is satisfied on the balance of probabilities 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 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); and
 - iii otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).
3. Dalriada Trustees Limited's fees and expenses shall be paid out of the resources of the Scheme pursuant to Section 8(1)(b) of the Pensions Act 1995.
4. 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.

B. Vesting Order under Section 9

1. The Pensions Regulator hereby orders the vesting in, and the assignation and transfer to, Dalriada Trustees Limited of Chamber of Commerce House, 22 Great Victoria Street, Belfast, BT2 7BA, as trustee of The George & Harding Group Pension 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.
2. This order is made by the Pensions Regulator pursuant to Section 9 of the Pensions Act 1995, as amended.
3. This order will take immediate effect on the date of this order."

7. Reasons for decisions

In making their decisions 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**.

On the limited evidence before it the reasons given by the Panel for their decisions were:

1. The Trustees have been without any independent trustee since the resignation of Colin Read. The remaining Trustees have potential conflicts of interest by virtue of their substantial involvement with various entities in the Group and, in connection with Sunburst House, direct conflicts of interest. An independent trustee not connected or associated with any of the entities within the Group will assist in effectively managing conflicts of interest following the departure of Mr Colin Read.
2. The circumstances surrounding the purchase of Sunburst House demonstrate that the Trustees failed to adequately identify conflicts of interest or take adequate steps to avoid or manage such conflicts. Whilst the minutes of the trustee meeting dated 8 August 2007 and the subsequent Annual Reports of the Scheme suggest that Mr Harding was not trying to hide his interest in the transaction, there was plainly a conflict for Mr Harding that was not managed properly or competently. It is difficult to envisage a more direct conflict than a trustee selling his own personal or company property to the pension scheme.
3. The Trustees' actions in purchasing Sunburst House show that they failed to adequately manage their conflicts of interest in:
 - (a) initially excluding the independent trustee from the discussions as to the purchase of Sunburst House;
 - (b) placing undue weight on the interests of other entities within the Group, and particularly the reported interests of Construction, in determining whether the Scheme should purchase Sunburst House;
 - (c) agreeing to purchase property from a trustee without adequate external legal advice, an expert and impartial valuation, adequate analysis of the risks and without omitting the trustee with the most direct conflict from the discussions or decision making on the matter.
4. The Trustees' actions displayed a lack of competence posing an immediate risk to the scheme by, amongst other matters:
 - (a) apparently failing to take adequate steps to negotiate the price or seek external expert valuation in respect of the purchase price for Sunburst House;

- (b) failing to appreciate the need to take legal advice as to their position in respect of the purchase of Sunburst House;
 - (c) apparently closing their minds to the obvious fact, recorded in the minutes of the Trustees' meeting, that they were agreeing to invest a significant part of the Scheme's assets in an investment that was valued on the basis of the receipt of income from Construction at a time when they knew Construction to have severe cashflow and business problems;
 - (d) making the investment in Sunburst House despite the fact that it appears not to have been in the best interests of the Scheme.
5. Purchasing Sunburst House as an investment was not in the best interests of the Scheme and was contrary to the Investment Regulations or principles given that:
- (a) It involved the Scheme replacing its diversified and largely liquid investment portfolio with a significantly less liquid asset. This loss of diversification was also a concentration in an asset which was closely associated and connected with the Group and increased the Scheme's exposure to the Group's solvency;
 - (b) The risks inherent in this concentration of Scheme investments in a single asset in fact materialised on the insolvency of Construction. The Scheme was accordingly left not only with no potential for employer contributions and no rental income, but also became liable to the rates and charges for Sunburst House.
6. The appointment of an independent trustee is necessary in order to strengthen the competence and independence of the trustees of the Scheme and so that a full investigation as to the actions of the Trustees in agreeing to the purchase of Sunburst House, and any other matters in which a conflict or interest or lack of competence may be an issue, can be undertaken. The legal complexities concerning the Scheme's eligibility for entry into the PPF / FAS provides a supporting reason for strengthening the competence and independence of the trustees. The Panel agreed that it was appropriate to appoint a trustee on a permanent, rather than a fixed term basis as it could not be known at this stage how long any investigations would take.

8. **Special Procedure**

The Panel considered it appropriate to exercise its powers under the Special Procedure because the evidence in the Request gave rise to serious concerns about the Trustees' xxxxxxxxxx understanding of conflicts of interest and the responsibilities of pension fund trustees. Whilst it is not clear from the available evidence the extent to which the assets/members of the scheme are at risk, the purchase of Sunburst House was a major lapse from the standards required of pension fund trustees. This one transaction creates a considerable degree of uncertainty about the competence xxxxxxxxxx of the trustees, and led

the Panel to consider that, on a balance of probabilities, it was likely that if a warning notice were to be given, there would be an immediate risk to the interests of the members or to the assets of the Scheme.

9. The Independent Trustee

The Panel considered it appropriate to appoint the trustee recommended in the Request, namely Dalriada Trustees Limited, as independent trustee. The Panel decided not to give Dalriada exclusive powers at this stage as there was insufficient evidence to suggest that this was necessary. Moreover, the Panel considered that it may be helpful for the independent trustee to work alongside the existing trustees as they (and particularly Mr Milburn) may be able to assist Dalriada further in their investigations.

The Panel were also mindful of the need to minimise the costs of any independent trustee given the size of the Scheme and its assets.

10. Important Notices

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

11. Representations to the Pensions Regulator

Take notice that you have the opportunity to make representations to the Regulator which will make up your defence to the allegations in the Application Request Notice and its exhibits which accompany this Determination Notice.

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:

- i. the determination is wrong in some particular detail; or
- ii. 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.

12. 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".

13. Referral to the Tax and Chancery Chamber of the Upper Tribunal ("the Tribunal")

After the compulsory review, you will have the right to refer the matter, to which this Determination Notice relates, to the Tax and Chancery Chamber of the Upper Tribunal ("The Tribunal") under Section 99(7) of the Act. The Final Notice will give more details regarding referrals to the Tribunal.

Signed:



Chairman: Alasdair Smith

Dated: 1 December 2011 as amended on 12 July 2012

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.