

The Pensions Regulator	<p style="text-align: center;"><b>Standard Procedure</b></p> <p style="text-align: center;"><b>DETERMINATION NOTICE</b></p> <p style="text-align: center;"><b>under Section 10(2)(b) of the Pensions Act 2004 (“PA 04”) and section 29(5) of the Pensions Act 1995 (“PA 95”)</b></p> <p style="text-align: center;"><b>Bale Group Retirement Benefits Scheme</b></p> <p style="text-align: center;"><b>(“the Scheme”)</b></p>	<p style="text-align: center;">The Pensions Regulator case ref:</p> <p style="text-align: center;">C96565471</p>
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1. The Determinations Panel (“the Panel”) of the Pensions Regulator (“the Regulator”) met on 15 March 2018 to determine whether to waive the disqualification for being a trustee of Mrs Hazel Lorna Bale and Mr Anthony Vernon Bale (“the Applicants”) of The Bale Group Retirement Benefits Scheme pursuant to section 29 PA 95. The power to waive a disqualification pursuant to section 29(5) PA 95 is a reserved regulatory function and may only be exercised by the Panel.
2. The request to exercise this power was made by way of an application under section 10(2)(b) of the Act (“the Application”).
3. The Panel determined that the power waiving disqualification should not be exercised.

#### **Directly Affected Parties**

4. The Warning Notice specified the following parties as being directly affected by the regulatory action.
  - i. Mrs Hazel Lorna Bale
  - ii. Mr Anthony Vernon Bale
  - iii. Ms Claire Emma Beech
  - iv. Mr James Jonathan Bale
  - v. DCD Trustees Limited (the Independent Trustee).

#### **Details of the Scheme**

5. The Bale Group Retirement Benefits Scheme is an occupational pension scheme established by Bale Group Limited and currently governed by a Trust Deed and Rules dated 1 September 2016, as a small self-administered scheme (SSAS). It is a defined contribution scheme open to future accrual with four members. The Regulator understands that the Scheme qualified as a “small scheme” for the purposes of the Occupational Pension Schemes (Investment) Regulations 2005, prior to the Applicants’ disqualification.

6. The Applicants, their two adult children, Ms Claire Emma Beech and Mr James Jonathan Bale, are the only members of the Scheme. Ms Claire Emma Beech and Mr James Jonathan Bale are also trustees of the Scheme along with DCD Trustees Limited, an independent trustee.
7. On 17 March 2017 the Applicants were adjudged bankrupt at the Torquay & Newton Abbot County Court. As a result, the Applicants are presently disqualified from acting as trustees by virtue of s.29(1)(b) of the 1995 Act and, in accordance with section 30(1) are removed as trustees of the Scheme.
8. The Case Team of the Regulator (“the Case Team”) have stated that it is expected that the disqualification will lapse on 17 March 2018 when the Applicants are likely to be discharged from bankruptcy, provided that they are not then the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order.
9. Following the Applicants’ disqualification, the Scheme no longer qualifies as a scheme where all members of the Scheme are trustees. Consequently certain pensions provisions, from which the Scheme was previously exempt (including in relation to restrictions on employer related investments, and requirements to implement dispute resolution arrangements and to appoint auditors) now apply to the Scheme.

### **Background to Application**

10. On 21 April 2017, the Applicants applied to the Regulator to exercise the power in Section 29(5) of PA 95 to waive their disqualification from acting as trustees, so that they can lawfully act as trustees of the Bale Group Retirement Benefits Scheme only.
11. The Regulator wrote to the Applicants on 9 May 2017 seeking further information regarding the circumstances leading up to the disqualification, the reasons why the Applicants believe the disqualification should be waived and the impact if the waiver is not granted. The Applicants were also asked to provide copies of the Trust Deed and Rules together with signed statements from the other trustees as to whether they supported the application.
12. On 23 May 2017, Mrs Bale advised, amongst other things that:
  - i. The bankruptcy proceedings were not due to running up large personal debts, nor having expenditure exceeding income.
  - ii. The Applicants were directors of a company which went into pre-pack administration in May 2016. The Applicants had given personal guarantees which were not covered by the process and this had directly led to their own bankruptcy as the personal guarantees subsequently crystallised.

