

	<p>DETERMINATION NOTICE under Section 10(2)(a) of the Pensions Act 2004 (the “Act”)</p> <p>DCT Civil Engineering Staff Pension Fund (the “Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>C26276259</p>
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1. The Determinations Panel (the “Panel”) of the Pensions Regulator (the “Regulator”) met to consider the issues in a Warning Notice of 5 February 2016.

Matters to be determined

2. The Warning Notice asked the Panel to determine whether to make an order under Section 67G(2) and 67G(6) of the Pensions Act 1995 (“the 1995 Act”) and whether to exercise a requirement under Section 67G(5)(a) of the 1995 Act.
3. The power to make an order under s.67(G)(2) is a reserved regulatory function and is, therefore, only exercisable by the Panel.

The Decision

4. The Panel determined to make an order that the Scheme’s Deed of Amendment executed on 18 August 2010 is void. The terms of the Order are recited at the conclusion of this Determination Notice. This Notice gives the Panel’s reasons for its determination.

Directly Affected Parties

5. The Panel considered the following parties as being directly affected by its determination:
 - i. Independent Trustee Services Limited (the “Trustee”)
 - ii. The former trustees of the scheme namely:

XXXXXXXXXX
XXXXXXXXXX
XXXXXXXXXXXXXXXXXX
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 - iii. the Pension Protection Fund (“PPF”).

The Scheme

6. The Warning Notice states that the Scheme is a defined benefit occupational pension scheme which has been closed to future accrual since 30 June 2002. The principal employer of the Scheme is in administration. The Scheme is subject to an assessment period to determine eligibility for PPF compensation.
7. As at 31 December 2012, there were 11 members, being 4 deferred members and 7 pensioner members. At the last draft valuation, as at 31 December 2012, the Scheme had assets of £1.3m.

Background to the application

8. The Scheme was established on 19 June 1989. The Scheme records are poor but the available evidence indicates that prior to 2010, the Scheme provided defined benefit pension benefits. That evidence includes:-
 - (i) a copy of a deed and rules which appear to have been executed sometime in 1996, although the exact date is uncertain (“the 1996 Rules”). This document has all the hallmarks of a defined benefit scheme including benefits being determined by reference to a formula using members’ final pensionable salary and years of pensionable service. It also identifies administrative processes associated with a defined benefit scheme;
 - (ii) a 2009 actuarial valuation and a draft 2012 valuation both of which are predicated on the Scheme providing defined benefits for the 11 members;
 - (iii) correspondence between XXXXXXXXXXXX, one of the Former Trustees and a solicitor which indicates XXXXXXXXXXXXXXXXXXXX’s understanding that pension benefits were calculated based on salary.
9. There is no evidence before the Panel that prior to 2010, the Scheme operated other than as a defined benefit scheme.
10. In October 2008 the Former Trustees instructed a law firm, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX to review the then current Scheme rules for compliance with legislative requirements and to clarify the means by which member benefits were calculated.
11. In January 2009 XXXX wrote to the Former Trustees recommending that, in part due to legislative changes, the existing rules be replaced. There is no evidence before the Panel that there was any consideration at that time of the nature of the benefits that the Scheme provided. The Former Trustees did not ask nor intend for the scheme to be converted from a defined benefit scheme to a defined contribution scheme.

12. A draft deed of amendment was produced. Clause 1 of the draft deed stated:

“In accordance with the provisions of Rule 46 of the Old Rules the Trustees with the consent of the Principal Employer HEREBY REVOKE all the provisions of the Old Rules and replace them with the new Rules contained in the Schedule hereto.”

