

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under section 96(2)(d) of the Pensions Act 2004</p> <p>Handley Ash Retirement Benefits Scheme</p>	<p>The Pensions Regulator case ref:</p> <p>C112387276</p>
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1. The Determinations Panel (“the Panel”), on behalf of the Pensions Regulator (“TPR”), met on 19 September 2018 to decide whether to exercise a reserved regulatory function in relation to the issues in the Warning Notice dated 13 August 2018. The matter was referred to the Panel by the case team of TPR (“the Case Team”) on 28 August 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 11(1)(c) of the Pensions Act 1995 (“PA 95”) to authorise the Handley Ash Retirement Benefits Scheme (“the Scheme”) to be wound up without regard to any consent that may be required by the Trust Deed and Rules governing the Scheme.

Decision

3. The Panel determined that it was necessary to wind up the Scheme to protect the interests of the generality of the members of the Scheme. The Panel determined that it was appropriate to make an order in the terms set out below. In accordance with the provisions of section 96(5) of the Pensions Act 2004 (“PA 04”), the order will be issued upon the expiration of the period during which this determination may be referred to the Upper Tribunal or, if referred, once the reference and any appeal has been finally disposed of.
 - (1) *“Dalriada Trustees Limited, the sole trustee of the Scheme, is hereby authorised to wind up the Scheme without regard to any consent required by the Trust Deed and Rules governing the Scheme.*
 - (2) *The order at (1) is made because the Pensions Regulator is satisfied that it is necessary in order to protect the interests of the generality of the members of the Scheme that it be wound up and the funds held within the Scheme distributed in a prompt and cost effective manner for the benefit of the members of the Scheme.*
 - (3) *This Order having been made by a determination under the Standard Procedure provided for by section 96 of the Pensions Act 2004, it shall not come into force until the end of the 28 day period within which that determination maybe be referred to the Tribunal (in accordance with subsection (5) of that section).”*

Directly Affected Parties

4. The Panel considered Dalriada Trustees Limited (the “Trustee”) to be the only party directly affected by its determination as the members’ interests are represented by the Trustee.

Details of the Scheme and Employer

5. The Scheme is a defined contribution scheme. It has 53 members and assets of £1,379,687.22 as at 30 June 2016. There is no active sponsoring employer supporting the Scheme and therefore costs are met from the members’ funds in accordance with a court order.
6. The Scheme was created by a Definitive Pension Trust Deed dated 28 January 2013. This deed refers to “the Pension Scheme Model Rules 2006” albeit that these are not clearly identifiable. There is, however, a document entitled the “*Model Rules for Marley Administration Services Occupational Pensions*” which the Panel understands is applicable to the Scheme.

Background

7. The Trustee was appointed to the Scheme on 20 September 2013 following an application to the High Court by TPR. The order by Hildyard J appointing the Trustee as trustee of the Scheme (and other schemes) included a provision that the Trustee’s fees and expenses of administering the Scheme be paid out of the assets of the Scheme (“the 2013 Order”).
8. The Warning Notice and exhibits set out that the Scheme was not established for the purpose of providing retirement benefits but as a vehicle for pension liberation or as a pension scam. Following the Trustee’s appointment, the Trustee managed to take control of the funds that had been transferred into the Scheme before they were transferred into any “investments”. The funds were recovered in full, and have since been reduced by the costs incurred by the Trustee following its appointment.
9. As the Scheme was not established as a legitimate retirement benefit scheme and as the majority of monies paid into the Scheme have been recovered by the Trustee, the Trustee, having received HMRC’s confirmation that no tax charges would be levied on the Scheme, believes it is in the interests of members to wind up the Scheme in order to transfer members’ funds out of the Scheme. This would be done in accordance with the duties of the Trustee either by way of a transfer to appropriate alternative pension arrangements, a lump sum payment to eligible members, or via an appropriate buy-out policy in members’ own names.
10. On 9 February 2018 the Trustee requested TPR to make an order winding up the Scheme. The Trustee explained that the Trustee’s intention to wind up the Scheme had been conveyed to members and “*met with no objections*”.