- iii. The pre-pack administration of the company achieved a swift sale of the business saving all jobs involved.
  - iv. The Scheme is a small family scheme where the only members are the two Applicants and their two adult children. It would be in the best interests of all members of the Scheme that the Applicants remain involved in the day to day running of the Scheme.
  - v. The Application is supported by all of the members of the Scheme.
  - vi. In order to be a member of the Scheme, the Applicants needed to be trustees of the Scheme as detailed in the Trust Deed and Rules. If the Application were unsuccessful *“then neither of us can continue to be members of the scheme. If we were not to remain as members, the scheme becomes limited in what it can do in terms of investment and loan backs. Existing loans could be deemed unauthorised payments and a tax charge may occur...[I]f we ceased to be trustees then we become in breach of the Trust Deed and Rules which then jeopardises the whole scheme for all four members...”*
13. In response, the Case Team wrote to Mrs Bale on 13 June 2017 requesting, amongst other things, *“specific details of any particular problems that the scheme will face if you are unable to remain as Trustees?”* Mrs Bale replied on 26 June 2017 that the Applicants had been advised that *“as this is a Small Self Administered Scheme, in order to be members of the scheme we must also be Trustees.”* Mrs Bale repeated her comments from 23 May 2017 regarding limits on investments and loan backs and the possibility of unauthorised payments and tax charges.
14. The Case Team has stated that it is interpreting this statement as an assertion that the Scheme may hold investments in the sponsoring employer which would be prohibited employer related investments if the Scheme were no longer able to meet the criteria for a small scheme. No specific evidence was, however, provided to the Case Team.
15. The Applicants provided the Case Team with letters from Ms Claire Emma Beech, Mr James Jonathan Bale and DCD Trustees Limited each stating that they were in agreement with the Applicants remaining as trustees of the Scheme.

### **Steps following the Application**

16. Following receipt of the Application, the Case Team carried out a disclosure exercise and in the course of doing so identified certain issues relating to the Applicants’ conduct which, whilst not related to the

operation of the Scheme, gave rise to concerns regarding their fitness to act as trustees. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Statement on the Merits**

- 18. The Case Team recommended that the Panel not exercise the power to waive the disqualification.
- 19. The Case Team acknowledged that certain factors would support an exercise of the power, namely:

- i. If the Scheme is no longer able to continue as a small scheme due to the disqualification of two of the trustee members, it is possible that there may be administrative costs and complexities.
- ii. All decisions must currently be made unanimously by all member trustees and certain decisions also require the participation of the Independent Trustee. If there is any doubt about the Applicants' capacity to make appropriate decisions, the presence of the other trustees would mitigate any risk.
- iii. The Applicants have asked for the disqualifications to be lifted only in respect of the Scheme. Consequently, any risk to members' benefits as a result of waiving the disqualifications is low.

20. However, the Case Team indicated that there are a number of factors outweighing those in favour of waiving the disqualification:-

- (i) The Applicants have not set out in detail what the current investment arrangements are nor what the likely consequences and impact might be if the disqualification is not waived;
- (ii) Given that the employer in relation to the Scheme was in administration at the time the disqualification was triggered, and is now in liquidation, it is unlikely that new arrangements for investments in or loans to the employer would arise.
- (iii) The Applicants have misunderstood the Trust Deed and Rules in that there is no requirement for all members to be Trustees and, if there had been, it would be possible for the relevant provisions to be amended. The Case Team suggested that this indicates a lack of relevant knowledge and understanding on the part of the Applicants and in particular a failure to be conversant with the Trust Deed and Rules of the Scheme as required by section 247(3)(a) of PA 04.
- (iv) The conditions for a loan to be an authorised payment under the Finance Act 2004 (set out in section 179 of the Act) do not include a requirement for members of the scheme making a loan to be trustees of the Scheme.

(v) [REDACTED]

- (vi) The Case Team did not consider that the Applicants have demonstrated that granting the waiver is necessary to protect the benefits or the interests of the members of the Scheme.