13. The new rules appear to be standard-form rules of a defined contribution SSAS-type pension scheme. Therefore, the effect of these amendments would be to replace all of the members’ rights to defined benefits with money purchase benefits. However XXXX did not give any written advice to the Former Trustees about this (or any other) effect of the Deed, nor about the consequences of such a change nor any further steps required.
14. On 4 May 2010, the scheme actuary wrote to the Former Trustees expressing concerns over the terms of the draft deed as it purported to change the accrued benefits from being defined benefits to money purchase benefits without member consent having been sought. The Scheme actuary confirmed that all aspects of the Scheme since his involvement had always been under the final salary requirements, adding that it would be *“very difficult to switch the scheme...without requesting individual members’ consent”*.
15. It appears that the scheme actuary’s concerns were not acted upon as the draft deed was executed by the Former Trustees on 18 August 2010 (“the 2010 Deed”).
16. From enquiries made by the Regulator, it is understood that the actuary’s concerns were not acted upon due to an oversight. Member consent was neither sought nor obtained nor were the members made aware of the amendments.
17. The Regulator understands that, since the deed was executed in August 2010, the Scheme has continued to be treated as having a defined benefit structure by all parties.
18. The purported effect of the 2010 Deed was brought to the attention of the Former Trustees in 2012 by XXXXXXXXXXXX which provided advice on scheme funding and related issues.
19. The sponsoring employer went into administration on 6 January 2014.
20. On 12 February 2014, the remaining Former Trustees both retired and Independent Trustee Services Ltd (ITS) was appointed as the sole trustee of the Scheme.
21. On 17 February 2014, the Trustee wrote to the Regulator to request an order confirming that the entire 2010 Deed be declared void.

22. Pending resolution of the effect of the 2010 Deed, members are receiving PPF levels of compensation.
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Warning Notice and Representations

23. In its Warning Notice, the Regulator set out the legal basis for the Panel to make an order declaring the modification to the Scheme deed and rules to be void. The Warning Notice raised the issue of whether the entirety of the 2010 Deed should be declared void. The Regulator asked the Panel to make an order declaring the provisions of the 2010 Deed void to the extent that it changes the members’ benefits under the Scheme to money purchase benefits and to the extent that it makes consequential amendments to deal with the members’ benefits on a money purchase basis.
24. The Regulator identified the provisions that it considered to be voidable but highlighted that the Trustee had requested that the entirety of the 2010 Deed be declared void and that the PPF supported the Trustee’s request.
25. The Regulator received no formal Representations from any of the Directly Affected Parties in response to the Warning Notice.
26. Following a preliminary consideration of the matter, the Panel indicated to the Parties that it was minded to declare Clause 1 of the 2010 Deed void with the consequence that the entire deed, rather than only parts of it, would be void. The Panel invited comments from the Parties. No objections to this approach were advised (save as had previously been set out in the Warning Notice).

The Law

27. Section 67 of the 1995 Act provides (where relevant):
- “(1) The subsisting rights provisions apply to any power conferred on any person by an occupational pension scheme to modify the scheme, other than a power conferred by-*
 - (a) a public service pension scheme, or*
 - (b) a prescribed scheme or a scheme of a prescribed description.*

 - (2) Any exercise of such a power to make a regulated modification is voidable in accordance with section 67G unless the following are satisfied in respect of the modification-*
 - (a) in the case of each affected member-*
 - (i) if the modification is a protected modification, the consent requirements (see section 67B),*

- (ii) if it is not, either the consent requirements or the actuarial equivalence requirements (see section 67C),
- (b) the trustee approval requirement (see section 67E), and
- (c) the reporting requirement (see section 67F).”

28. Section 67A defines a regulated modification as follows

“

(2) *"Regulated modification" means a modification which is-*

- (a) *a protected modification, or*
 - (b) *a detrimental modification,*
- or is both.*

(3) *"Protected modification" means a modification of an occupational pension scheme which-*

- (a) *on taking effect would or might result in any subsisting right of-*
 - (i) *a member of the scheme, or*
 - (ii) *a survivor of a member of the scheme,*

which is not a right or entitlement to money purchase benefits becoming, or being replaced with, a right or entitlement to money purchase benefits under the scheme rules,

- (b) *would or might result in a reduction in the prevailing rate of any pension in payment under the scheme rules, or*
- (c) *is of a prescribed description.*

...

(6) *"Subsisting right" means-*

- (a) *in relation to a member of an occupational pension scheme, at any time-*
 - (i) *any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or*
 - (ii) *any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules,*

and
- (b) *in relation to the survivor of a member of an occupational pension scheme, at any time, any entitlement to benefits, or right to future benefits, which he has at that time under the scheme rules in respect of the member.*

For this purpose, "right" includes a pension credit right.”

