

The Pensions Regulator	<b>Standard Procedure</b> <b>DETERMINATION NOTICE</b> <b>under section 96(2)(d) of the Pensions</b> <b>Act 2004</b>	The Pensions Regulator case ref:  <b>C68407341</b>
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1. The Determinations Panel (“the Panel”), on behalf of the Pensions Regulator (“the Regulator”) met on 15 November 2016 to decide whether to exercise a reserved regulatory function in relation to the issues in a Warning Notice dated 31 May 2016. The matter was referred to the Panel on 31 October 2016 following a period for representations and responses.

**Matters to be determined**

2. In the Warning Notice the Panel was asked to determine whether to make an order under section 3(1) of the Pensions Act 1995 (“PA 1995”) to prohibit:
  - (i) one or more of Mr Timothy Walker, Mr Macalister Lindsay and Mr Desmond Cheyne (“the Trustees”) from acting as a trustee of trust schemes in general on the basis that they are not fit and proper to be a trustee of trust schemes in general;
  - (ii) one or both of Mr Timothy Walker and Mr Macalister Lindsay (“the Milton Trustees”) from acting as a trustee of the following schemes (“the Milton Schemes”):
    - (a) Ochil Birch Retirement Benefit Scheme (“Ochil Birch RBS”);
    - (b) Binnian Cedar Retirement Benefit Scheme (“Binnian Cedar RBS”);
    - (c) Bodmin Stincher Retirement Benefit Scheme (“Bodmin Stincher RBS”);
    - (d) Sidlaw Larch Retirement Benefit Scheme (“Sidlaw Larch RBS”);
    - (e) Lawers Tay Retirement Benefit Scheme (“Lawers Tay RBS”); and
    - (f) Quantock Yew Retirement Benefit Scheme (“Quantock Yew RBS”).
  - (iii) one or both of Mr Timothy Walker and Mr Desmond Cheyne (“the Carrick Trustees”) from acting as a trustee of the Carrick Harbours Retirement Benefit Scheme (“the Carrick Scheme”).
3. The Warning Notice contended that the Trustees were not fit and proper on the basis of their integrity and/or their competence and capability. The grounds relied on were not always the same for each of the Trustees.

4. The power to prohibit a trustee under section 3(1) PA 1995 is a reserved function under paragraph 4 of Schedule 2 to the Pensions Act 2004 (“the Act”) and can therefore only be exercised by the Panel.

### **Decision**

5. The Panel determined to prohibit Mr Macalister Lindsay, Mr Timothy Walker and Mr Desmond Cheyne from acting as trustees of trust schemes in general. The reasons for the Panel’s decision are set out below.

### **Directly Affected Parties**

6. The Panel considered the following parties to be directly affected by its determination for the purposes of the Act:-
  - Mr Cheyne
  - Mr Lindsay
  - Mr Walker
  - Dalriada Trustees Limited (“Dalriada”) – independent trustee of the Milton Schemes and the Carrick Scheme;
  - The Milton Schemes’ sponsoring employers namely:
    - Binnian Cedar Limited
    - Bodmin Stincher Limited
    - Sidlaw Larch Limited
    - Lawers Tay Limited
    - Quantock Yew Limited
7. The Panel noted that the following former sponsoring employers are dissolved:
  - Ochil Birch Limited
  - Carrick Harbours Limited.

### **The Trustees**

#### **Mr Lindsay**

8. Mr Lindsay was a trustee of the Milton Schemes until he was suspended by order of the Determinations Panel on 13 June 2013. As this suspension had effect only until 12 June 2014, Mr Lindsay remains a trustee of the Milton Schemes albeit that Dalriada has exclusive powers under the terms of the Panel’s order of 13 June 2013.
9. Mr Lindsay is also the sole director of Chalcedon Trustees Ltd which is the corporate trustee of six pension schemes, four of which are active.

### Mr Walker

10. Mr Walker was a trustee of the Milton Schemes until he was suspended by order of the Determinations Panel on 13 June 2013. As this suspension had effect only until 12 June 2014, Mr Walker remains a trustee of the Milton Schemes albeit that Dalriada has exclusive powers under the terms of the Panel's order of 13 June 2013.
11. Mr Walker was a trustee of the Carrick Scheme until excluded by the appointment of Dalriada as independent trustee by order of the High Court dated 19 September 2013. Mr Walker was then removed as a trustee of the Carrick Scheme by order of the High Court dated 14 November 2013, an order that he did not oppose.
12. Mr Walker was also an employee of Turnberry Wealth Management ("TWM") then an FSA/FCA regulated company. From bank statements it is apparent that Mr Walker received payments from TWM between at least January 2012 and July 2013 of approximately £1,500 per month.

### Mr Cheyne

13. Mr Cheyne was a Trustee of the Carrick Scheme until excluded by the appointment of Dalriada by order of the High Court dated 19 September 2013. Mr Cheyne was then removed as trustee by order of the High Court dated 7 October 2013, an order that Mr Cheyne did not oppose.

### Dalriada

14. Dalriada is an independent professional trustee company which was appointed as trustee of the Milton Schemes with exclusive powers by order of the Panel on 13 June 2013 and of the Carrick Scheme with exclusive powers by order of the High Court on 19 September 2013.

### **Prohibition**

15. The current regulatory action against the Trustees relates to their conduct in respect of specific schemes. As regards Mr Lindsay, the concerns raised are in respect of the Milton Schemes. As regards Mr Cheyne, the concerns relate to the Carrick Scheme and as regards Mr Walker, the concerns relate to his conduct on both the Milton Schemes and the Carrick Scheme.

### **A. The Milton Schemes**

#### **(i) Scheme background**

16. The Panel was given the following information in the Warning Notice in relation to the Milton Schemes which has not been challenged. (Where the information has been provided from elsewhere, or where it has been expressly challenged, this is set out below).

17. The Milton Schemes were each registered as occupational pension schemes with HMRC between September and November 2012.

