

<p>The Pensions Regulator</p>	<p>Standard Procedure</p> <p>DETERMINATION NOTICE</p> <p>under section 3 of the Pensions Act 1995 and section 96(2)(d) of the Pensions Act 2004</p> <p>Susan Dalton</p>	<p>The Pensions Regulator case ref:</p> <p>C112776666/4</p>
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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) of the Pensions Act 1995 (“PA 95”) to prohibit Susan Dalton from acting as a trustee of trust schemes in general.
3. The power to prohibit a trustee 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 Susan Dalton, from acting as a trustee of trust schemes in general as the Panel is satisfied that she 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 does so on the balance of probabilities whilst recognising that the more serious an allegation, the more convincing must be the proof required to tip the balance.

Directly Affected Parties

6. The Panel considers Susan Dalton 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 Ms Dalton and invites the Panel to base its conclusion that Ms Dalton 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 Ms Dalton 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 Ms Dalton (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 Ms Dalton and others should pay specified sums to the independent trustee appointed to 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 Ms Dalton and others “in relation to the facts and matters the subject of these proceedings”.
9. The case against Ms Dalton is that she is not a fit and proper person to be a trustee as she 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 Ms Dalton 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 Ms Dalton because (i) the Judge’s findings were based on extensive evidence (including over 2000 documents), (ii) Ms Dalton 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 Ms Dalton, 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 David Austin and others, including Ms Dalton (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. The second group of four schemes are referred to as “the *Dalton Schemes*” because Ms 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. Ms Dalton had no involvement in the third category of scheme so it is unnecessary to set out here any further detail in relation to that scheme.
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 include the following broad categories:-
 - (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.

(A fourth category of loss is not included here as it relates to the third category of scheme with which Ms Dalton was not concerned.)

The Judge's findings

17. The Case Team submits that the findings in the Judgment in relation to Ms Dalton and her involvement with the Receiving Schemes demonstrate that she lacks the requisite honesty and integrity to be a trustee.
18. The following findings were made by the Judge in relation to Ms Dalton:-
 - (i) "*Mr Barratt and Ms Dalton acted in their capacity as trustees of the Receiving Schemes under the control and direction of Mr Austin*";
 - (ii) "*Mr Barratt and Ms Dalton did [Mr Austin's] bidding whilst ostensibly being independent trustees of the various Receiving Schemes...*"
 - (iii) "*Mr Austin directed Mr Barratt and Ms Dalton to sign books of blank cheques and they did so thereby enabling Mr Austin...to remove Receiving Scheme funds from the scheme accounts at will*";

- (iv) Ms Dalton *“had no understanding of the technicalities of being a pension scheme trustee or of her doing anything other than she was directed to either by Mr Austin or Mr Mitchell on his behalf.”*
- (v) *“By abdicating responsibility for assets that belonged to the Barratt and Dalton schemes in the manner described... and by taking or accepting funds from the accounts for their own use as and when it suited Mr Austin for [Ms Dalton/Mr Barratt] to receive such funds, they acted in breach of trust.”*
- (vi) *“...there is no documentary evidence of any consideration by either of [Ms Dalton or Mr Barratt] as to the investment of the money received by the Receiving Schemes of which they were respectively trustees. The documentary evidence that is available demonstrates very clearly that it was Mr Austin who controlled all investment activity”;*
- (vii) *“There is no evidence of any due diligence having been carried out in relation to [the investment in St Lucia]. Had it been, it would have been apparent that the investment was highly illiquid and that the insolvency risk was high unless the escrow arrangement worked as it was presented – something that does not appear to have been considered or investigated by either Ms Dalton or Mr Barratt. No trustee acting reasonably would have invested significant sums in this project. High levels of commission were payable for these investments.”*
- (viii) *“It is entirely clear that [Ms Dalton] was ... aware ... that the payments to Members as an inducement to transfer were unlawful. She fully subscribed to the practice of telling transferring Members not to tell anyone about such payments...”*
- (ix) *“Ms Dalton’s knowledge set out above and earlier in this judgment rendered her participation in the operation contrary to ordinary standards of honest behaviour in relation to the sums removed from the Dalton Receiving Schemes’ bank accounts.”*

