

	<p>FINAL NOTICE</p> <p>under Section 99 (4) of the Pensions Act 2004 (“the Act”)</p> <p>The Hugh Mackay Retirement Benefits Scheme (the “Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>TM8515</p>
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1. The Determinations Panel (the “Panel”) on behalf of the Pensions Regulator (the “Regulator”) met on 22 February 2010 by way of an oral hearing to conduct a compulsory review, pursuant to Section 99 of the Act, of its initial determination (the “Initial Determination”) to appoint Pi Consulting (Trustee Services) Limited (“PTS”) as an independent trustee to the Scheme on 7 December 2009 pursuant to Section 7 (3) (c) and (d) of the Pensions Act 1995 (the “1995 Act”) and to issue a vesting order pursuant to Section 9 of the 1995 Act.

Matter to be determined and parties

2. The following parties (together with the Regulator the “Parties”) were considered to be directly affected by the compulsory review:
 - (a) Mr Robert Hill;
 - (b) Mr Simon Ragg;
 - (c) Mr Nicholas Halton; (together the “Original Trustees”);
 - (d) XXXXXXXXXXXXXXXX;
 - (e) XXXXXXXXXXXXXXXX;
 - (f) Chartpoint Limited (“Chartpoint”);
 - (g) Leathers LLP;

(h) Pi Consulting (Trustee Services) Limited.

3. At the oral hearing the Regulator was represented by Mr Rowley Q.C. PTS was represented by Mr Simmonds Q.C. and the Original Trustees were represented by Mr Ham Q.C. and Mr Sawyer. Mr Jones represented Chartpoint.
4. As set out above the purpose of the oral hearing was to conduct a review of the Initial Determination namely whether it was reasonable to appoint an independent trustee to the Scheme and if so whether that independent trustee ought to be PTS. The Panel also had to consider whether PTS, or an alternative independent trustee, ought to have exclusive powers, how the fees and expenses of the independent trustee ought to be met, and whether to issue a vesting order.
5. At the outset of the oral hearing Mr Ham Q.C., on behalf of the Original Trustees, made a number of concessions (the “Concessions”) namely that the Original Trustees accepted that they had breached the following statutory provisions:
 - (a) regulation 4 (5) of The Occupational Pension Schemes (Investment) Regulations 2005 (the “Investment Regulations”); and
 - (b) Section 36A¹ of the 1995 Act and regulation 5 of the Investment Regulations;
 - (c) Section 247 of the Act.
6. As a result of the Concessions the Original Trustees did not oppose:
 - (a) the appointment of PTS as an independent trustee;

¹ Strictly construed Section 36A of the 1995 Act cannot be breached but provides that regulations (here the Investment Regulations) may, amongst other things, prohibit borrowing by the trustees of an occupational pension scheme.

commercial property development company whose principal activity is the provision of services to the Scheme.

12. Chartpoint purports to provide three services to the Scheme namely the introduction of investment opportunities (which are property related), raising finance in order to exploit those opportunities and administrative services. In consideration for these services Chartpoint has received approximately £1 million in fees from the Scheme between 2006 and 2008.
13. The Original Trustees, XXXXXXXX and XXXXXXXXXXXX have been paid salaries by Chartpoint. It remains unclear to the Panel precisely what services they have provided in consideration for these salaries but for the purposes of the review, and in light of the Concessions, it was unnecessary for the Panel to resolve this point.
14. The assets of the Scheme, according to the unchallenged submissions of the PTS, comprise of:
 - (a) freehold commercial properties valued at £35.9 million in aggregate;
 - (b) unlisted property trust units valued at £5.5 million in aggregate;
 - (c) current assets of £7.1 million consisting principally of bank loans which have been drawn but not spent.
15. It was clear to the Panel from the above that:
 - (a) the assets of the Scheme were predominantly invested in property (PTS put the ratio at between 85% to 95% with the balance consisting of cash);
 - (b) the property acquisitions had been financed with bank loans totalling approximately £25 million.
16. By reason of the above, and in light of the Concessions, the Panel found that the Investment Regulations had been breached. Further, the Original

Trustees had pursued an investment strategy in ignorance of the requirements of the Investment Regulations which, in the Panel's view, constituted a breach of Section 247 of the Act. Section 247 of the Act requires trustees to have sufficient knowledge and understanding of, amongst other things, the law relating to pensions and the principles relating to the investment of assets in occupational pensions schemes.

Breaches of the Investment Regulations

17. The Investment Regulations are designed to limit the investment risks faced by an occupational pension scheme. To that end the Investment Regulations require a scheme's assets to consist predominately of investments admitted to trading on regulated markets and prohibit, save in limited circumstances which did not apply in this case, borrowing by the trustees of a scheme.

