


| | | |
|---|--|---|
|  | <p>DETERMINATION NOTICE under section 96(2)(d) of the Pensions Act 2004 (“the Act”)</p> <p>The Data General Employee Benefit Plan (“the Plan”)</p> | <p>The Pensions Regulator case ref:</p> <p>TM 1915</p> |
|---|--|---|

1. The Determinations Panel, on behalf of the Pensions Regulator, met on 7 November 2008 to decide whether to exercise a reserved regulatory function in relation to the issues in the Warning Notice dated 14 August 2008. The Pensions Regulator considered under Section 10(2) of the Pensions Act 2004 that the exercise of a reserved regulatory function was appropriate.

2. Matter to be determined:

The function the Panel was asked to exercise was the application made by Mr Ralph Dilley, a member of the Plan, for an order to be issued under Sections 7(3)(a) and 7(3)(b) of the Pensions Act 1995 to appoint an independent trustee to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the scheme and that the number of trustees is sufficient for the proper administration of the scheme.

3. Parties

The Warning Notice specified the following parties as being directly affected by the regulatory action outlined in the Warning Notice:

- (a) Mr Ralph Dilley – the ‘Applicant’
- (b) Alan Pearson, William McManus and Gordon Robertson – the ‘Current Trustees’
- (c) EMC Europe Limited – the ‘Principal Employer’
- (d) EMC Corporation Inc – the ‘US Parent’
- (e) Robert Sliney and Paul Sanchez – the ‘Former Trustees’
- (f) The Financial Assistance Scheme

4. Decision

The Panel refused the application for an order to be issued under Sections 7(3)(a) and 7(3)(b) of the Pensions Act 1995.

5. Submissions of the parties

In making the Determination the Panel took into account the evidence and submissions included in the Warning Notice. It also took into account the responses and submissions to the Warning Notice sent by:

- (a) Sacker & Partners on behalf of the Former Trustees
- (b) Quarters on behalf of the Applicant

6. Details of plan and employer

The application is in relation to a contracted out, Defined Benefit plan which is winding up. As at 31 May 2005 there were 514 members and the size of the fund was £21,527,213.

The Principal Employer is EMC Europe Limited which was known as Data General Limited until 6 April 2000. EMC Computer Systems (UL) Limited is also a Participating Employer. Companies House show both companies as still being active.

7. Background to application

1. The Plan is a defined benefit occupational pension scheme established by a Declaration of Trust dated 23 February 1978 by the Principal Employer and came into effect on 1 April 1978. It is currently governed by a Definitive Deed and Schedule of Rules dated 16 July 1993. EMC Computer Systems (UK) Limited, the Participating Employer, is the immediate parent of the Principal Employer and was admitted to the Plan on 1 February 2000.
2. The Plan was closed to new members with effect from 1 January 2000. On 15 December 2000, the Principal Employer gave notice under rule 5.3 to the Former Trustees that it intended to terminate all contributions due under rule 5.1 of the Plan Rules with immediate effect but stated that this did not constitute notice to terminate the Plan under rule 16.1. The Plan closed to future accrual on 30 June 2002 and is now being wound up.
3. Two successive actuarial valuations for the Plan as at 1 April 1997 and 1 April 2000, showed an actuarial deficit of £2.5m and £5m respectively. As at 1 April 2000 the Plan was between 99% and 101% funded on a Minimum Funding Valuation (MFR) basis, which equates to a maximum MFR deficit of £196,000.
4. At a trustee meeting held on 29 October 2001, the Former Trustees noted that the MFR funding position had deteriorated to a deficit of approximately £2.25m. At a meeting of the trustees held on 4 March 2002, the Former Trustees noted that changes in MFR regulations with effect from 7 March 2002 would reduce the MFR deficit to

approximately £1.1m but this was a “ballpark” figure and should not be relied upon.

