

# THE PENSIONS REGULATOR

## ORAL HEARING

Victoria House  
Bloomsbury Place  
London WC1A 2EB

Wednesday, 7<sup>th</sup> November 2007

Before:

**MICHAEL MAUNSELL**  
(Chairman)  
**DIANNE HAYTER**  
**JOHN SCAMPION CBE**

Compulsory Review of the decision  
made at the Special Procedure hearing on 19 October 2007  
in respect of the:

GEC 1972 Plan (“the Scheme”)

**Parties:**

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- (a) Stanhope Pension Trust Limited (“the Trustee”)
  - (b) Pension Corporation LLP (“PC”)
  - (c) Co-Investment No 5 LP Incorporated (“CILP”)
  - (d) telent Plc (“the Employer”)
  - (e) The Law Debenture Trust Corporation plc  
(appointed independent trustee)
  - (f) Burges Salmon Pension Trustees Limited  
(appointed independent trustee)
  - (g) Bridge Trustees Limited (appointed independent trustee)
  - (h) The Pensions Regulator (“the Regulator”)

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### **Reasons of the Determinations Panel**

*(All references to page numbers are references to the paginated bundles  
supplied to the Panel at the oral hearing)*

1. On 19 October 2007 the Determinations Panel (the “Panel”) determined (the “Initial Determination”) to appoint three independent trustees, as listed in (e) to (g) above (“the Independent Trustees”), to the Scheme pursuant to Section 7 (3) (c) of the Pensions Act 1995 (the “1995 Act”). The application (the “Application”) to appoint the Independent Trustees was made by letter from the Trustee to the Regulator dated

18 October 2007. The Panel made the Initial Determination under the Special Procedure set out in Section 97 (2) (a) of the Pensions Act 2004 (“2004 Act”).

2. After a determination made under the special procedure the 2004 Act requires a compulsory review to take place as soon as reasonably practicable. Given that the review was taking place against a background of an offer by CILP advised by PC<sup>1</sup> (the “Offer”) for the Employer PC requested that the review should take place as soon as it could be arranged and requested an oral hearing. Accordingly the Panel directed that the review be conducted on 7 November 2007 by way of an oral hearing. This meant that all of the parties had to work to a tight timetable. The parties made representations to the Panel accompanied by a considerable amount of documentation. This included extensive correspondence, witness statements, documents disclosed by PC and skeleton arguments<sup>2</sup>. On the 8 November 2007 the Panel issued a final notice which confirmed the order made on 19 October. The reasons for the decision set out in the final notice are in this document.
  
3. At the oral hearing the parties were represented as follows:
  - a. Mr Brian Green Q.C. and Mr Jonathan Evans appeared on behalf of the Trustee, instructed by Sacker & Partners;
  - b. Mr Richard Drabble Q.C., Miss Sarah Asplin Q.C. and Mr James Maurici appeared on behalf of PC and CILP respectively instructed by Weil, Gotschal & Manges;
  - c. Mr Robert Ham Q.C. appeared on behalf of the Employer instructed by Slaughter and May;
  - d. Mr Michael Furness Q.C. appeared on behalf of the Independent Trustees instructed by Lovells; and
  - e. Mr Michael Tennet Q.C. and Mr Jonathan Hilliard appeared on behalf of the Regulator.

### **The Central Issue**

4. The central issue to which the parties devoted the most time was whether the test, as set out in Section 7 (3) (c) of the 1995 Act was met. Section 7 (3) (c) states:

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<sup>1</sup> In this document the terms CILP and PC are used interchangeably.

<sup>2</sup> A full index is annexed to these reasons

*“The Authority may also by order appoint a trustee of a trust scheme where they are satisfied that it is necessary to do so in order-*

*(c) to secure the proper use or application of the assets of the scheme.”*

5. Various submissions as to the construction of Section 7 were put forward by the parties (which will be considered below). Whether the test under Section 7 was made out would determine whether the Panel would revoke or confirm the order made on 19 October 2007.

