

	<b>DETERMINATION NOTICE</b> <b>under Section 96(2)(d) of the</b> <b>Pensions Act 2004 (“the Act”)</b> <b>XXXXXXXX Pension Scheme</b> <b>(“the Scheme”)</b>	The Pensions Regulator case ref:  <b>TM9018</b>
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1. The Determinations Panel, on behalf of the Pensions Regulator, met on 6 July 2010 to decide whether to exercise a reserved regulatory function in relation to the issues in the Warning Notice dated 18 June 2010. 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 the Trustees of the Scheme and supported by the Regulator:

- (a) to appoint a Trustee under Section 7(3)(c) of the Pensions Act 1995 (“the 1995 Act”);
- (b) under Section 7(5)(b) of the 1995 Act to require that the Trustee appointed be paid fees and expenses out of the Scheme’s resources;
- (c) under Section 8(4)(b) of the 1995 Act to make provision for the powers or duties of a Trustee appointed under Section 7 of the 1995 Act to be exercisable by a Trustee to the exclusion of other trustees; and
- (d) under Section 9 of the 1995 Act to make an order vesting any property in, or transferring property to, a Trustee appointed under Section 7 of the 1995 Act.

**3. Parties**

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

- (a) The XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX Limited as Pensioner Trustee
- (b) XXXXXXXX as Trustee
- (c) XXXXXXXX (formerly XXXXXXXX as Principal Employer
- (d) Capita ATL Pension Trustees Limited as the newly appointed Trustee

#### 4. Background

- (a) The Scheme is a small self-administered scheme established in XXXXXXXX. Its two remaining beneficiaries are XXXXXXXX and XXXXXXXX (XXXXXXX) (the “**Beneficiaries**”).
- (b) The trustees of the Scheme were The XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX Limited and XXXXXXXX (collectively, the “**Trustees**”). As from 27 May 2010 they resigned as trustees and ceased so to act.
- (c) XXXXXXXX, previously known as XXXXXXXX, is the Principal Employer of the Scheme (the “**Principal Employer**”). Its directors are XXXXXXXX and XXXXXXXX, who are also its shareholders together with XXXXXXXX.
- (d) A dispute concerning the Scheme’s allocation of assets arose when the Trustees decided to reduce XXXXXXXX’s pension in 2005 and again in 2008 following receipt of actuarial advice that the Scheme could not maintain the level of benefit payments being made.
- (e) XXXXXXXX’s XXXXXXXX (XXXXXXX) made a complaint to the Pensions Ombudsman (the “**Ombudsman**”) regarding the reduction in XXXXXXXX XXXXXXXX pension. The Ombudsman made a determination on XXXXXXXX and, along with specified guidelines, remitted to the Trustees for reconsideration their 2005 decision to alter the level of pensions.
- (f) In accordance with the Ombudsman’s determination, the Trustees revisited their decision to alter the level of pensions and concluded in January 2010 that they would reimburse the balance of pension payments not paid to XXXXXXXX from December 2005 and that the remaining balance of the funds would be split between the Beneficiaries as originally decided in 1999 (the “**January 2010 Decision**”).
- (g) Shortly thereafter, XXXXXXXX’s representatives contacted the Trustees and convinced them to revisit the January 2010 decision. On 24 February 2010, the Trustees decided to reverse that decision in XXXXXXXX’s favour (the “**February 2010 Decision**”).
- (h) XXXXXXXX’s XXXXXXXX sought advice from The Pensions Advisory Service (TPAS) regarding the Trustees’ reversal of their January 2010 decision and, upon receiving a copy of this advice the Trustees sought the view of their own legal advisers (Burgess Salmon LLP) on the matter. Burgess Salmon LLP confirmed TPAS’s opinion that the February 2010 decision was improperly reached and that the Trustees did not have the power to substitute the January 2010 decision with a further decision in favour of XXXXXXXX.