18. The Milton Schemes share a significant number of common features, including that the Milton Trustees were the trustees of each of the Milton Schemes, they each had the same scheme address and they each had a single sponsoring employer with the same registered address as the scheme. Each scheme was also administered by Marley Administration Services Limited (“Marley”). The sole director of Marley is Martin Brown.

19. As at 11 November 2013, the Milton Schemes had the following member numbers:-

Binnian Cedar – 103 members  
Sidlaw Larch – 91 members  
Ochil Birch – 74 members  
Bodmin Stincher – 68 members.  
 (“the active schemes”).

Lawers Tay – 0 members  
Quantock Yew – 0 members.  
 (“the dormant schemes”).

20. The trust deeds for the Milton Schemes are materially in the same form. Each is stated to be executed as a deed and is signed by the “provider” and by Mr Lindsay and Mr Walker.

21. Mr Lindsay and Mr Walker appear to have each received £4,000 in respect of each active scheme.

(ii) Regulatory action

22. TPR was contacted in November 2012 by HMRC expressing concern about the activities of Marley and possible pension liberation. On 8 May 2013, the City of London Police executed search warrants at a number of addresses,

XX  
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XX  
XX.

23. The Regulator was informed in advance of the intended search and XXXXXXX and members of the case team were present when it was carried out. Mr Walker was also present at XXXXXXX and at the time stated he was an employee of Turnberry Wealth Management Ltd. Mr Walker did not identify himself at the time as a trustee of any pension scheme.

24. Following the XXXXXXXX the Regulator sought the appointment of Dalriada, and the suspension of Mr Lindsay and Mr Walker, using the special procedure (“the IT appointment/suspension proceedings”). The application was made on the basis of concerns about suspected pension liberation as well as investment/trustee concerns. On 13 June 2013 Dalriada was appointed with exclusive powers and Mr Walker and Mr Lindsay suspended. These suspensions expired on 12 June 2014 albeit that the Milton Trustees did not resume any powers in relation to the schemes given the terms of Dalriada’s appointment.
25. The following additional background in relation to the Milton Schemes is based upon the Regulator’s investigations and information provided by Dalriada.

(iii) The Milton Schemes’ Investments

26. The Milton Schemes appear to have invested solely in two investments, the Advalorem Value Asset Fund (“Advalorem”) and Swan Holdings PCC Limited (“Swan”) previously called the Advalorem Added Value PCC Limited.
27. Advalorem was incorporated in Gibraltar on 29 June 2012 and registered as an Experienced Investor Fund on 26 July 2012. It was said to “*employ a strategic approach to unlocking value from real estate*”. The investments by the Milton Schemes were made in the period from 3 December 2012 to 19 March 2013 as set out below:-

<b>Scheme</b>	<b>Investment in Advalorem</b>	<b>Investment in Swan</b>
Binnian Cedar RBS	£1,159,000.00	£957,590.00
Bodmin Stincher RBS	£1,882,000.00	£110,000.00
Ochil Birch RBS	£2,113,000.00	£55,000.00
Sidlaw Larch RBS	£2,606,500.00	-
<b>Total</b>	<b>£7,760,500.00</b>	<b>£1,122,590.00</b>

28. The Financial Services Commission in Gibraltar (the “FSC”) investigated Advalorem and produced a final report on 10 October 2013 which concluded that “*it is highly probable that Advalorem has been used as part of a fraud, and/or attempted a fraud against investors in Advalorem*”. The report notes that £6 million was spent by Advalorem on land later valued by Savills at £190,000.

29. Swan is a protected cell company incorporated in the Isle of Man and registered on 28 March 2013 with a bank account in Morocco. Swan purports to invest in distressed property in the UK and promised a return of 6-10% per annum.
30. The investments in Swan were made in April/May 2013 after the FSC placed restrictions on Advalorem's ability to accept any further subscriptions or make further investments. One of the active schemes, Sidlaw Larch, did not invest in Swan.

(iv) Prohibition grounds against the Milton Trustees

31. The Regulator has sought the prohibition of the Milton Trustees, on the grounds that neither is a fit and proper person by reason of a lack of integrity or competence and capability in relation to the following matters:-

- i. Breach of investment duties;
- ii. Pension liberation;
- iii. Fees failures and conflicts of interest;
- iv. Inadequate scheme governance.

32. In its Warning Notice the Regulator contended that the matters relied on showed a lack of competence and capability and demonstrated a lack of integrity, either directly or inferentially, because the lack of competence was so striking as to suggest a lack of integrity. The Regulator submitted that, because the Milton Trustees charged for their services, they should be held to a higher standard of account than a lay trustee, albeit submitting that the prohibition test was met even if this point were not accepted.

i. *Breach of investment duties*

33. The Regulator's Warning Notice argued that the investments made by the Milton Trustees were inappropriate for the following reasons:-

- (i) Under Regulation 4(7) and/or Regulation 7 of the Occupational Pension Scheme (Investment) Regulations 2005 ("the Investment Regulations") (depending on whether the scheme had more or less than 100 members respectively) and under common law, the Milton Trustees had a duty to diversify assets/investments. Given that each of the Milton Schemes invested in Advalorem and Swan (or in the case of Sidlaw Larch, in Advalorem alone), the Regulator submitted that there was a clear lack of diversification both in terms of asset class and specific investment as both entities invested in distressed property in the UK;
- (ii) The investments chosen did not provide sufficient security, quality or liquidity for members. The Regulator submitted that they were high risk investments and were exclusively foreign, which would make them harder to trace. Moreover, as regards Binnian Cedar (which had 103

members and was therefore subject to Regulation 4 of the Investment Regulations) the investments were not made predominantly on regulated markets as required;

- (iii) The Advalorem investment has been found by the Gibraltar Financial Services Commission to have been a “vehicle for fraud”;
  - (iv) The decision to invest in Swan in April/May 2013, after concerns had been raised about Advalorem, was clearly inappropriate;
  - (v) Substantial fees were paid out of the funds invested, including 7% being paid to the introducer;
  - (vi) There is no evidence that proper investment advice, in writing, was obtained by the Milton Trustees prior to making the investments, in breach of section 36(3) PA 1995;
  - (vii) The Milton Trustees effectively delegated their power of investment to Marley (in breach of section 34 PA 1995). As well as being wrong of itself, the Regulator submitted that this also created a conflict of interest for Mr Walker who also worked for TWM (a company connected to Marley by Mr Brown). Mr Walker was therefore not able to weigh up members’ interests as a neutral trustee should, bearing in mind only the interests of members.
34. In support of its arguments relating to the investment failures, the Regulator referred to the fact that during the period in which the Milton Trustees were responsible for the Milton Schemes’ investments, the value of the funds fell from almost £11.5 million to approximately £1.7 million.