### **The Background Facts**

6. The Scheme is a mature plan. It has some 62,000 members but the Panel understands that less than 1,000 of these are active members who are employees of the Employer for whom contributions are still being paid. The value of the Scheme assets is some £2.5 billion. According to the Employer’s accounts the Scheme is 100% funded on an IAS 19 valuation.
7. In 2006 the Employer, then called the Marconi Corporation, and principal employer to the Scheme, participated in the sale of the majority of the group’s business to the Ericsson group. As part of a clearance application to the Regulator, an escrow was established by the Employer (the “Escrow”) into which £490 million was paid on completion of the sale to Ericsson. The purpose of the Escrow, as set out in the agreement that established it (the “Escrow Agreement”), was to give comfort to the Trustee for the commitment of the Employer to the Scheme [page 390] because of the situation post sale when the covenant of the Employer would be materially reduced. Until the conditions arise under which money will be paid to the Scheme, under the Escrow Agreement, the Escrow is an asset of the Employer. This is reflected in its accounts.
8. The conditions for claiming funds from the Escrow are set out in clause 8 (for the Trustee) and clause 9 (for the Employer) of the Agreement as amended [pages 312-316]. Clause 8 of the Agreement provides that after each IAS 19 valuation, if and to

the extent that the Scheme is less than 100% funded on an IAS 19 basis, funds will be released from the Escrow to the Scheme. Clause 9 of the Agreement provides that if and to the extent that the assets of the Scheme and the Escrow are valued at more than 105% on the buyout basis, then funds will be released to the Employer.

9. On 25 September 2007 PC announced its offer for the Employer of £6.00 per share (which valued the Employer at £398 million). PC had already acquired 29% of the Employer's shares. The Trustee, on the announcement of the Offer, initiated a series of meetings in order to ascertain PC's attitude and plans towards the Scheme. There is some dispute as to what was said during these meetings. However, it is clear that the meetings did not allay the concerns of the Trustee about the attitude of PC to the Scheme.
10. Over a period extending more than a year, the Trustee had been investigating the possibility of a Bulk Purchase of Annuities ("BPA") for the Scheme and had a number of discussions with the Employer. By October 2007 this had reached quite an advanced stage and providers had been asked to quote. On 5 October 2007 the Trustee sent the Employer a letter initiating the procedure for consulting about changing the Scheme's Statement of Investment Principles ("SIP") so as to include a possible BPA indicating a closing date for that consultation of 5 November. The Employer responded on 17 October raising a number of queries and that process continues. It was accepted at the hearing that BPA covering all the liabilities of the Scheme would not be possible without considerable addition to the Scheme assets plus the Escrow. The funding gap on this basis is currently about £150 million.

### **The Review**

11. Section 99 of the 2004 Act aligns the special procedure with the standard procedure. In doing so it is in effect a rehearing of the Initial Determination. The Panel may consider any fresh evidence since Section 99 (3) (d) of the 2004 Act provides that the Panel may deal with any matter arising on the review as if it had occurred as part of the Initial Determination. Therefore the Panel on review had to determine whether the Initial Determination, in light of all that was now known, should stand. This basis of proceeding was supported by all of the parties save for PC and the Employer.

12. PC, in its skeleton, submitted that the question as to whether the special procedure was appropriate was a live issue for the review. This was because, in its submission, Section 7 of the 1995 Act could not be viewed in isolation. Two tests had to be met. Firstly that the use of the special procedure was justified and secondly that it was necessary to appoint independent trustees. On PC's analysis, if the first hurdle was not passed then the question as to Section 7 fell away. This argument was not pursued during the hearing.
13. In any event the Panel did not accept this analysis. This is because the review is not a retrospective procedure with which to analyse whether the reasons behind the Initial Determination were right. It is a procedure which reviews the outcome of the Initial Determination on the basis of the facts at the time of the review. Accordingly the Panel felt that whether Section 97 of the 2004 Act applied at the time of the Initial Determination was not relevant to the substantive point that arose at the review: namely whether the facts before it justified the appointment of the Independent Trustees.
14. As indicated above the kernel of this case is the wording of Section 7 of the 1995 Act. In order to justify a decision to confirm the order it must be established on a balance of probabilities that the requirements of Section 7 have been met. A related topic which took up a significant part of the discussion was the law surrounding conflicts of interest and it is appropriate to look at these principles next.