21. As regards the Regulator's duty to have regard to the interests of members as set out in section 100 of PA 04, the Case Team recognised that certain matters may be considered detrimental to the members if the disqualification is not waived, namely:-

- (i) The Scheme may incur additional administrative expenses as a result of internal dispute resolution arrangements and auditor appointment requirements. In the Case Team's view, the level of administrative expenses was likely to be immaterial in comparison to the fund value of approximately £559,677 as at 31 March 2014;
- (ii) The Scheme could potentially be liable to financial penalties under section 10 PA 95 if the Trustees have failed to take all such steps as are reasonable to secure compliance with section 40 of PA 95. In the absence of any evidence as to the nature of the Scheme's investments, the Case Team suggested that the risk of any detriment was too remote to be taken into account. The Case Team stated that there is insufficient information to assess any potential section 40 breach;
- (iii) There is the possibility of adverse tax treatment of existing employer loans. The Case Team did not, however, accept this suggestion as the conditions for a loan to be an authorised payment under the Finance Act 2004 do not include a requirement for members of a scheme making a loan to also be trustees of the scheme.

22. The Case Team submitted that the Applicants had not provided evidence of any specific detriment that would be caused by the Regulator not agreeing to waive the disqualification or evidence on the quantum of any such detriment. The Case Team therefore argued that the potential detriment to the interests of members is not a material factor. The Case Team did, however, note that the Applicants would have an opportunity to make representations as to the level of detriment to members if they disagreed with the Case Team's assessment.

### **Representations**

23. No representations were submitted by the Applicants in response to the Warning Notice.

24. On 22 February 2018, the Applicants confirmed that they wished to proceed with the Application in spite of the fact that a decision on the Application might not be given before the disqualification of the Applicants had lapsed.

## **The Law**

25. Section 29 of PA 95 sets out the following:-

*Persons disqualified for being trustees*

*(1) Subject to subsection (5), a person is disqualified for being a trustee of any trust scheme if-*

...

*(b) he has been made bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged or he is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order,*

...

*(2) In subsection (1)-*

...

*(b) paragraph (b) applies whether the adjudication of bankruptcy or the sequestration or the making of the bankruptcy restrictions order or an interim order occurred before or after the coming into force of that subsection,*

...

*(5) The Authority may, on the application of any person disqualified under this section-*

*(a) give notice in writing to him waiving his disqualification, either generally or in relation to a particular scheme or particular description of schemes.*

*(6) A notice given at any time by virtue of subsection (5) cannot affect anything done before that time.*

26. Section 30 of PA 95 stipulates the consequences of disqualification as follows:-

*(1) Where a person who is a trustee of a trust scheme becomes disqualified under section 29 in relation to the scheme, his becoming so disqualified has the effect of removing him as a trustee.*

## **Decision**

27. The Panel determined not to waive the disqualification of Mrs Hazel Lorna Bale and Mr Anthony Vernon Bale from acting as trustees in respect of the Bale Group Limited Retirement Benefits Scheme.

## **Reasons for decision**

28. In making its decision the Panel had regard to the matters mentioned in Section 100 of PA 04 as well as to the objectives of the Regulator as set out in Section 5.

29. The Panel decided not to waive the disqualifications for the following reasons:-

- i. The effect of the Applicants' disqualification is not that the Applicants can no longer be members of the Scheme. The disqualification removed the Applicants from being trustees of the Scheme but not members;
- ii. Whilst the disqualifications may result in the Scheme losing its status as a "small scheme" and therefore lead to the Scheme incurring additional administrative expenses, the Applicants had not provided any evidence of the additional costs or detriment that would be borne by members. Similarly, the Applicants had not provided any evidence of the detrimental effect on the Scheme's investments as a result of the Scheme no longer qualifying as a small scheme.
- iii. As the Applicants had not provided evidence of the detriment caused by their disqualifications, the Panel was not satisfied that it was appropriate to waive the automatic disqualification from acting as trustee. The Applicants had not demonstrated to the Panel that it should waive the disqualifications in the interests of the generality of the members of the Scheme.

iv. [REDACTED]

30. **Appendix 1** to this Determination Notice contains important information about the rights of appeal of the directly affected parties against this decision.

Signed:

Chairman: Tony Foster

Dated: 26 March 2018

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

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under Section 103 of the Pensions Act 2004 (“the Act”) you have 28 days from the date this Determination Notice is given to refer the matter to the Tribunal or such other period as specified in the Tribunal rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice. The Tribunal’s address is:

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

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal Rules.

You should note that the Tribunal Rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to The Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support  
The Pensions Regulator,  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW.

Tel: 01273 811852