*ii. Pension liberation failures*

35. In its Warning Notice the Regulator explained that there are a number of “typical” indicators of pension liberation. These include the following:
- (i) New sponsoring employers are established, seemingly without any real business interest;
  - (ii) The scheme in question is usually established a short time afterwards (or at the same time);
  - (iii) All or almost all of the members who join the scheme have no employment link with the sponsoring employer;
  - (iv) Assets are invested in risky investments, often overseas;
  - (v) Multiple entities are often used, so that when one is shut down another one can be used.
36. Where such elements are present, the Regulator considers that this is good evidence of liberation or scam activity taking place.
37. The set-up of the Milton Schemes demonstrated a number of the pension liberation indicators. At the time of the IT appointment and suspension proceedings, the Regulator identified a number of other indicators including the following:-

- (i) Concerns having been raised with the Regulator by independent pension professionals, including reports of “suspicious” transfers;
- (ii) Cheque book stubs found in the search of XXXXXXXXXXXX, including four cheques in sums ranging from £5,000 to £16,000 recorded as “25% drawdown.” Similarly 3 cheques between £5,000 and £12,000 recorded as “refund provider”;
- (iii) Bank accounts evidencing payments to members of 25% of the amount transferred into the scheme account suggesting that payments from ceding pension providers were used to make significant payments to members;
- (iv) a list of questions and answers found in Timothy Walker’s desk. This document included the following:

*“Q. How much money can I borrow if I transfer my pension?*

*A. It is up to 40% of the equivalent value of your pension(s) when it transfers to the new scheme.’*

*Q. Am I getting money out of my pension early as I thought this was against pension rules?*

*A. No you are not – and you are quite right that it is not possible to get money out from your pensions before the age of 55 without facing a tax liability from HMRC. By transferring your pension to the new scheme, as a member it gives you access to preferential loan arrangements from a third party and separate loan company. You are not taking money out of your pension.’*

*Q. Do I have to transfer ALL of my pension into the new scheme...?*

*A. You only need to transfer the minimum required... . However, you will only be able to borrow an amount equivalent to 40% of the ACTUAL amount transferred into the new scheme, so the more you transfer the more you can access via a loan.”*

- 38. The Regulator’s position is that obtaining loans from “independent” third parties, using a pension as security for the loan, is an indicator of pension liberation. Contrary to the answer recorded on the Q&A Document, such arrangements may be “unauthorised payments” within the meaning of section 160 of the Finance Act 2004 and attract tax penalties.
- 39. In its Warning Notice, the Regulator submitted that the Milton Trustees must have known about the indicators of pension liberation, or at the very least were reckless in this regard. Any trustee would have known, or ought to have known, that it was not plausible for so many members to transfer into the Milton Schemes without some other driver and that liberation activity was the only reasonable explanation, alternatively one very possible explanation.
- 40. The Regulator argued that the Milton Trustees were an integral part of scheme structures bearing many of the hallmarks of pension liberation. In those circumstances, the liberation activity should be attributed to the



Milton Trustees. Alternatively, if they failed to recognise the potential for pension liberation, then the Milton Trustees failed in their duties as trustees. This was particularly the case given the number of other pension trustees who raised concerns about the Milton Schemes' activities. The Regulator therefore submitted that the failure of the Milton Trustees to act showed either a lack of integrity, or a lack of competence and capability.

41. The Regulator also contended that members had transferred into the schemes on the basis of representations that they would not suffer any adverse tax consequences and/or that it was permissible under the legislation to receive a loan. As this was not true, the Regulator submitted that these were misrepresentations that were deliberately designed to induce, or were reckless, or negligent in inducing the transfer of assets to the Milton Schemes.
42. Finally the Regulator argued that the Milton Trustees breached Rule 13.3 of the scheme rules which prohibited loans to members and were therefore in breach of trust.

*iii. Fees failures*

43. In its Warning Notice the Regulator argued that the fees paid out of the Milton Schemes, and the people to whom they were paid, indicated that the Milton Trustees are unsuitable to act as trustees. The Regulator relied on a number of specific examples:-
  - (i) A payment of £4,000 to each of Mr Lindsay and Mr Walker for each active scheme was inappropriate. The Regulator submitted that it was unclear what work was carried out by Mr Lindsay and Mr Walker to justify that payment, particularly as the fees seem to have been paid regardless of the number of members who joined the Milton Schemes;
  - (ii) There was a standalone breach of trust with regard to the payment of £32,407.55 from the Sidlaw Larch scheme to CXXXXXXXXXX. In the Regulator's view, no trustee would legitimately incur such an expense for the benefit of a pension scheme;
  - (iii) Fees were paid across the four active schemes of £150,084 to Marley and £129,092 to TWM. The Regulator argued that such fees were higher than the Regulator would normally expect for what would appear to be minimal work and that they appeared to bear no relation to the number of members. The Regulator noted that companies of which Mr Brown was a director were, therefore, paid almost £280,000 over a matter of months. This was of even more concern given that Mr Walker authorised or allowed the payments whilst he himself was receiving up to £1,500 per month from TWM.
44. The Regulator argued that a lack of internal controls led to exorbitant and unjustified sums being paid out of members' assets in breach of trust. This suggested a lack of integrity, and /or competence and capability on the part of the Milton Trustees.

iv. *Governance failures*

45. The Regulator also relied on a number of discrete examples of where the Milton Trustees had acted in breach of their duties as trustees. These included the following:-