5. On 2 August 2002 the Former Trustees entered into an Agreement with the Principal Employer, the Participating Employer and the US Parent. In summary, the US Parent agreed to invest funds in both UK Employers to enable them to pay £1.2m to the Plan in full and final settlement of any debt. The Regulator noted that a payment of £1.2m was made to the Plan on 30 August 2002. Legislation at that time required the Employer to meet any shortfall in the Plan assets to bring it up to being 100% funded on an MFR basis. This legislative requirement was met by the payment.
6. Clause 14 of the Agreement described the grounds under which the Employers (specified in the Agreement as being EMC Europe Limited, EMC Computer Systems (UK) Limited and EMC Corporation) would indemnify the trustees (specified in the Agreement as being John Stanley Finlay Calderwood, Stephen Barrett, Peter Hall, Robert Sliney, Paul Sanchez and Nicholas Cantor).
7. On 8 March 2007, the Applicant made a formal written application to the Regulator under Section 7(5A) of the 1995 Act, requesting the appointment of an independent trustee for the Plan. Under Section 7(5A) of the 1995 Act “*any member of the Plan*” can make an application under Section 7(3)(a) of the 1995 Act.
8. The Applicant confirmed that he authorised John Quarrell of Quarters, who acts as legal adviser to him and those described as members of the “Data General Pension Fund Campaign Group”, to liaise with the Regulator regarding the trustee appointment.
9. The grounds put forward by the Applicant in support of the application were set out in the information required by the Regulator for the consideration of new trustee appointments and submitted on 16 February 2007; they were further supported in a portfolio of correspondence exhibited to the Warning Notice.
10. The principal features of the Applicant’s arguments were:
 - (a) the Plan was significantly in deficit on a buy out basis and insufficiently funded to meet the pension entitlements of its members;
 - (b) the actions of the Former Trustees in signing the Agreement in August 2002 significantly contributed to the present deficit. By that Agreement the Parent Company paid the sum of £1,200,000 to release the two Employers from the Plan debt; the Plan was formally terminated under the provisions of its rules with effect from 30 June 2002. The Former Trustees were indemnified in respect of a

range of faults on their part, including their having entered into the Compromise under the Agreement;

- (c) it was alleged by the Applicant that at the time of signing the Agreement the Former Trustees had been misled about the financial position of the Employers and the Parent Company and that the financial information obtained after the Agreement was signed indicated that the Participating Employer was stripped of its cash surplus on, or around, the time it was signed; two trustees employed by the Parent Company allegedly had made allegedly untruthful statements to their fellow trustees;
 - (d) the Former Trustees as a whole were in breach of their fiduciary duty in not obtaining an audit of the Companies' accounts and in failing to ascertain the true financial status of the Parent Company before signing the Agreement;
 - (e) the Former Trustees should have requested the full buy out costs of the benefits once the Employer had given notice to cease contributions on 15 December 2000. There was a similar responsibility on the Current Trustees. This was a principle - the Applicants said - highlighted in the case of *Capital Cranfield Trustees Ltd v Pinsent Curtis (a firm) and others (2004)*;
 - (f) the Applicant's case was that these allegations which, in his opinion, amounted to fraud against the Plan had not been vigorously pursued by the Current Trustees, essentially for two reasons: their lack of appropriate knowledge and skills, and because their solicitors (Sackers) were conflicted and should not have continued to act. The Applicant maintained that there were, or were likely to have been, actions or omissions of the Trustees' solicitors which contributed to the Plan's funding situation which the Current Trustees must seek to challenge;
 - (g) there were two further issues raised by the Applicant which he maintained indicated insufficient knowledge or skill on the part of the Current Trustees. They should have used the indemnity within the Agreement to finance their action in pursuing the case against the Former Trustees and they had failed to release documents which the beneficiaries were entitled to see, claiming professional privilege as the reason for not doing so.
11. It was stated by the Applicant, and not challenged, that 161 members of the Plan had given their signed written support to the application.
 12. The Current Trustees and the Regulator opposed the application.
 13. The Current Trustees' response supported views in the Warning Notice expressed by the Regulator and their response to other

aspects of the case were further set out in various sections of the exhibited correspondence.

14. The essential features of their response were:
- (a) they had pursued, and were continuing to pursue, the funding deficit and the issues relating to it which flowed from the Agreement having obtained two financial reports (on the Employers' financial ability to make an increased contribution to the Plan in the run-up to, and at the time of, the Compromise Agreement) and Counsel's Opinion on the courses of actions open to them;
 - (b) in addition to taking advice from the solicitors and Counsel they had consulted the Regulator and kept them fully informed at all stages;
 - (c) they were keeping members informed;
 - (d) they were attempting to keep a number of factors carefully in balance. They did not want to wind up the scheme prematurely without taking every opportunity to maximise the Plan's funding but were aware that delay could result in the funding position worsening whilst legal action might result in extra costs falling on the fund and again worsening the members' pension position. They had also pursued the possibility of support from the Financial Assistance Scheme, following a Government announcement that schemes in their position might be eligible in January 2007;
 - (e) with this balance in mind they had asked the Regulator to consider taking action using the anti-avoidance powers in the Pensions Act 2004 on the basis that such action could result in the funding position being improved. If the Regulator were not able to use anti-avoidance powers it would be the Trustees' intention to refer the matter back to Counsel for further advice. The Panel noted that the Regulator stated in the Warning notice that it was legally impossible to use its anti-avoidance powers in this case, though it is not clear when the Current Trustees were informed of this. The Panel further noted that there was a complaint made by one of the Current Trustees to the Pensions Ombudsman relating to the conduct of the Former Trustees and that a separate complaint had previously been made to the Pensions Ombudsman by the Applicant;
 - (f) because the Principal Employer's notification that it intended to terminate its contributions had immediate effect under rule 5.3 of the Plan Rules there was no legal opportunity for either the Former or the Current Trustees to demand, as of right, that the Employer should pay the full buy out costs. Their solicitors' interpretation of the Pinsent Curtis case, which had been cited by the Applicant in support of making such a claim, was not applicable given the rule which had been used in this case;