### **The No Conflict Rule**

15. There was little dispute as to the nature of the no conflict rule nor how the principles applied in this case.
16. The avoidance of conflicts of interest is a well established principle.

*“A trustee, like other fiduciaries, is not allowed to place himself in a position where his personal interest, or interest in another fiduciary capacity, conflicts or possibly may conflict with his duty. The general effect of these rules, which in no way depend*

*on fraud or absence of good faith, is that a trustee is not allowed to derive any personal advantage from the administration of the trust property that is not expressly authorised.”*

Lewin on Trusts 17<sup>th</sup> ed (2000) para 20-01

17. The Trustee’s unchallenged submission was that the no conflict rule applies to the power to appoint trustees<sup>3</sup>, which is a fiduciary one, as well as to the way in which trustees exercise their duties. Trustees have core duties which are summarised by Millet L.J. in *Bristol and West Building Society v Mothew* [1998] Ch.1 at p.18:

*“The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or the benefit of a third person without the informed consent of his principal.”*

18. The Regulator argued that the no conflict rule does not only apply when an actual conflict of interest exists. It is sufficient that there is a potential conflict of interest. Furthermore, a breach of the no conflict rule does not require any impropriety or conscious wrongdoing. This submission was not challenged.

19. The Trustee acknowledged that the no conflict rule does not automatically preclude an employer from exercising a power of appointment in the context of pension schemes. If that were the case then the power of appointment (which is frequently vested in the employer) could never be exercised without breaching the no conflict rule. The panel were referred to a number of cases, including *in re Skeat’s Settlement* (1889) 42 ChD 522 which showed that the power of appointment of a trustee had to be exercised in a fiduciary way. The power of appointment should be exercised within the boundaries of the no conflict rule. The Trustee, Regulator and the Independent Trustees all submitted that PC’s use of the appointment power, through the Employer, would not be legitimate and that the no conflict rule would be breached.

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<sup>3</sup> Including directors to the board of a corporate trustee

20. The Panel's attention was also directed to Regulation 4 (2) of the *Occupational Pensions Schemes (Investment) Regulations 2005* which states:

*"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."*

### **Ways in which the conflicts of interest might arise**

21. The Panel felt that there were three potential scenarios in which conflicts of interest might arise. These were:

- (i) The use by the Employer, if controlled by PC, of the power to appoint its directors to the board of the Trustee where there was a risk that those appointees would wish to implement PC's investment strategy;
- (ii) The new trustees, if appointed by PC, would have a conflict of interest when deciding whether to exercise their powers of investment and when deciding on whether to appoint PC as the Scheme's investment manager; and
- (iii) If PC were appointed as the Scheme's investment manager or its personnel were involved in decisions on investment policy or its application then a conflict of interest could arise on every occasion that PC (or its personnel) provided investment advice to the Scheme.

### **The Trustee's Case**

22. The Trustee's case, which was supported by the Independent Trustees and the Regulator, was that the approach of PC to the Scheme (as evidenced by its own literature, by statements made on its behalf and by actions taken in the schemes of other employers acquired by PC) created such a fundamental conflict of interest that regulatory action was needed now to protect the Scheme and the interests of its members. The point was made that, in raising the conflict issue, this was not a challenge to the personal probity of those named as potential trustees.