- (i) Signing fundamentally contradictory and inappropriate trust deeds, which described each scheme as simultaneously both a personal pension and an occupational pension scheme. As the Milton Trustees do not appear to be authorised persons within the statutory requirements of the Financial Services and Markets Act 2000 (“FSMA”), it would not be possible for the Milton Trustees to provide benefits under personal pension arrangements in any event;
- (ii) Failing properly to execute the Milton Schemes’ deeds as the signatures were not witnessed;
- (iii) Allowing references to provisions in the deed which do not exist;
- (iv) Failing to register a number of the Milton Schemes with the Regulator. (Only 1 of the 4 active schemes was registered prior to Dalriada’s appointment in breach of section 62 of the Act);
- (v) Breaching the member nominated trustee requirements of section 241(1) of the Act;
- (vi) Failing to limit the scheme activities to those relating to the provision of retirement benefits as required by section 255 of the Act. The Regulator suggested that one of the purposes of the Milton Schemes was to provide a vehicle for pension liberation activities and that the Milton Schemes were specifically set up in order to invest in Advalorem;
- (vii) Failing to appoint an auditor in breach of section 47 PA 1995;
- (viii) Failing to provide an illustration of benefits in breach of regulation 5 of the Occupational Pension Schemes (Disclosure of Information) Regulations 1996;
- (ix) Failing to assist the Regulator following XXXXXXXXXXXXXXXXXXXXXXXX. The Regulator considered that the Milton Trustees were evasive, unhelpful and defensive.

**B. The Carrick Scheme**

(i) Scheme Background

46. The Panel was given the following information in the Warning Notice in relation to the Carrick Scheme which has not been challenged. (Where the information has been provided from elsewhere, or where it has been expressly challenged, this is set out below). The Carrick Scheme was established by deed dated 26 September 2012. The trust deed and rules refer to the Carrick Scheme as being both a personal pension scheme and an occupational pension scheme.

47. The Carrick Scheme's sponsoring employer was Carrick Harbours Limited which was incorporated on 21 September 2012. Its sole director was Mr Brown. Carrick Harbours Limited was dissolved on 16 May 2014. The Carrick Scheme literature, including the membership application form, was produced by XXXXXXXXXXXXXXXX Investments.
49. In a meeting with HMRC on 26 November 2012, Mr Brown advised that the Carrick "*scheme was put in place for ...XXXXXXXXXXXX(a promoter of investments) who wanted to invest pension money in commercial property and storage.*"
50. At the time the Carrick Scheme was established, the trustees were Mr Walker and Mr Cheyne.
51. The administrator for the Carrick Scheme was Marley until April/May 2013 when the administration was taken over by XXXXXXXXXXXXXXXX. This change appears to have followed a meeting between XXXXXXXXXXXXXXXX and XXXXXXXXXXXXXXXX on 22 March 2013. XXXXXXXXXXXXXXXX has advised that, at least initially, it mainly dealt with "the XXXXX companies" in relation to the Carrick Scheme. The document appointing XXXXXXXXXXXXXXXX as administrator was signed by Mr Walker and Mr Cheyne.

(ii) Regulatory action

52. In 2013, the High Court was asked to appoint Dalriada as an independent trustee to the Carrick Scheme which it did on 19 September 2013. Due to uncertainty over whether the Carrick Scheme was a "trust scheme" within the meaning of PA 1995, and therefore whether the Panel had jurisdiction, the Regulator sought the removal of the Carrick Trustees, by the High Court. Mr Cheyne was removed as trustee by the High Court on 7 October 2013 and Mr Walker was similarly removed on 14 November 2013.
53. Following their appointment Dalriada has carried out investigations in relation to the Carrick Scheme.

(iii) Scheme Investments

54. The Carrick Scheme invested in two "XXXXX" investments, one being XXXXX Property XXXXXXXXXXXXXXXXXXXX ("XXXXXXXXXXXXXXXX") and the other being XXXXXXXXXXXX Leisure XXXXXXXXXXXXXXXX ("XXXXXXXXXXXXXXXX"). The investments were similar, being "buy to let" hotel investments, one in Edinburgh and one in Angus. Mr Walker has stated that TWM arranged the investments in XXXXXXXXXXXXXXXX and XXXXXXXXXXXXXXXX.
55. XXXXXXXXXXXXXXXX is in liquidation which has been ongoing since April 2014. XXXXXXXXXXXXXXXX entered liquidation on 1 May 2015.
56. The Warning Notice states that approximately £930,000 was paid into the Carrick Scheme. Dalriada has confirmed that £434,000 was invested in

the XXXXXXXX investments. As regards XXXXXXXXXXXXXXX, the Carrick Scheme was the predominant investor.

(iv) Prohibition grounds against the Carrick Trustees

57. The Regulator has sought the prohibition of the Carrick Trustees, on the grounds that neither is a fit and proper person in relation to the following matters:-

- i. Breach of investment duties;
- ii. Fees failures and conflicts of interest;
- iii. Inadequate scheme governance.

58. As regards Mr Walker, the Regulator submitted that he is not a fit and proper person by reason of a lack of integrity and/or competence and capability. As regards Mr Cheyne, the Regulator initially argued a lack of integrity but, in response to Mr Cheyne's representations, altered its position to no longer pursue an integrity case. Rather, the Regulator's case was that Mr Cheyne is not a fit and proper person by reason of a lack of competence and capability.

i. *Breach of investment duties*

59. In its Warning Notice, the Regulator submitted that the Carrick Trustees were in breach of their duties to the scheme members for the following reasons:-

- i. The Carrick Trustees allowed the Carrick Scheme to invest solely in only one type of investment in two closely linked companies. This concentration of assets led to a lack of diversification;
- ii. The investments were illiquid and not in regulated markets. As regards the XXXXXXXXXXXXXXX investment, the Carrick Scheme took on an undue risk by being the principal investor;
- iii. The investments were made under a conflict of interest because XXXXXXXXXXXXXXX was an associate of Mr Brown who, in turn, was Mr Cheyne's associate or friend. (The friendship was denied by Mr Cheyne);
- iv. There was no evidence of due diligence having been undertaken or investment advice obtained;
- v. The evidence suggested that people connected to the XXXXX companies effectively controlled the investments. The Trustees had no real control.

ii. *Fees failures*

60. The Regulator considered that the level of fees paid out of the Carrick Scheme, and the people to whom they were paid, indicated that the Carrick Trustees are unsuitable to act as trustees. In particular it referred to the £4,000 paid to Mr Walker and Mr Cheyne, stating that it is unclear what work has been done to justify such payments. Similarly, the

Regulator referred to amounts of £10,800 paid to Marley and £7,812 paid to TWM which the Regulator stated were higher figures than it would have expected and which appeared to have been paid without proper basis.