- (g) their solicitors were not conflicted; they argued that the evidence demonstrated they had investigated the financial state of the Employers and Parent and what the Former Trustees at the time of the Agreement might have “squeezed out of the company” and that following this the Trustees were pursuing an appropriate course of action;
 - (h) there was no legal basis for the Applicant’s argument that the indemnity in the Agreement covered actions taken by the Current Trustees and their interpretation of the law relating to privilege entitled them to withhold release of the Opinion of Counsel. The issue did not arise in relation to the two financial reports referred to by the applicant since they had been made available to him.
15. The regulatory team of the Regulator were of the view that:
- (a) the actions of the Former Trustees was not evidence that the Current Trustees lacked knowledge and understanding; and
 - (b) the Current Trustees were considering the Compromise Agreement (the Agreement). The steps they had taken so far in their considerations did not indicate a lack of knowledge and understanding.
16. The Regulator considered therefore that the evidence provided by the Applicant did not provide sufficient grounds to appoint an independent trustee under section 7(3)(a) of the 1995 Act.
17. The Regulator stated that when considering whether to exercise a discretionary power to appoint an independent trustee, the Panel must:
- (a) bear in mind that it must be exercised for the proper purposes which are consistent with the legislation under which it was granted;
 - (b) take account of relevant considerations and ignore irrelevant considerations;
 - (c) consider its overall statutory objectives under section 5 of the 2004 Act and, in particular, the statutory objective to protect members’ benefits; and
 - (d) take account of the interests of the generality of the members of the Plan under section 100 of the 2004 Act.
18. A letter dated 5 October 2007 from the Current Trustees’ solicitors to the Regulator states: “... In anticipation of the commencement of the draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007, the Plan has now formally applied for qualification into the Financial Assistance Scheme.”

8. Statutory issues

In making their decision the Panel had regard to the objectives of the Regulator as set out in section 5 of the Pensions Act 2004 and to the matters mentioned in Section 100, as set out in **Appendix 1**.

The panel were advised by an independent Counsel on matters of legal interpretation in their Determination.

9. Reasons for decision

- (a) The Determinations Panel considered all the arguments put forward by the parties, together with the detailed correspondence set out in the papers exhibited to the Warning Notice. They noted that whilst the Applicant had included the ground for the appointment of a trustee specified in Section 7(3)(b), namely: 'to secure that the number of trustees was sufficient for the proper administration of the scheme' he had not directed any submissions towards that ground but rather had concentrated his arguments on paragraph (3)(a) of Section 7. The Panel accordingly found that there was no reason to conclude that the number of trustees was insufficient.
- (b) In considering whether the trustees had, or had not, exercised the necessary knowledge and skill for the proper administration of the Plan the Panel considered events following the appointment of the Current Trustees on 3 March 2003 as they related to the questions raised in the application concerning the funding position of the Plan and the Compromise Agreement of August 2002. The central question was whether, on the evidence before them, the Former Trustees had given reasonable consideration to the funding issues that arose from the Agreement and whether they had pursued them diligently including obtaining, and the consideration of, appropriate advice.
- (c) There were three events directly relating to this question; the first was the commissioning of a financial report from McNair Mason dated December 2004, which examined the information the Former Trustees would have found from publicly available sources had they requested a report on the Companies' financial position had they commissioned a report on 4 March 2002 before entering the Agreement. In the Panel's view the fact that the Current Trustees did commission such a report some time during 2004 (the actual report was not available to the Panel) indicated that the new trustees were exercised at a sufficiently early time in their trusteeship about the funding position of the Plan and the impact that the Agreement might have had on it. Following this report, two further events took place; during 2005 advice was sought from Counsel, Christopher Nugee QC, and on receipt of that advice the Current Trustees obtained a further financial report from BDO Stoy Hayward which was more searching in its terms of reference in that it asked for an opinion on the largest debt the Companies could have met at the time of the Agreement in August 2002. The Panel, again, have seen neither the Opinion of Counsel nor the full

text of the BDO Stoy Hayward financial report of November 2005, though its contents are summarised in a letter from Sackers to the EMC Corporation Inc of 28 November 2005 in the correspondence circulated with the Warning Notice.