23. Factors to which the Trustee or the Independent Trustees drew the attention of the Panel included the following:

- a. PC had referred to 'gaining control' of previously acquired pension funds [pages 466, 467 447, 449 & 450]. There were references to this being the intention for the acquisition of the Employer [page 467]. This was seen as inappropriate for the trustees of a pension scheme;
- b. PC's executives and board members are among its investors and thus are personally interested in the success of PC's business strategy [page 134];
- c. Those who would be nominated to either the Board of the Trustee or to the proposed investment and liability sub committee would be executives of PC. This was consistent with PC's approach after acquiring other employers;
- d. Despite representations that the return to PC would be achieved by investment management performance and that there were no plans to seek to obtain money from the Escrow in the near future, there was an email [pages 924-927], dated 23 September, from Mr Edmund Truell which indicated that PC was contemplating a very significant liability management exercise and as part of this was seeking to use of £30 million from the Escrow in the short term;
- e. There could be circumstances in which the Trustee of the Scheme might seek the Employer's agreement to use some of the funds in the Escrow where some action was in the best interests of the Scheme. The approach of PC suggested that this would be rejected without real consideration.
- f. Evidence was submitted that, following earlier acquisitions of Thorn and Thresher & Glennie, PC had:
  - i. Appointed its own executives to positions where they were in a majority on the board of the relevant corporate trustees and on committees which had delegated functions for investment performance; and



- ii. In one case appointed PC as investment advisor without considering any competitors i.e. there was no “beauty parade”.
- g. There was no recognition from PC that in causing its proposed subsidiary, the Employer, to appoint its executives or board members to the board of the Trustee it was exercising this power in a fiduciary way;
- h. While the Trustee accepted that PC and its executives may be skilled in running pension schemes and investments, this did not prevent them being affected by significant conflict issues. While disclosure of the conflicts would certainly be noted, the Trustee felt that the level of the conflict (and the lack of any recognition by PC of such conflicts) created a danger that the assets of the Scheme and the interests of the members would be at risk;
- i. Once PC had acquired the Employer, there would be a very different level of conflict between telent/PC as the employer and that which is normally inherent in the relationship between an employer and its pension fund.
- j. The Trustee claimed that, in order to achieve PC’s aim of an improved investment return, the Scheme would need to adopt an investment strategy that bore a higher risk level than at present. This was developed in paragraph 5 of Mr Mitchell’s witness statement [page 552].

**PC’s case**

24. PC’s case, as put forward in its skeleton, was that:

- a. The conditions of Section 97 of the 2004 Act had not been met;
- b. The Initial Determination was based on facts that were incorrect and that therefore the use of Section 7 could not be justified; and
- c. The true construction of Section 7 meant that any risk to the Scheme’s assets had to be immediate rather than prospective.

25. Point (a) has been discussed above. However, whilst PC maintained that points (b) & (c) were correct, it argued that the nature of PC's rebuttal had by necessity changed radically in order to meet what it considered to be a case different to that submitted by the Trustee at the time of the Application. The case now put forward by the Trustee, the Independent Trustees and the Regulator centred on the inherent conflict of interest that would arise if the Offer were to be accepted.
26. While the skeleton argument of PC did not directly address the issue of conflict a number of oral submissions did go to this topic. It was submitted by PC that the issue on conflict had materially changed but, in its view, that there was nothing unusual or indeed unduly problematic about the relationship between PC and the scheme. PC appeared to suggest that the references in the documents referred to in paragraph 23(a) above could be explained, but PC did not do so. Specifically it was argued that there was nothing in this which could justify action under Section 7(3)(c) of the 1995 Act. This was in essence because there was no conflict situation or problem at the moment and thus no need for any action to be taken. If a problem arose later and it was not addressed satisfactorily, action could then be taken.
27. Although PC submitted at the hearing that there was no inherent conflict of interest that would arise should the Offer succeed (or, if there was, it could be justified by necessary implication), the Panel was invited to consider the Section 7 test in light of a proposal (the "Solution") put forward by PC to address the concerns of the Regulator and the Trustee. A compromise had been suggested by PC prior to the oral hearing and had been revised as a result of negotiations. Its pre-hearing form was set out in the appendix to PC's solicitor's letter of 31 October 2007 (the "Solution") [page 744].
28. The Solution (which PC undertook to implement) had three key terms. It entrenched the position of independent trustees within the Scheme's rules and allowed for the Independent Trustees to remain in office until April 2008 (with a further two year term for a single trustee) thus ensuring the presence of an independent trustee who could "blow the whistle" or involve the Regulator should it be thought necessary. Given these proposed changes, PC argued that the appointment of the Independent Trustees was unnecessary.