61. As regards Mr Walker it was also submitted that he was conflicted in relation to these payments as he also worked for/ was paid by TWM.

*iii. Governance failures*

62. In its Warning Notice the Regulator also relied on a number of discrete examples where the Carrick Trustees had acted in breach of their duties as trustees, including the following:-

- (i) Allowing contradictory provisions in the Trust deed. The deed states that the Carrick Scheme is both an occupational and a personal pension scheme which is not possible;
- (ii) Failing to recognise that it would not be possible for the Carrick Trustees to provide benefits under “personal pension arrangements” as they were not authorised to do so under the Financial Services and Markets Act;
- (iii) Failing to execute the deed validly as it was not witnessed and allowing references in the deed which do not exist;
- (iv) Breaching the duty to appoint a member nominated trustee under section 241(1) of the Act;
- (v) Failing to limit the Carrick Scheme’s activities to providing retirement benefits thereby breaching section 255 of the Act;
- (vi) Failing to appoint an auditor as required by section 47 PA 1995;
- (vii) Failing to provide information in breach of Regulation 5 of the Occupational Pension Schemes (Disclosure of Information) Regulations 1996;
- (viii) Failing to comply with a penal order within the timeframe specified by the High Court and failing to assist in the regulatory investigation;
- (ix) Appointing a new administrator (XXXXXXXXXXXX) who had no track record, a lack of experience and without making any proper enquiries;
- (x) Misrepresenting, or permitting misrepresentations to be made, in relation to the Carrick Scheme including suggesting a degree of member choice in relation to investments.

**The Law**

63. Section 3 of the 1995 Act states as follows:-

***“Prohibition orders***

- (1) The Authority may by order prohibit a person from being a trustee of-*
- (a) a particular trust scheme,*
  - (b) a particular description of trust schemes, or*
  - (c) trust schemes in general,*

*if they are satisfied that he is not a fit and proper person to be a trustee of the scheme or schemes to which the order relates.*

*(2) Where a prohibition order is made under subsection (1) against a person in respect of one or more schemes of which he is a trustee, the order has the effect of removing him.*

...

*(6) The Authority must prepare and publish a statement of the policies they intend to adopt in relation to the exercise of their powers under this section.”*

64. The Regulator has published a statement on prohibition orders (“the Prohibition Statement”) dated July 2016. This states that the Regulator will consider (amongst other matters) a trustee’s honesty, integrity, competence and capability when considering whether a trustee is a “*fit and proper person*” and will also give consideration to guidance given in relevant legal authorities, e.g. decisions of the Upper Tribunal.
65. Section 36 PA 1995 sets out the statutory duties of trustees with regard to choosing investments. This provides that trustees must exercise their discretion in accordance with the following regulations:-

*“Occupational Pension Schemes (Investment) Regulations 2005*

*Regulation 4. Investment by trustees*

*(1)The trustees of a trust scheme must exercise their powers of investment, and any fund manager to whom any discretion has been delegated under section 34 of the 1995 Act (power of investment and delegation) must exercise the discretion, in accordance with the following provisions of this regulation.*

*(2)The assets must be invested-*

*(a) in the best interests of members and beneficiaries; and*

*(b) in the case of a potential conflict of interest, in the sole interest of members and beneficiaries.*

*(3)The powers of investment, or the discretion, must be exercised in a manner calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole.*

...

*(5)The assets of the scheme must consist predominantly of investments admitted to trading on regulated markets.*

*(6)Investment in assets which are not admitted to trading on such markets must in any event be kept to a prudent level.*

*(7)The assets of the scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a*

*whole. Investments in assets issued by the same issuer or by issuers belonging to the same group must not expose the scheme to excessive risk concentration.*

*Regulation 7: Disapplication of regulations 4 and 5 in respect of schemes with fewer than 100 members*

- (1) Regulations 4 and 5 do not apply to a scheme which has fewer than 100 members.*
- (2) Where Regulation 4 does not apply to a scheme by virtue only of paragraph (1), the trustees of the scheme in exercising their powers of investment, and any fund manager to whom any discretion has been delegated under section 34 of the 1995 Act in exercising the discretion, must have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme."*

66. Section 247 of the Act sets out the requirements for knowledge and understanding of individual trustees. It states

- (1) This section applies to every individual who is a trustee of an occupational pension scheme.*
- (2) In this section, "relevant scheme", in relation to an individual, means any occupational pension scheme of which he is a trustee.*
- (3) An individual to whom this section applies must, in relation to each relevant scheme, be conversant with-*
  - (a) the trust deed and rules of the scheme,*
  - (b) any statement of investment principles for the time being maintained under section 35 of the Pensions Act 1995 (c. 26),*
  - (c) in the case of a relevant scheme to which Part 3 (scheme funding) applies, the statement of funding principles most recently prepared or revised under section 223, and*
  - (d) any other document recording policy for the time being adopted by the trustees relating to the administration of the scheme generally.*
- (4) An individual to whom this section applies must have knowledge and understanding of-*
  - (a) the law relating to pensions and trusts,*
  - (b) the principles relating to-*
    - (i) the funding of occupational pension schemes, and*
    - (ii) investment of the assets of such schemes, and*
  - (c) such other matters as may be prescribed.*
- (5) The degree of knowledge and understanding required by subsection (4) is that appropriate for the purposes of enabling the individual properly to exercise his functions as trustee of any relevant scheme".*

## **Representations**

63. In response to the Warning Notice, the Regulator received representations from Dalriada and Mr Cheyne. No representations were received from Mr Walker or Mr Lindsay.

