

The Pensions Regulator	Standard Procedure DETERMINATION NOTICE under section 3 of the Pensions Act 1995 and section 96(2)(d) of the Pensions Act 2004 David Austin	The Pensions Regulator case ref: C112776666/2
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1. The Determinations Panel (“the Panel”), on behalf of the Pensions Regulator (“TPR”), met on 8 August 2018 to decide whether to exercise a reserved regulatory function in relation to the issues in a Warning Notice dated 31 May 2018. The matter was referred to the Panel by the Case Team of TPR (“the Case Team”) on 4 July 2018 following a period for representations.

Matters to be determined

2. In the Warning Notice the Panel was asked to determine whether to make an order under section 3(1)(c) of the Pensions Act 1995 (“PA 95”) to prohibit David Austin from acting as a trustee of trust schemes in general.
3. The power to prohibit a person under section 3(1) PA 95 is a reserved function under paragraph 4 of Schedule 2 to the Pensions Act 2004 (“PA 04”) and can therefore only be exercised by the Panel.

Decision

4. The Panel determined to prohibit David Austin from acting as a trustee of trust schemes in general as the Panel is satisfied that he is not a fit and proper person to be a trustee of trust schemes.
5. The reasons for the Panel’s decision are set out below. Where the Panel reaches findings of fact, it is doing so on the balance of probabilities whilst recognising that the more serious an allegation, the more convincing must be the proof required to tip that balance.

Directly Affected Parties

6. The Panel considers David Austin to be the only party directly affected by this determination.

Background to regulatory action

7. The Warning Notice sets out the background to the regulatory action against Mr Austin and invites the Panel to base its conclusion that Mr Austin is not a fit and proper person to be a trustee entirely on findings previously made by HHJ Pelling QC (“*the Judge*”) in the High Court decision dated 23 January 2018 (“*the Judgment*”) in *TPR -v- PAYAE and Others [2018] EWHC 36 (Ch)* (“*the High Court proceedings*”) and the

consequential order made (*“the Order”*). These proceedings were brought by TPR against Mr Austin and others pursuant to section 16 of PA 04 to recover sums lost as a result of the misuse or misappropriation of pension scheme assets.

8. The Judge in the High Court proceedings found that Mr Austin (and others) was knowingly, and dishonestly, involved in the misuse or misappropriation of pension scheme assets which constituted fraudulent breaches of trust. As a result of the High Court proceedings, it was ordered that Mr Austin and others should pay specified sums to the independent trustee appointed to the schemes concerned (*“the Schemes”*), Dalriada Trustees Limited (*“Dalriada”*). The Judge also ordered that a referral be made to the Director of Public Prosecutions *“for consideration as to whether there are grounds for prosecution”* of Mr Austin (and others) *“in relation to the facts and matters the subject of these proceedings”*.
9. The case against Mr Austin is that he is not a fit and proper person to be a trustee as he lacks the requisite honesty and integrity. In its Warning Notice the Case Team argues that the Judge’s findings alone are sufficiently serious to discharge the burden of proof and warrant prohibition of Mr Austin and that this is consistent with the terms of TPR’s Prohibition Statement (see below).
10. The Warning Notice sets out that the determination sought does not require a re-examination of the underlying evidence or issues before the Judge in the High Court proceedings. It also highlights that there is no risk of unfairness to Mr Austin because (i) the Judge’s findings were based on extensive evidence (including over 2000 documents), (ii) Mr Austin had the opportunity to challenge the evidence at trial but did not do so and (iii) TPR disclosed all documents in its possession in accordance with its obligations under the Civil Procedure Rules, including all material bearing on the issues in respect of which the Judge made findings.
11. The Warning Notice further sets out that the Judgment has not been appealed by Mr Austin, or the other defendants to the High Court proceedings, and that the applicable time limit for filing a notice of appeal expired on 13 February 2018.

The Schemes

12. Further background to the High Court proceedings is set out in the Judgment and the Warning Notice which explains that individuals were induced to transfer their pension pots from primarily occupational pension schemes (the Ceding Schemes) to schemes which were *“established, controlled or operated”* by Mr Austin and others (the Receiving Schemes). There were 11 Receiving Schemes falling into 3 broad categories.
13. The first group of six Receiving Schemes are referred to as *“the Barratt Schemes”* because Mr Alan Barratt was a trustee or the sole trustee of each of those schemes until Dalriada was appointed. Similarly, the second group of four schemes are referred to as *“the Dalton Schemes”* because Ms Susan Dalton was either a trustee or the sole trustee of

those schemes again until Dalriada's appointment. Whilst Mr Barratt and Ms Dalton were named as trustee to the respective schemes, it is apparent from the factual background set out in the Judgment that Mr Austin effectively controlled the activities of Mr Barratt and Ms Dalton whilst they acted as trustees.