11. Following discussions between the Trustee and the Case Team it was agreed that section 11(1)(c) of PA 95 was the most appropriate power, given the circumstances of the Scheme. On 11 June 2018, the Trustee formally wrote to TPR to ask for an order to wind up the Scheme. The Trustee advised that:-
- i. The Scheme's rules do not give the Trustee the power to commence wind up unilaterally.
 - ii. There is a provision in the rules governing the Scheme for the Scheme to be terminated only at the discretion of the 'provider'. Handley Ash Limited was the provider for this purpose. However, Handley Ash Limited has been dissolved since 2014, removed from the Companies House register and so no longer exists as an entity.
 - iii. The Trustee instigated contact with the former sole director of the now dissolved Handley Ash Limited. Despite initial indications that she would be amenable to restoration of the 'provider' company and consent thereafter to wind up of the Scheme, this was not progressed as the director stopped responding to communications from the Trustee.
 - iv. In the absence of a "provider" there is no mechanism in the rules governing the Scheme to trigger wind up. The Trustee has obtained a legal opinion from counsel which supports this conclusion.
 - v. Incurring the ongoing costs of running the Scheme is detrimental to members' funds, and so it is in the interests of all members of the Scheme to wind up the Scheme, and for the Trustee to be in a position to settle members' benefits by way of a transfer of pension benefits, payment of a winding up lump sum or securing of individual policies. The Trustee considers that this approach will reduce the ongoing cost to the Members.
12. The alternative to wind up is for the transfer out of all members (with or without their consent). This has been considered by the Trustee, which is of the view that this would incur costs similar to those required to continue running the Scheme, which would be payable from member funds. This alternative would not be as advantageous to members as transferring benefits following a wind up of the Scheme. The Trustee also considered that whilst it was possible to regularise and run the Scheme, it would not be cost effective for it to do so.
13. In the Trustee's opinion it is therefore more cost effective to wind up the scheme now and transfer out members' benefits. The Trustee considers that there would be *"no member whose best interests would not be served by the scheme being wound up and their benefits transferred to an alternative arrangement"*.

Case Team's view

14. Given the limited amount of funds available in the Scheme, which was valued at £1,379,687.22 in 2016, the Case Team is of the opinion that it

would be most efficient if the wind up is triggered without the requirement for further steps on the part of the Trustee. The Case Team recommends that the order authorises the Trustee to trigger the wind up of the Scheme without the consent of the provider.

15. On 19 September 2018 the Case Team confirmed that the Scheme is an Occupational Pension Scheme within the meaning of section 1 of the Pensions Schemes Act 1993 over which TPR has remit. This is the Case Team's understanding following the court's judgments in *Pi Consulting (Trustee Services) Ltd v The Pensions Regulator and others, Dalriada Trustees Ltd v Nidd Vale Trustees Ltd and others* [2013] EWHC 3181 (Ch) and based on the fact that the documentation and operation of the Scheme were very similar to those schemes to which the court's decisions related. The Case Team stated that the court treated the schemes as occupational pension schemes albeit they appear to have been used for purposes of pension liberation and not for the provision of retirement benefits for members. The Case Team noted also that the Trustee agreed with this view of the Scheme.
16. The Case Team is of the view that granting an order which *authorises* that the Scheme is put into wind up will empower the Trustee to take appropriate action to a) protect the assets of the Scheme, b) preserve members' benefits, and c) act in the best interests of Scheme members. In supporting this application TPR also meets its statutory objective to protect the benefits of members of occupational schemes.

Reasons for decision

17. In making its decision the Panel had regard to the objectives of the Regulator as set out in section 5 of PA 04 and to the matters listed in section 100 of PA 04.
18. The Panel accepted the Case Team's reasoning that the Scheme is an Occupational Pension Scheme over which TPR has remit as set out above.
19. The Panel also accepted that it is in the members' best interests to wind up the Scheme. The Scheme's assets are made up of members' benefits only as recovered by the Trustee following its appointment. No investments have been made by the Scheme and no further contributions paid in. The ongoing costs of running the Scheme are taken from members' funds in accordance with the 2013 Order and so continuing to run the Scheme would be detrimental to members' interests, as their benefits held in the Scheme are being eroded over time.
20. The Panel accepted the Trustee's view that, whilst it was possible to regularise and run the Scheme, it would not be cost effective for the Trustee to do so. Further alternatives were considered by the Trustee such as bulk transfer of members' benefits out of the Scheme with or without their consent and then winding up the Scheme. This would, however, still require an order from TPR to wind up the Scheme once the funds had been transferred out. This would involve a longer period and

further costs to the Scheme which would be taken out the members' benefits.

21. Given the limited amount of funds available in the Scheme and TPR's objective to protect members' benefits, the wind up should be triggered promptly and cost effectively without the consent required in the rules governing the Scheme.
22. In these circumstances, the Panel was satisfied that it is necessary in order to protect the generality of interests of the members of the Scheme to wind up the Scheme in accordance with section 11(1)(c) of the PA 95 in order to permit the members to receive the benefits of their membership of the Scheme in a more prompt and cost effective manner.
23. The Panel considered section 11(4) of the PA 95 and made no direction with respect to the manner and timing of the winding up.

Human Rights Act

24. TPR may only make an order to direct or authorise a scheme's winding up if the making of such order would not be unlawful as a result of section 6(1) of the Human Rights Act 1998 (unlawful for a public authority to act in a contravention of a Convention right). The Panel noted that the Trustee had notified members of the Scheme of the proposal to wind up the scheme and as indicated above the Trustee reports that the proposal has not met with any objections. The Scheme provider and employer, Handley Ash Limited, no longer exists as it has been dissolved since 2014 and removed from Companies House register. In the circumstances, the Panel did not consider that the issuing of the order would be unlawful under section 6(1) as no one is being deprived of their property or other Convention right.
25. Appendix 1 to this Determination Notice contains important information about the Directly Affected Parties' rights to refer this decision to the Upper Tribunal.

Signed:

Chairman: Elizabeth Neville

Dated: 26 September 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