Dalriada

64. Dalriada's representations provided an update on the representations previously served in the IT appointment/suspension proceedings and, specifically, contained an update on the position with regard to the Milton Schemes' and Carrick Scheme's investments.

65. As regards the Milton Schemes Dalriada has established that £7.76million was transferred to Advalorem. £6.6million was used to buy land which is believed to be worth significantly less than was paid for it and the transaction would appear to be fraudulent. The Gibraltar High Court has issued a freezing order on 8 parties that the administrator considered to be involved, totalling £8million (also to cover costs).

66. As regards the Swan investment, Dalriada confirmed it is still investigating but has no more information so far.

67. As regards the Carrick Scheme, £434,000 was invested in the 2 XXXXX companies. Both companies are in liquidation with no prospect of any return to the Scheme.

Mr Cheyne

68. Summarised briefly, Mr Cheyne's representations primarily asserted that he had "*done nothing pursuant to the trust purposes nor was I ever asked to*". Mr Cheyne also stated that:-

- (i) Mr Brown was not his friend; but was his Independent Financial Advisor for 30 years. Mr Cheyne rejected any suggestion of a conflict and confirmed he had never met Mr Walker;
- (ii) He understood the scheme to be a pension for employees and family members of Carrick Harbours being Mr Brown's business. Mr Cheyne never authorised other people to become members;
- (iii) As far as he was aware the trust was inactive. Mr Cheyne explained that he was completely ignorant of the fact that the Carrick Scheme had assets;
- (iv) He had done nothing pursuant to the trust purposes nor was he ever asked to. He had signed only 3 documents in relation to the trust – the trust deed, an application to open a bank account and the authorisation to change administrator. Regarding the administrator, Mr Cheyne stated that he had ascertained that they were a bona fide firm of chartered accountants;
- (v) He played no part whatsoever in any of the decisions relating to the investments;
- (vi) He never operated any bank account held by the trustees;
- (vii) As regards the fee of £4,000 paid to him, he was told that it was being paid by Mr Brown's company, Carrick Harbours Limited, on the basis that "*although not yet asked to do anything in exercise of the office of*



- trustee, may be called upon to do so*". He did not ask to be paid the sum and considered it to be "*de minimis*";
- (viii) As regards the Regulator's suggestion of disobedience to a court order, Mr Cheyne argued that was wholly unfair and stated that he had co-operated to the fullest extent possible. As soon as he became aware of the High Court proceedings, he voluntarily resigned as trustee.
69. In response to Mr Cheyne's representations, the Regulator reasserted the case for his prohibition. In the Regulator's view, it was not appropriate for Mr Cheyne to accept a position as a trustee, and receive payment, and then take no interest in how the Carrick Scheme was run. The Regulator relied in particular on the fact that, if Mr Cheyne had acted in accordance with his duties, the investments would not have been made and the Carrick Scheme would not have lost £434,000 of assets. Moreover, the fact that Mr Cheyne did not consider it necessary to take any steps as trustee, demonstrated a lack of the requisite knowledge and understanding and his failure to appreciate this exacerbated his failings. In the Regulator's opinion, it appeared likely, or at the very least possible, that if not prohibited such failures could be repeated in the future.
70. As regards the limited involvement that Mr Cheyne had with the Scheme, the Regulator relied on the fact that Mr Cheyne signed the trust deed and should, therefore, have been aware of his obligations as a trustee. Similarly when signing an authorisation to change administrator, Mr Cheyne should have, at the very least, enquired as to the reasons for the change, and should have ensured that the new administrator was suitably experienced. The Regulator submitted that Mr Cheyne did not, in fact, undertake any due diligence.
71. The Regulator also rejected Mr Cheyne's representations regarding the limited payment received from the Scheme stating that, at the very least, Mr Cheyne should not have accepted payment where he had not "*performed any meaningful service justifying the payment.*"
72. Following the Representations and the Regulator's Response, Mr Cheyne advised that he would not be contesting any application that he should not act as a trustee in a regulated scheme in the future. He did not, however, accept any of the grounds referred to by the Regulator as justifying the application.

### **Order**

73. The Panel agreed that an order be made under section 3 PA 1995 prohibiting each of the Trustees from acting as trustees of trust schemes in general. The Panel determined that an order be made in the following terms:-

*"The Pensions Regulator hereby orders as follows:*

*The following individuals are prohibited from acting as trustees of trust schemes in general:-*

*Timothy Walker  
Macalister Lindsay  
Desmond Cheyne*

*This order has the effect of removing the above-named individuals from all or any schemes of which they are a trustee.*

*By section 6 of the Pensions Act 1995, any person who purports to act as a trustee of a trust scheme whilst prohibited under section 3 is guilty of an offence and liable*

- (a) on summary conviction to a fine not exceeding the statutory maximum, and*
- (b) on conviction on indictment to a fine or imprisonment or both.”*

### **Reasons for Decision**

74. 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 of the Act.
75. The Panel also had regard to all the representations submitted in relation to these proceedings and the IT appointment/suspension proceedings.
76. Finally, the Panel had regard to the Regulator’s published statement on its policies regarding prohibition and specifically the criteria the Regulator takes into account when considering whether trustees are “*fit and proper persons*”. The Panel took note of the non-exhaustive list of factors listed in the statement including any misuse of trust funds, any breaches of trust or pensions law, and where a trustee’s professional charges constitute a breach of trust. As regards the meaning of “*integrity*” the Panel had regard to the decision in Arch -v- FCA [2015] UKUT 0013 (TCC) at paragraphs 199-201.
77. The Panel considered that there had been a number of breaches of duty/ failures by each of the Trustees as set out below.