- (i) Due to the potential repercussions of any reinstatement of the January 2010 decision, the Trustees said that they felt unable to follow the legal advice received from Burges Salmon LLP and reach a definitive decision regarding the application of the Scheme's assets. They stated that they had been placed under considerable pressure. This led to their decision to resign.
- (j) The Regulator is of the opinion that it would not be appropriate for it to take a view on the dispute between XXXXXXXX and XXXXXXXX on the allocation of the pension benefits as the Ombudsman has reviewed and made a determination in respect of the matter. However, the Scheme requires a trustee to address the dispute and give effect to the Ombudsman's decision.
- (k) The Trustees acknowledge that the Principal Employer has the power under the rules of the Scheme to appoint a new trustee to the Scheme. However, due to one of its directors (XXXXXXX) being XXXXXXXX XXXXXXXX, the Trustees did not consider it appropriate to ask the Principal Employer to appoint a trustee to the Scheme. The Trustees, accordingly, applied to the Pensions Regulator for the appointment of a trustee.
- (l) However, on 14 May 2010, the Trustees' legal advisers confirmed their approval to the Regulator's proposal that it approach the directors of the Principal Employer to determine their willingness to appoint a trustee from the Regulator's Trustee Register (the "**Register**") as this would avoid the need to proceed with the Application. Despite attempts by the Regulator to secure approval from the Principal Employer for the appointment of a trustee from the Register this was not forthcoming from either of the directors.
- (m) On 14 June 2010 XXXXXXXX's legal advisers wrote to the Regulator confirming that XXXXXXXX had no objection to the appointment of a professional and independent trustee and would in fact welcome such an appointment.
- (n) Considering this, the Regulator decided to proceed with consideration of the Trustees' Application to appoint a trustee under section 7(3)(c) of the 1995 Act in order to secure the proper use or application of the assets of the Scheme.

## 5. **Decision**

- (a) The panel agreed that it was appropriate to make the following order:
  - i To appoint a Trustee under Section 7(3)(c) of the 1995 Act;

- ii under Section 7(5)(b) of the 1995 Act to require that the Trustee appointed be paid fees and expenses out of the Scheme's resources;
- iii under Section 8(4)(b) of the 1995 Act to make provision for the powers or duties of a Trustee appointed under Section 7 of the 1995 Act to be exercisable by a Trustee to the exclusion of other trustees; and
- iv under Section 9 of the 1995 Act to make an order vesting any property in, or transferring property to, a Trustee appointed under Section 7 of the 1995 Act.

(b) The Pensions Regulator hereby orders that:

**Appointment of Trustee under Section 7**

1. Capita ATL Pension Trustees Limited of 7<sup>th</sup> Floor, Phoenix House, 18 King William Street, London EC4N 7HE is hereby appointed as trustee of the XXXXXXXX Pension Scheme (the "Scheme") with effect on and from 7 July 2010.
2. This order is made because the Pensions Regulator is satisfied that it is reasonable to do so, pursuant to the relevant provisions of the Pensions Act 1995 as set out below, in order:
  - i to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c).
3. The powers and duties exercisable by Capita ATL Pension Trustees Limited shall be to the exclusion of all other trustees of the Scheme pursuant to Section 8(4)(b) of the Pensions Act 1995.
4. Capita ATL Pension Trustees Limited's fees and expenses shall be paid out of the resources of the Scheme pursuant to Section 7(5)(b) of the Pensions Act 1995.
5. This order:
  - i will take immediate effect on the date of this order;
  - ii may be terminated, or the appointed trustee replaced, at the expiration of 28 days notice from the Pensions Regulator to the appointed trustee, pursuant to Section 7(5)(c) of the Pensions Act 1995.

**Vesting Order under Section 9**

1. The Pensions Regulator hereby orders the vesting in, and the assignation and transfer to, Capital ATL Pension Trustees Limited of 7<sup>th</sup> Floor, Phoenix House, 18 King William Street, London EC4N 7HE, as trustee of the XXXXXXXX Pension Scheme, appointed under Section 7 of the Pensions Act 1995 by the Pensions Regulator, of all property and assets of the above scheme, heritable and moveable, real and personal, of every description and wherever situated.

2. This order is made by the Pensions Regulator pursuant to section 9 of the Pensions Act 1995, as amended.
3. This order will take immediate effect on the date of this order.

6. **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) XXXXXXXX Chairman, XXXXXXXX dated 1 July 2010 and the Regulator's response thereto dated 2 July 2010

7. **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**.

8. **Reasons for decision**

The reasons given by the Panel for their decision were as listed below:

- (a) As of 27 May 2010 the Scheme has been without any trustees as those formerly in place resigned.
- (b) This means that it has not been possible to make any progress in settling the current outstanding problems with the Scheme and its Beneficiaries.
- (c) The Pensions Ombudsman's determination of XXXXXXXX remitted the decision made in 2005 to alter the level of pensions back to the Trustees for reconsideration. The Ombudsman required the Trustees to do four things one of which was to recognise that the Scheme assets should have been, and, now had to be, used to buy annuities. No progress can be made in carrying out this, or any of the other recommendations, as things stand.

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

Signed: Suzanne McCarthy.....

Chairman: **Suzanne McCarthy**.....

Dated: 9 July 2010.....

**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 Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)**

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under section 103 of the Pensions Act 2004 (“the Act”) you have 28 days from the date this Determination Notice is given 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 Tax and Chancery Chamber of the Upper Tribunal  
45 Bedford Square  
London  
WC1B 3DN  
Tel: 020 7612 9700

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 811852