29. Section 67B of the 1995 Act covers the consent requirements which are not set out fully here.

30. Section 67G of the 1995 Act provides (where relevant):

“

(1) *Subsection (2) applies in relation to a regulated modification made in exercise of a power to which the subsisting rights provisions apply which is voidable by virtue of-*

- (a) section 67(2) or
- (b) ..
- (2) *The Authority may make an order declaring that subsection (6) applies in relation to the regulated modification.*
- ...
- (5) *An order under subsection (2) relating to a regulated modification may also-*
 - (a) *require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of giving effect to the order...*
- (6) *Where the Authority make an order declaring that this subsection applies in relation to a modification of a scheme, or the grant of any rights under the scheme, the modification or grant is void to the extent specified in the order, and in respect of the specified persons, as from the time when it would, disregarding the order, have taken effect."*

Reasons for the Decision

- 31. In making its decision the Panel had regard to the objectives of the Regulator as set out in Section 5 of the Act and to the matters listed in Section 100.
- 32. The Panel was satisfied of the following:-
 - (i) at the time of the modification of the Scheme deed and rules in August 2010, the Scheme was subject to the subsisting rights provisions set out in s.67 of the 1995 Act. The Panel accepted that the Scheme was not exempt;
 - (ii) on the balance of probabilities, before the 2010 Deed was executed, all of the members of the Scheme had a right or entitlement to a defined benefit pension;
 - (iii) the amendments made in the 2010 Deed purported to change the defined benefit entitlement;
 - (iv) the amendment effected by Clause 1 of the 2010 Deed was a Regulated Modification. The Panel considered that the 2010 Deed was a Protected Modification within the meaning of s.67A(3) insofar as it "*would or might result in any subsisting right of (i) a member of the Scheme... which is not a right or entitlement to money purchase benefits becoming, or being replaced with, a right or entitlement to money purchase benefits under the scheme rules.*"
 - (v) there is no evidence that consent was sought from members before the 2010 Deed was executed. Consequently s.67(2) does not prevent the regulated modification from being voidable;

(vi) Clause 1 of the 2010 Deed was voidable within the meaning of s.67G.

33. The Panel concluded that it was in the members' interests that the 2010 Deed should be declared void. Unless the 2010 Deed was declared void the Scheme would not reflect the understanding of all parties and the interests of the Members.
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XXXXXXXXXX.
34. In the circumstances, the Panel considered it reasonable to exercise the power to declare Clause 1 of the 2010 Deed void. In the Panel's view, the consequence of this is that the 1996 Rules are not revoked or replaced with the new rules in the schedule to the 2010 Deed.
35. The Panel was not aware of any reason why the 2010 Deed should not be declared void. Whilst the Regulator had indicated in the Warning Notice that it considered only certain provisions of the 2010 Deed were voidable, it advised in later correspondence that it did not object to the position being adopted by the Panel, namely that the entire 2010 Deed be declared void.

Conclusion

36. For these reasons the Panel determined that an Order should be made in the following terms:

"Pursuant to s. 67G(2) and s.67G(6) of the Pensions Act 1995, the Scheme's Deed of Amendment executed on 18 August 2010 (the "2010 Deed") is hereby declared void. This Order takes effect in respect of all members of the Scheme".

37. In light of the proposed Order, the Panel did not consider it necessary to impose any requirements under s.67G(5).
38. By virtue of section 96(5) of the Pensions Act 2004 the Order will not be made during the period within which this determination may be referred to the Upper Tribunal and, if so referred, until the reference and any appeal against the Upper Tribunal's determination has been disposed of.
39. **Appendix 1** to this Determination Notice contains important information about the rights of the parties to refer this decision to the Upper Tribunal.

Signed:

Chairman: Elizabeth Neville

Dated: 5 April 2016

Referral to the Tax and Chancery Chamber of the Upper Tribunal

You 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 you have 28 days from the date this Determination 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 Determination Notice.

The Tribunal’s address is:

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

Tel: 020 7612 9700

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

Tel: 01273 811852

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

http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043