- (d) In June 2006 the Applicant's solicitors registered their concern to the Current Trustees' solicitors that things were not being moved along by the Current Trustees; they said that the Current Trustees had not asked for a contribution from the companies or investigated any of the individuals alleged to be responsible for the adverse funding position. The response of the Current Trustees to this was that they were dealing with sensitive matters which, in the best interests of the members, could not be fully discussed but that the Regulator was being kept informed and presumably had no objections to their action.
- (e) The exhibited correspondence showed that the Current Trustees' solicitors had in fact written to the Parent Company on 29 November 2005 immediately after receiving the second financial report expressing concern at the conduct of two of the previous trustees and, subject to any explanation those trustees might have, giving notice of a claim for £4.13 million for which legal proceedings would be a likely outcome in the absence of a satisfactory response. This set in train correspondence between the Current Trustees' solicitors and the Companies and their solicitors. The Panel therefore concluded that although the Applicant and other Plan members had not been fully informed of the Current Trustees' work in respect of the funding deficit, the Current Trustees had shown no lack of appropriate urgency or commitment in taking advice and undertaking action into 2006.
- (f) The evidence before the Panel, however, suggested that the Current Trustees brought no action in 2006, or subsequently, to follow up the reference to legal proceedings in the letter of 29 November 2005, nor was there any evidence that they had received either from the Companies, or from the Current Trustees, any offer, explanation or other response which had satisfied their concerns. Their reason for this was the need, as they saw it, for caution based on the balanced approach to action which the Panel found had been adopted from mid 2006 onwards. The Panel found no reason to conclude that adopting such an approach was indicative of any lack of diligence on the part of the Current Trustees, nor of any lack of understanding or skill, since the position taken was based on legal advice both from the solicitors and Counsel and they had continued to keep the Regulator fully informed. The Current Trustees' caution in not putting the Plan fund at risk was understandable given that they were waiting for the decision of the Regulator on the use of its anti-avoidance powers which they had reason to believe might have resulted in a Direction to make a contribution to the fund. The Regulator's decision not to use such powers does not appear to have been communicated to the Current Trustees until the Warning Notice was issued in August 2008.

- (g) The Applicant had strongly pressed the Trustees' solicitors on their conflicted position, having advised the Former Trustees and allegedly having done so erroneously in a number of important respects. The Panel carefully considered this claim, because any finding of conflict would question the Trustees' skill and knowledge since, on the face of it, they should be expected to recognise and challenge any significant indicators of conflict in their adviser's position.
- (h) The Panel took the view that advisers were not inherently in conflict merely because they continued to act when the Plan's Trustees changed; indeed it was in such situations when the availability of a continuity of advice could be valuable. Their approach was to ask whether there was anything in the actions taken, or advice given, by the solicitors when acting for the Former Trustees that might cause a reasonably minded person to conclude that they might be prejudiced, biased or defensive about past actions when advising the Current Trustees. The Panel considered the evidence of the advice actually given by the solicitors and whether they had misdirected the Trustees; they found that the Applicant had raised no issues where any such concern was justified. The Panel found the assertion correct that the MFR level of the fund after the £1,200,000 contribution, taking the Agreement at face value, fully met the only statutory requirement imposed by the legislation then in force. The Panel also found the Trustees' solicitors' interpretation that the principles of the Pinsent Curtis case did not impose a responsibility on them to demand full buy out costs after the date of contributions ceasing, which in this case was on 15 December 2000, was also correct; and the Panel concurred with the solicitors' argument that the indemnity clause within the Compromise Agreement could not be used by the Current Trustees to fund the costs of pursuing any action against the Companies or Former Trustees. It was clear that the definition of Trustees used in the Compromise Agreement meant the named Former Trustees only and there was nothing in the indemnity clause which extended its cover to future trustees. Moreover, the Panel found, on the evidence submitted, that the solicitors had advised the Former Trustees at a meeting on 12 September 2001 to obtain an independent report on the financial position of the Companies after a trustee employed by the Parent Company had outlined his understanding of the financial position to his fellow trustees. That advice was rejected. The Panel considered, therefore, that there were no grounds to conclude that the solicitors were acting other than professionally and in good faith, and in the proper interests of both the Current Trustees and beneficiaries, and that the allegations of conflict were not founded.
- (i) The overall conclusion of the Panel was therefore that the evidence did not reveal any lack of skill or knowledge on the part of Trustees that would support a decision to appoint an independent trustee, having regard to the interests of the members of the Plan. The actions of the Current Trustees in pursuing the funding question were appropriately diligent and taken on legal advice and their caution after receipt of the

second financial report disclosed no lessening of judgment. In the Panel's view the solicitors were not conflicted.