### **Mr Lindsay**

78. The Panel concluded that Mr Lindsay failed in his duties as a trustee and is not a fit and proper person to act as trustee for the following reasons:
  - (i) He admitted in a call with the Regulator in May 2013 that he was “*fully aware*” of all the actions taken by Mr Brown in relation to the movement of money and the investments in the Milton Schemes;
  - (ii) The Milton Schemes’ investments were inappropriate for a pension scheme, being illiquid, high risk, lacking in diversification and with high

- fees. They were also in entities established overseas making them harder to trace;
- (iii) The investments were made without appropriate investment advice (in breach of section 36 PA 1995) and without due diligence having been undertaken. Mr Lindsay stated in a discussion with the Regulator that the sole investment advice that was taken in relation to the Advalorem investment was from Mr Brown;
  - (iv) Mr Lindsay appeared to have delegated investment decisions to Mr Brown;
  - (v) The investment in Swan was wholly inappropriate given the issues that had arisen in relation to Advalorem;
  - (vi) There would appear to have been a degree of complicity in pension liberation. In the Panel's view, Mr Lindsay either did know, or should have known that pension liberation was at least a likely explanation for the activities of the Milton Schemes;
  - (vii) He authorised or permitted substantial fees to be paid to Marley for apparently minimal work and he permitted substantial payments to TWM for reasons that were never defined. If Mr Lindsay was not aware of the fees being paid (contrary to his statement in his call with the Regulator), the Panel considered that he should have been and was reckless as to the fees being paid;
  - (viii) The Panel had considerable concerns regarding Mr Lindsay's governance of the Milton Schemes since he allowed contradictory scheme documents to remain in place and failed to register 3 of the schemes with the Regulator;
  - (ix) Mr Lindsay, along with his fellow trustee, had been responsible for a number of breaches of pensions law, including the failure to appoint a member nominated trustee (section 241 of the Act), the failure to appoint an auditor (section 47 PA 1995) and a failure to limit the activities of the Milton Schemes to the provision of retirement benefits (section 255 of the Act);

79. In summary, Mr Lindsay demonstrated a reckless disregard for his obligations as trustee of the Milton Schemes. For all of the reasons outlined, the Panel considered that Mr Lindsay had failed to act with the competence and capability to be expected of a trustee. This was of even more concern, given that he was paid £4,000 per Milton Scheme in fees. Indeed, taken as a whole, Mr Lindsay's conduct was so reckless as to demonstrate that he lacked the integrity appropriate to acting as a trustee, particularly given his admission that he was fully aware of the actions taken by Mr Brown in investing scheme monies in inappropriate investments and paying substantial fees to Mr Brown's companies. In the Panel's view, the extent of Mr Lindsay's failures were highlighted by the Milton Trustee's failures in relation to the investment in Advalorem, considered to be a fraud, and the subsequent investment in Swan, even after significant concerns had been raised. It was clear to the Panel that Mr Lindsay did not act in the best financial interests of members but rather invested the scheme assets in a manner which exposed the Milton Scheme's assets to excessive risk. The manner in which Mr Lindsay undertook his role as trustee and the gravity of the consequences of his

failures satisfied the Panel that he should be prohibited, not just from the schemes of which he is currently a trustee, but from all schemes.

80. The Panel did not consider it necessary to rely or make findings on other matters raised by the Regulator in support of the prohibition case against Mr Lindsay. These matters included the following:-

- (i) Whether an amount of £4,000 per Milton Scheme was an inappropriate figure to be paid to a trustee;
- (ii) Whether Mr Lindsay's conduct in relation to the Regulator's investigation demonstrated that he was not a fit and proper person to act as trustee;
- (iii) Whether the fees paid to CXXXXXXX were necessarily of concern without more information.

### **Mr Walker**

81. The Panel concluded that Mr Walker failed in his duties as a trustee and is not a fit and proper person to act as trustee for the following reasons:-

- (i) Mr Walker worked in the office at XXXXXXXXXXXX and received monthly payments from TWM. It is more likely than not therefore that he would have been aware of the actions of Mr Brown in relation to the Milton and Carrick Schemes and their investments;
- (ii) The Milton Schemes' investments were inappropriate for a pension scheme, being illiquid, high risk, lacking in diversification and with high fees. They were also in entities established overseas making them harder to trace. The Carrick Scheme investments were inappropriate for a pension scheme and amounted to one type of investment in 2 closely linked companies and were illiquid, lacking in diversity and included no regulated investments;
- (iii) The Milton and Carrick scheme investments were made without appropriate investment advice (in breach of section 36 PA 1995) and without due diligence having been undertaken by or on behalf of the Milton Trustees. It appears that the sole investment advice that was taken in relation to the Advalorem investment was from Mr Brown. This is of particular concern given that the Advalorem investment has been found to be a fraud on the investors. As regards the Carrick Scheme, it appears that it was actually set up in order to invest in the XXXX entities, rather than to provide retirement benefits and there is no evidence of any investment advice having been obtained;
- (iv) As trustee, Mr Walker appeared to have delegated investment decisions to Mr Brown in relation to both the Milton and Carrick Schemes. Mr Walker confirmed in a letter dated 7 October 2013 that TWM "arranged investment in the XXXXXX and XXXXXX hotel developments". The fact of investment in Swan after issues had arisen in relation to Advalorem was wholly inappropriate;
- (v) As regards the Milton Schemes, the Panel finds it more likely than not Mr Walker was complicit in the pension liberation activities. Mr Walker had the Q & A document in his desk. He must have known, or should

have known, that pension liberation was at least a likely feature in attracting members;

- (vi) Mr Walker authorised, or permitted to be paid, substantial fees to Marley for minimal work and substantial fees to TWM for reasons that were never defined. These fees amounted to approximately £150,000/£129,000 to Marley/TWM on the Milton Schemes and £10,800/£7,812 on the Carrick Scheme. Either Mr Walker knew, or he was reckless as to the fees being paid. Further Mr Walker was conflicted in authorising or making payments to TWM as he worked for TWM and received up to £1,500 per month from it;
- (vii) The Panel had considerable concerns regarding governance of the Milton Schemes' and the Carrick Scheme, including the fact that Mr Walker allowed contradictory scheme documents to remain in place, failed to register 3 of the Milton Schemes with the Regulator, failed to carry out due diligence before the appointment of XXXXXXXXXXXXX and failed to declare a conflict as regards replacement of Marley as administrator;
- (viii) Mr Walker, along with his fellow trustees, had been responsible for a number of breaches of pensions law, including the failure to appoint member nominated trustees (section 241 of the Act), the failure to appoint an auditor (section 47 PA 1995) and the failure to limit the activities of the Milton Schemes and the Carrick Scheme to the provision of retirement benefits (section 255 of the Act).