14. The third category consisted of a single fund called the Friendly Pensions Retirement Scheme ("FRPF"). The sole trustee of FPRF was a corporate trustee called Friendly Trustees Limited (again until Dalriada's appointment). Mr Julian Hanson became the sole director of FTL at Mr Austin's request between 15 July 2014 and its dissolution on 9 June 2015. Mr Austin was the sole shareholder of FTL.
15. Between January 2013 and September 2014, approximately 245 individuals were persuaded to transfer a total of around £13.7m into the Receiving Schemes, being an average of £55,000 per individual. Whilst the individuals generally received some cash (approximately 13% on average) as an inducement to transfer their pension pots to the Receiving Schemes, the rest of the money was transferred out of the Receiving Scheme bank accounts and was largely lost. This has resulted in the individuals losing their pension pots (other than the cash sums paid to them) and they have also been exposed to the possibility of having to pay significant tax penalties because the sums received by them were arguably "*unauthorised payments*" under the relevant tax legislation.
16. The Judgment sets out that the losses that have been suffered by the Receiving Schemes fall into four broad categories as follows:-
 - (i) Monies paid directly to Mr Barratt (£245,550) and Ms Dalton (£72,986) personally;
 - (ii) Monies transferred to two companies controlled by Mr Austin (Friendly Investments Company Limited and Friendly Pensions Limited) without any consideration as to whether such transfers were appropriate investments for pension schemes;
 - (iii) Sums transferred from the Barratt and Dalton Schemes for investment in a property development in St Lucia without consideration of whether these were appropriate investments;
 - (iv) £120,000 transferred by FRPF to Broadbridges Consulting Limited ("*Broadbridges*"), another corporate vehicle owned by Mr Austin. This money was used to fund litigation in which Mr Austin was involved.

The Judge's findings

17. The Case Team submits that the findings in the Judgment in relation to Mr Austin and his involvement with the Receiving Schemes demonstrate that he lacks the requisite honesty and integrity to be a trustee. In particular the Case Team relies on the following findings by the Judge:
 - (i) Mr Austin "*controlled the setting up of the Receiving Scheme bank accounts and indeed the entire operation. He was as Mr Hilliard puts it in his written and oral submissions "the mastermind"*;

- (ii) *“The material I refer to amply supports the conclusion that Mr Austin was the driving force of the pension transfer operation the subject of this claim, that he was a “shadow trustee””;*
- (iii) *“Having made findings about Mr Austin’s knowledge of the operation, it is next necessary to reach a conclusion as to whether that knowledge rendered his participation contrary to ordinary standards of honest behaviour. I have no hesitation in concluding that it was. None of the facts and matters mentioned above are consistent with honest behaviour”;*
- (iv) *“All this leads me to conclude that Mr Austin was the mastermind of the operation as alleged by TPR and that for the detailed reasons set out above he was dishonestly involved in the misuse or misappropriation of all the sums that were received into and then removed from the Receiving Scheme accounts”;*
- (v) *“The sums ultimately received by Mr Austin and his family from the Receiving Schemes derived from the documentary evidence totals £1,355,946.30 and €2,472.92”;* and
- (vi) *“He sought to mislead TPR and the court by a series of untrue denials and representations”.*

Summary of grounds

18. The Case Team seeks the prohibition of Mr Austin, principally on the following grounds:-

- (i) The matters referred to above all highlight Mr Austin’s lack of honesty and/or integrity;
- (ii) Prohibition is necessary in the wider regulatory context, and is in the interests of occupational pension schemes and their members generally given that:-
 - (a) only a prohibition will place Mr Austin on the register of those prohibited from acting as a trustee, and thereby assist in raising awareness among trustees and members that Mr Austin is unsuitable to act as a trustee of schemes generally;
 - (b) prohibition should protect and enhance public confidence in the integrity of the pensions industry and TPR’s oversight of it.

19. Further, the Warning Notice highlights that the failures were so serious that the prohibition should extend to trust schemes in general.