- (j) The Panel had no evidence before them of the up to date position regarding what action the Current Trustees might take in the light of the Regulator's decision not to employ its anti-avoidance powers. It will be for the Trustees to make any decision in the light of the further Counsel's Advice, which they intend to obtain, and to continue to weigh carefully all the advantages and disadvantages to the fund in pursuing action and delaying wind up. The Panel noted that the Plan had been accepted as being 'potentially eligible' within the Financial Assistance Scheme which could be a significant factor for the Plan members.
- (k) The Panel were mindful that the reason this application was brought lay in the understandable concern of a substantial number of members of the Plan about the funding shortfall and their equally understandable need to be satisfied that everything possible was being done as quickly as it could be to pursue any possible remedies against the Employer's Parent Company and Former Trustees. The Trustees submitted evidence that they kept members informed about their approach and actions. However, it was clear from the correspondence that they had not been prepared to disclose to the Applicant, or to the generality of members, the position relating to the possible action to secure further funding. In the Panel's view it was this lack of disclosure that had fuelled suspicions that the Trustees were lacking in fortitude and their advisers not properly focused.
- (l) In the Panel's view there was still an urgent need for the Current Trustees to consider ways in which a fuller account could be given to the members of the advantages and disadvantages of further action and of the approach they intended to take. In addition, the Current Trustees' position regarding explaining the legal advice of Christopher Nugee QC (including the further advice when obtained) should be reconsidered. The Panel did not accept the submission of the Regulator and the Current Trustees that it might be withheld on the grounds of privilege. In their view the general rule that a beneficiary has the right at all reasonable times to inspect the documents relating to the affairs of a Trust extends to the Opinions of Counsel obtained by the Trustees for the guidance on the discharge of their duties; the Panel did not consider that, on the evidence they saw, any of the recognised exceptions to this principle applied.
- (m) The Panel recognised the understandable desire of the solicitors to ensure that the Plan was not prejudiced by aspects of their strategy reaching the public domain; some suitable redaction might be needed to be considered when they did release the advice they have received. Nevertheless the Panel recommend that the Current Trustees, subject, if they considered it necessary to a condition that the documents should not be further disclosed, reconsider their position on the release of these Opinions and they address urgently other ways in which they could disseminate information and so regain the confidence of a substantial

number of Plan members that they were acting with the members' proper interests fully in mind.

- (n) The Panel ask that within the next three months the Current Trustees inform the Regulator of the actions they had taken in this regard.

10. Appendix 2 to this Determination Notice contains important information about the rights of appeal of the parties against this decision.

Signed: ...*John Scampion*.....

Chairman: **John Scampion**.....

Dated: 17 November 2008.....

Section 5 of the Pensions Act 2004
Regulator's objectives

- (1) The main objectives of the Regulator in exercising its functions are –
- (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
 - (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
 - (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
 - (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.
- (2) For the purposes of subsection (1)(b) the members of personal pension schemes within this subsection are-
- (a) the members who are employees in respect of whom direct payment arrangements exist, and
 - (b) where the scheme is a stakeholder pension scheme, any other members.
- (3) In this section-
- “stakeholder pension scheme” means a personal pension scheme, which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c.30)(register of stakeholder schemes);
- “work-based pension scheme” means-
- (a) an occupational pension scheme,
 - (b) a personal pensions scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
 - (c) a stakeholder pension scheme.

Section 100 of Pensions Act 2004
Duty to have regard to the interests of members etc

- (1) The Regulator must have regard to the matters mentioned in subsection (2) –
- (a) when determining whether to exercise a regulatory function –
 - (i) in a case where the requirements of the standard or special procedure apply, or
 - (i) on a review under section 99, and
 - (b) when exercising the regulatory function in question.

- (2) Those matters are –
- (a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
 - (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

Referral to the Pensions Regulator Tribunal

You have the right to refer the matter to which this Determination Notice relates to the Pensions Regulator Tribunal (“the Tribunal”). Under section 103(1)(b) of the Act you have 28 days from the date this Determination Notice is given 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:

The Pensions Regulator Tribunal
15-19 Bedford Avenue
London
WC1B 3AS
Tel: 020 7612 9649.

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 Support
The Pensions Regulator,
Napier House
Trafalgar Place
Brighton
BN1 4DW.
Tel: 01273 627698