82. In the Panel's view, Mr Walker's conduct in relation to the Milton and Carrick schemes demonstrated a lack of competence and capability to be a trustee. This was of even more concern given that he was paid £4,000 for each scheme of which he was a trustee. Moreover, Mr Walker demonstrated a reckless disregard for his obligations as trustee of the Milton Schemes and the Carrick Scheme which indicated a lack of integrity on his part. This reckless disregard led to grave consequences for the schemes of which Mr Walker was a trustee, highlighted by the investment in Advalorem, considered to be a fraud, and the subsequent investment in Swan, even after significant concerns had been raised. It was clear to the Panel that Mr Walker did not act in the best financial interests of members but rather invested scheme assets in a manner which exposed them to excessive risk. The manner in which Mr Walker undertook his role as trustee and the gravity of the consequences of his failures satisfied the Panel that he should be prohibited, not just from the schemes of which he is currently a trustee, but from all schemes.

83. The Panel did not consider it necessary to rely or make findings on various matters raised by the Regulator in support of the prohibition case, including the following:-

- (i) Whether an amount of £4,000 per Milton Scheme was an inappropriate figure to be paid to a trustee;
- (ii) Whether Mr Walker's conduct in relation to TPR's investigation demonstrated that he was not fit and proper;

- (iii) Whether Mr Walker acted under a conflict of interest as regards the scheme investments;
- (iv) Whether the fees paid to CXXXXXXX on the Milton Schemes were necessarily of concern without more information.

### **Mr Cheyne**

84. The Panel concluded that Mr Cheyne failed in his duties as a trustee and is not a fit and proper person to act as trustee for the following reasons:-

- (i) Mr Cheyne admitted in his representations that he did “nothing pursuant to the trust purposes”. In the Panel’s view, the fact that he considered it unnecessary to take any steps as trustee demonstrates his unsuitability to act. Even if Mr Cheyne had been led to believe that the Carrick Scheme was inactive, he was under an obligation as trustee to satisfy himself that this was, in fact, the case;
- (ii) Mr Cheyne knew that some people were likely to be beneficiaries of the Carrick Scheme (as stated by Mr Cheyne to be the employees and family member of Carrick Harbours Limited). He should therefore have known that a scheme set up for their benefit would involve looking after scheme members’ money;
- (iii) Having signed the trust deed, and authorised the opening of a bank account, Mr Cheyne, should have made enquiries as to whether and what assets the Carrick Scheme held. It was not enough, in the Panel’s view, for Mr Cheyne to simply rely on the fact that he had never operated the bank account;
- (iv) The Carrick Scheme investments were inappropriate for a pension scheme and amounted to one type of investment in 2 closely linked companies. It appeared that the Carrick Scheme was set up in order to invest in the XXXXX companies and that investment decisions were delegated to the XXXXX companies. The investments were illiquid, lacked diversity and included no regulated investments. Again, even if Mr Cheyne was not aware of them, as a trustee, he should have been;
- (v) Similarly, Mr Cheyne authorised a change of administrator without any due diligence, save for checking that the new administrator was a firm of chartered accountants;
- (vi) Mr Cheyne accepted £4,000 of the Carrick Scheme monies as an annual retainer in respect of his future services as a trustee of the Carrick Scheme. This acknowledgment is proof that he was, on more than one occasion, reminded of his position as a trustee;
- (vii) In failing to take any active steps in relation to the Scheme, Mr Cheyne permitted substantial fees to be paid to Marley/TWM (£10,800 and £7,812 respectively);
- (viii) Similarly Mr Cheyne failed to ensure that the Carrick Scheme complied with various governance requirements. Specifically, he permitted contradictory scheme documents to be executed, including references in the deed which do not exist, which he himself signed, and breached various requirements to appoint a member nominated trustee (section 241 of the Act) and appoint an auditor (section 47

PA 1995). It was not enough for Mr Cheyne to say that he has never “*held himself out as an expert in trusteeship*”. Having agreed to act as trustee, and paid £4,000 in return, Mr Cheyne should have taken steps to ensure that he took all appropriate steps. Given his legal qualifications, the Panel was surprised that he considered it unnecessary to do so. It should have been obvious to him that, as a trustee, he was under certain duties. In the Panel’s view, it was clear that he had not complied with the requirements for trustee knowledge and understanding as set out in section 247 of the Act.

85. In summary, the Panel concluded that Mr Cheyne’s actions, or lack of them, and the gravity of the consequences for scheme members demonstrated a lack of competence and capability to be a trustee. Given the failures outlined, the Panel concluded that a prohibition across all schemes was appropriate.
86. The Panel did not consider it necessary to rely or make findings on various matters raised by the Regulator in support of the prohibition case, including the following:-
- (i) Whether Mr Cheyne’s conduct in relation to TPR’s investigation demonstrated that he was not fit and proper;
  - (ii) Whether Mr Cheyne permitted Mr Walker to act under a conflict of interest in paying fees to TWM.

### **Conclusion**

87. The Panel concluded that it was appropriate to make prohibition orders against each of the Trustees. Given the seriousness of their respective failures, a prohibition across all schemes was appropriate.
88. Appendix 1 to this Determination Notice contains important information about the Directly Affected Parties’ rights to refer this decision to the Upper Tribunal.

Signed: *Determinations Panel*

Name: Determinations Panel

Dated: 15 December 2016

## Appendix 1

### 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”). 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](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043)