19. The Judge went on to state that his findings in relation to Mr Barratt applied equally to Ms Dalton. These findings included that:-

- (i) *“scheme money was being invested in investments that were inherently too risky or illiquid or otherwise obviously inappropriate for occupational pension schemes holding modest pension pots and in companies controlled by Mr Austin without any due diligence as to the appropriateness of those investments having been undertaken or any independent advice obtained either concerning the investments or the entities being invested in”;*
- (ii) *“scheme money was being paid to [her] when [she] was not a professional trustee, when [s]he was not attempting to perform the duties of such a trustee, when [s]he had no legitimate right to receive the money paid to [her] which by reason of these facts and the amounts involved [s]he knew further compromised [her] independence.”*

20. The Case Team seeks the prohibition of Ms Dalton, principally on the following grounds:-
- (i) The matters referred to above all highlight Ms Dalton'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 Ms Dalton on the register of prohibited trustees, and thereby assist in raising awareness among trustees and members that Ms Dalton is unsuitable to act as a trustee of schemes generally;
 - (b) it is important that trustees who have failed in their duties to the extent demonstrated here should be aware that they will not be permitted to continue acting as a trustee;
 - (c) prohibition should protect and enhance public confidence in the integrity of the pensions industry and TPR's oversight of it.
21. Further, the Warning Notice highlights that the failures were so serious that the prohibition should extend to trust schemes in general.

Representations

22. No Representations in response to the Warning Notice were received from Ms Dalton.

The Law

23. 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."

24. When the Panel refers to the question of whether Ms Dalton is a “*fit and proper person*” it is by way of shorthand for, and reference to, that section 3(1) test.

25. 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 a trustee is 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 trustee’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

26. The Panel agreed that an order be made under section 3 PA 95 prohibiting Ms Dalton from acting as trustee of trust schemes in general.

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

“Susan Dalton (date of birth 27 September 1955) is hereby prohibited from acting as trustee of trust schemes in general.

The order is made under section 3(1)(c) Pensions Act 1995 (PA95).

By section 6 PA95, 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

28. 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.
29. 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, any breaches of trust or pensions law, and where a trustee's professional charges constitute a breach of trust.
30. 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.
31. In particular, the Panel agreed with the Judge's conclusions that Ms Dalton acted dishonestly in relation to the Schemes. Specifically the Panel accepted that Ms Dalton knew that:-
 - (i) she was not exercising any control over the Dalton Schemes of which she was ostensibly trustee and that these schemes were being controlled by Mr Austin;
 - (ii) she had signed blank cheques which facilitated removal of the funds from the bank account of the Dalton Schemes and allowed them to be used by others;
 - (iii) Scheme funds were being invested in high risk, unsecured or illiquid investments which were inappropriate for those schemes or in companies controlled by Mr Austin without any due diligence as to whether they were appropriate investments and without any independent advice having been obtained;
 - (iv) Scheme monies were being used to make unauthorised payments to members which would expose members to possible tax penalties. It is clear from emails sent by Ms Dalton that she knew that such payments were unlawful;
 - (v) Scheme money was being paid to Ms Dalton when she was not a professional trustee and was not performing the duties of a trustee. It is apparent from the Judgment that Ms Dalton received approximately £73,000 directly from the Receiving

Schemes and around £91,000 from other companies controlled by Mr Austin using the Receiving Schemes' monies.

32. The Panel agreed with the Judge's conclusions that the above matters are inconsistent with honest behaviour and that Ms Dalton has been dishonestly involved in the misuse or misappropriation of scheme assets. In doing so, the Panel noted that Ms Dalton 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.
33. By reference to TPR's Prohibition Statement, the Panel noted that Ms Dalton's involvement with the Receiving Schemes raised concerns not only in relation to dishonesty. Ms Dalton's complete failure to act in the way that the trustee of an occupational pension scheme should and the substantial amount of fees/monies she received from the Receiving Schemes were both matters of significant concern.
34. Consequently, the Panel determined that Ms Dalton is not a fit and proper person to be a trustee. The Panel concluded that the evidence in relation to Ms Dalton's conduct was so serious as to warrant her 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 Ms Dalton's name being added to the register of prohibited persons.
35. 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