29. In view of the conclusions the Panel reached on this argument, it is appropriate to summarise at this point the discussion that took place about page 744 as the hearing progressed. The Independent Trustees pointed out that when originally proposed there was considerable additional material which would have to be settled [pages 100-108]. They had objected that the terms of the Solution were unsatisfactory because paragraph 3 contained provisions which sought to limit the actions the Trustee might take by expressly barring it from any action which would enable the Scheme to access the Escrow. PC indicated during the first part of the hearing that it would 'undertake' to operate paragraphs 1 and 2, with the position on the objections to paragraph 3 being initially reserved. After an adjournment, PC agreed to omit paragraph 3 [page 744].
30. The Trustee and Independent Trustees subsequently argued that paragraph 1 did not sufficiently entrench the independence of the trustee body after April 2008 and that the powers to be delegated under paragraph 2 would be held by persons appointed by the Employer, presumably to be nominated by PC. In its final submissions PC argued that it would be willing to consider with the other parties a mechanism for overcoming their objections to these points.

### **The arguments of other parties**

31. In its skeleton argument, the Employer had indicated that it would be willing, by Deed Poll, to entrench the position of independent trustees in the board of the Trustee so that it would have a permanent structure.
32. It is not thought necessary, in regard to the other issues, to set out the representations of the Regulator, the Independent Trustees and the Employer for, so far as they are important, they are covered in the appropriate place.

### **Section 7 of the 1995 Act**

33. In approaching Section 7, all parties agreed there were no special rules that would assist in interpreting the key terms of this provision. A key term is the requirement of necessity, which means nothing more than "requires". However, PC and the Employer

submitted that necessity required immediacy. In Mr Ham's words, the use of Section 7 could only be justified if there was "a clear and present danger" to the assets of the Scheme. The Trustee, Independent Trustees and Regulator submitted that Section 7 can, and should, be exercised prospectively to prevent any such danger arising. The Panel did not feel that the Section 7 power was constrained to situations in which a breach of trust had either occurred or was immediately about to occur. This is not to say that the Section 7 power should be used when there is no realistic prospect of the threat to the assets occurring in the reasonably foreseeable future. It is a question of fact and degree. However, the Section 7 power is preventative. Therefore the Panel felt that, given the circumstances and timing surrounding the Offer, and the record of PC with other pension schemes, the threat to the Scheme's assets was sufficiently proximate to justify the use of the Section 7 power.

34. It was strongly argued by PC that the appointment of the Independent Trustees was not necessary if the Solution was solid. Likewise it had been forcefully represented by the Employer that its commitment to change the structure of the Trustee so as to secure the position of independent trustees as members of the board of the Trustee made regulatory action unnecessary.
35. The Panel considered the arguments summarised in the last paragraph very carefully. However it did not think that either the existence of the PC proposed Solution (as amended during the hearing) or the Employer's proposed entrenchment of the rights of independent trustees on the board of the Trustee provided sufficient protection.
36. The Solution was not sufficient because, notwithstanding the commitment given at the hearing to carry it through:-
  - a. Considerable work was required to ensure that the governance of the Trustee would be appropriate and secure before it could be converted into a binding and satisfactory agreement, and this would need to be in place before the anticipated take-over; and

- b. The fact that it had undergone a number of changes during the course of the hearing suggested that there could be considerable difficulty in reaching such a conclusion.