Representations

20. No Representations in response to the Warning Notice were received from Mr Austin.

The Law

21. Section 3 of PA 95 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.”

22. When the Panel refers to the question of whether Mr Austin is a “*fit and proper person*” it is by way of shorthand for, and reference to, that section 3(1) test.
23. The most recent statement published by TPR in accordance with section 3(6) was published in July 2016 (“the Prohibition Statement”). The Prohibition Statement contains the following guidance on the criteria for a ‘fit and proper person’:

“When considering whether a person ought to be prohibited, we will investigate whether [they are] a ‘fit and proper person’ to be a trustee of a trust scheme by looking at all the relevant information.

In particular we will consider any information which concerns the [person’s]:

- *honesty*
- *integrity*
- *competence and capability*
- *financial soundness*

When considering the above criteria, we may take account (where relevant) of:

- *any attempt to deceive*
- *any misuse of trust funds*
- *any breaches of trust or pensions law, particularly if these are significant, persistent, deliberate or contrary to legal advice received*
- *whether a trustee’s professional charges constitute a breach of trust or demonstrate a lack of internal controls*
- *criminal convictions, not limited to those involving dishonesty or deception, so including (for example) money laundering, violence or substance abuse*

This is not a comprehensive list of the factors we will look at when considering whether to prohibit, but it is indicative of what may be relevant. One of our statutory objectives under the Pensions Act 2004 (...) is to protect the benefits of members of occupational pension

schemes, and we will take such actions as are necessary and proportionate to meet that objective.”

Decision

24. The Panel agreed that an order be made under section 3 PA 95 prohibiting Mr Austin from acting as a trustee of trust schemes in general.

25. The Panel determined that an order be made in the following terms:-

“David Austin (date of birth 14 January 1966) is hereby prohibited from acting as a trustee of trust schemes in general.

The order is made under section 3(1)(c) Pensions Act 1995 (PA 95).

By section 6 PA 95, any person who purports to act as a trustee of a trust scheme whilst prohibited in relation to the scheme under section 3 is guilty of an offence and liable

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

Reasons for Decision

26. In making its decision the Panel had regard to the objectives of TPR as set out in Section 5 of PA 04 and to the matters listed in Section 100 of PA 04.

27. The Panel also had regard to TPR’s published statement on its policies regarding prohibition and specifically the criteria TPR takes into account when considering whether individuals 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 and any breaches of trust or pensions law.

28. Whilst noting that the statutory provisions before the Panel are not the same as those before the Judge in the High Court proceedings, the Panel fully considered the Judgment and the conclusions reached. The Panel took account of the detailed and careful analysis made by the Judge which the Panel found to be both highly relevant and compelling. The Panel had no reason to disagree with the Judge’s conclusions. The Panel was satisfied on the evidence before it and agreed that it was unnecessary to conduct any further re-examination of the underlying evidence.

29. In particular, the Panel agreed with the Judge’s conclusions that Mr Austin acted dishonestly in relation to the Schemes. Specifically the Panel accepted that Mr Austin knew that:-

- (i) he controlled the Scheme bank accounts;
- (ii) members’ pension pots were being paid out to Mr Barratt and Ms Dalton on his instructions;

- (iii) funds were being invested on his instructions without any independent analysis or scrutiny by the trustees;
 - (iv) funds were being invested in high risk, unsecured investments principally because they generated high commissions which could then be used to help finance rebate payments to members;
 - (v) funds were being invested in part in bonds issued by companies controlled by him without any independent oversight by the trustees;
 - (vi) at least £1.355m of the sums invested into companies controlled by him were ultimately paid to him and members of his family.
30. The Panel agreed with the Judge's conclusions that the above matters are inconsistent with honest behaviour and that Mr Austin has been dishonestly involved in the misuse or misappropriation of scheme assets.
31. The Panel noted that Mr Austin was not appointed as a trustee at the time of the events referred to. Section 3 PA 95 is not, however, limited to those already appointed as trustee and any "*person*" may be prohibited. Taking account of the criteria in TPR's Prohibition Statement, the Panel determined that Mr Austin is not a fit and proper person to be a trustee. In doing so, the Panel noted that Mr Austin has had the opportunity to appeal the Judge's findings and to make representations in response to the matters set out in the Warning Notice and has not done so.
32. The Panel concluded that the evidence in relation to Mr Austin's conduct was so serious, and his involvement in the Receiving Schemes was so close and influential, as to warrant his prohibition from acting as a trustee of trust schemes in general. The Panel agreed with the Case Team's assertion regarding the wider regulatory context and, in particular, the importance of Mr Austin's name being added to the register of prohibited persons.
33. Appendix 1 to this Determination Notice contains important information about the Directly Affected Party's rights to refer this decision to the Upper Tribunal.

Signed:

Name: Tony Foster

Dated: 30 August 2018

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 PA 04 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