37. As to the proposed Deed Poll, questions were raised by other parties about how this could be imposed without the agreement of PC. The Panel also considers that there are legal issues about the enforceability of an arrangement imposing a corporate structure binding for all time on a company's shareholders whoever they might be. As neither of these points had not been developed between the parties, the Panel did not feel it could take it as solving the problem.

### **Conclusions**

38. The Regulator submitted that if the Panel was satisfied that there was a realistic prospect of all or any of the conflicts described in paragraph 21, especially given that PC had shown no real recognition of these, let alone any proper arrangements for managing such conflicts, then regulatory action was not only justified but necessary. The Panel was satisfied that there was a realistic prospect that the scenarios described in paragraph 21 might occur, and no arrangements had been put in place for managing those conflicts. Accordingly, the Panel concluded that the original appointment of the Independent Trustees was necessary under Section 7 (3) (c) of the 1995 Act and should be confirmed. The Panel reached this conclusion on the basis of the following key factors.

39. At the heart of the objections raised to the Offer is PC's business model and investment strategy. PC's literature, and the evidence before the Panel, suggested that it was not interested in the commercial activities of the Employer nor in the employers that it had acquired in the past. PC's business is the management of pension schemes. It is implicit that the Offer was made with a view to profit for its investors (some of whom were to be appointed to the Trustee board). The language that PC uses in describing its business is indicative of the approach that PC would take should the Offer be successful. The Panel did not feel that the use of terms such as "control" and "own" was merely superficial. PC's intentions, which it never denied, were to manage the assets of the Scheme in a way that would generate a return for its investors. The

Panel considered that the relationship between the Employer/PC and the Scheme would be fundamentally different in this case from a typical employer/scheme relationship. This was because of PC's business model, the Escrow and its terms and because of the unusual ratio between active and deferred members.

40. Sir Mark Weinberg's witness statement made plain the intention of PC to manage the assets of the Scheme so that the conditions of the Escrow Agreement would be satisfied in PC's favour. He stated that PC intended to manage the Scheme to 105% of buyout over a five year period. PC denied that this would involve adopting an investment strategy that would place the Scheme's assets at risk. Instead PC had stated that it could be achieved with an investment strategy that bore a lower risk than that currently adopted by the Scheme. Mr Mitchell, while making the point that he had not been provided with details of PC's investment model, indicated that this would require a very significant increase in value of the risk bearing assets of the Scheme. He concluded that it would not be possible to achieve PC's aim without greater risk and hence reduced security for the members' benefits [page 552]. The Panel preferred Mr Mitchell's evidence on this point.

41. The contents of an email disclosed by PC [page 924], which indicate that funds from the Escrow would be used as part of a planned liability management exercise, cannot be reconciled with Sir Mark Weinberg's evidence as to PC's attitude to the Escrow.

42. The Panel felt that there were a number of other factors relevant to its conclusion. These included:

- (a) Senior PC personnel who would be appointed to the board of the Trustee, or the proposed investment and liability sub committee, would have a personal interest given that they were investors in PC;
- (b) The original terms of the Solution would have precluded any part of the Escrow being available for BPA until it was amended during the second part of the hearing. This gave rise to concern as to PC's attitude to the Trustee's legitimate interests in using the Escrow for the members' benefit. It was noted that the first version of the draft solution with this restriction bore the same date as Sir Mark Weinberg's witness statement in which he stated that PC had an open mind with

respect to BPA. As Sir Mark was not tendered for cross examination, this point could not be resolved.

43. The Panel felt that all of the above factors demonstrated a conflict of interest in the way described in paragraph 21.

44. The Panel also had to take account of the objects of the Regulator set out in Section 5 of the 2004 Act. The Panel considered that the appointment of the Independent Trustees was required to protect the interests of the members of the Scheme. The Panel felt that this appointment was a balanced and proportionate response to the risks taking account of Section 100 of the 2004 Act and the differing interests of all the directly affected parties.

Signed:



Chairman: ~~Michael Maunsell~~, on behalf of the Panel

Dated: 14 November 2007

## Exhibit List

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