18. Regulation 4 (5) of the Investment Regulations requires that:

*"The assets of the scheme **must consist predominantly** of investments admitted to trading on regulated markets."* (emphasis added)

19. The Panel found, given the complexion of the Scheme's assets, that regulation 4 (5) had been breached. None of the Scheme's assets consist of "investments admitted to trading on regulated markets". It was therefore axiomatic that regulation 4 (5) had been breached. This conclusion was not contested by the Original Trustees.

20. The Investment Regulations also prohibit borrowing. Regulation 5 provides that:

*"(1) Except as provided in paragraph (2), the trustees of a trust scheme, and a fund manager to whom any discretion has been delegated under section 34 of the 1995 Act, **must not borrow money** or act as a guarantor in respect of the obligations of another person where the borrowing is liable to be repaid, or liability under a guarantee is liable to be satisfied, out of the assets of the scheme.*

(2) Paragraph (1) does not preclude borrowing made only for the purpose of providing liquidity for the scheme and on a temporary basis.” (emphasis added)

21. The unchallenged evidence before the Panel was that the Original Trustees had borrowed approximately £24.7 million. It was therefore plain to the Panel that regulation 5 of the Investment Regulations had been breached. This was not contested by the Original Trustees.

22. The Original Trustees were unaware that the above breaches of the Investment Regulations had occurred. However, as part of the Concessions, they admitted that they should have known about the requirements imposed by the Investment Regulations and that therefore they had failed to comply with Section 247 of the Act.

Trustee knowledge and understanding

23. Section 247 of the Act, where material, provides that:

“An individual to whom this section applies must have knowledge and understanding of-

*(a) the law relating **to pensions and trusts,***

(b) the principles relating to-

*(ii) **investment of the assets of such schemes, and***

(5)The degree of knowledge and understanding required by subsection (4) is that appropriate for the purposes of enabling the individual properly to exercise his functions as trustee of any relevant scheme.” (emphases added)

24. By committing such serious breaches of the Investment Regulations it was clear to the Panel that the Original Trustees did not have the appropriate

degree of knowledge and understanding of the law relating to pensions or the principles relating to the investment of the Scheme's assets. Had the Original Trustees had adequate knowledge and understanding of pensions law and investment principles they would have appreciated the stark breaches of the Investment Regulations that they had committed. By acting in ignorance of the Investment Regulations the Scheme has borrowed very large sums of money which it should not have done and has a highly concentrated asset portfolio which exposes it to risk which the Investment Regulations are designed to limit. As a result the Panel was satisfied that the interests of the members of the Scheme had not been sufficiently protected.

Conclusion

25. Section 7 (3) of the 1995 Act provides, where material, that:

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

(c) to secure the proper use or application of the assets of the scheme, or

(d) otherwise to protect the interests of the generality of the members of the scheme.”

26. As set out above the Panel found that the Original Trustees had committed serious breaches of the Investment Regulations and had completely failed to appreciate this in breach of Section 247 of the Act. As a result the Scheme was heavily in debt (by reason of borrowing approximately £25 million) and had a concentrated asset portfolio which exposed the Scheme to risk.

27. Accordingly the Panel concluded that it was reasonable to confirm the appointment of PTS as an independent trustee to the Scheme in order to secure the proper use or application of the assets of the Scheme and to protect the interests of the generality of the members pursuant to Section 7 (3) (c) and (d) of the 1995 Act.

28. The Panel was also satisfied that the powers and duties of PTS ought to be to the exclusion of other trustees, for any fees and expenses of PTS to be paid from Chartpoint's resources, and that its appointment should not be limited. The Panel was also satisfied that a vesting order ought to be made pursuant to Section 9 of the 1995 Act.

29. Accordingly the Panel confirmed the Initial Determination and determined that orders be issued in the terms set out in Appendix 1.

Right of appeal

30. Appendix 2 contains important information about the right to appeal.

Signed:



Chairman: **John Scampion**

Dated: 5 March 2010

Orders issued:

Appointment of independent trustee

The Pensions Regulator hereby orders as follows:	
1.	Pi Consulting (Trustee Services) Limited of The White House, 57-63 Church Road, Wimbledon, London SW19 5SB is hereby appointed as trustee of the Hugh Mackay Retirement Benefits Scheme (the "Scheme") with effect on and from 7 December 2009.
2.	<p>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:</p> <ul style="list-style-type: none"> i. to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c); ii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).
3.	The powers and duties exercisable by Pi Consulting (Trustee Services) 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.	Pi Consulting (Trustee Services) Limited's fees and expenses shall be paid out of the resources of the Scheme pursuant to Section 8(1)(b) of the Pensions Act 1995 and an amount equal to the amount paid out of the resources of the Scheme by virtue of Subsection 8(1)(b) is to be treated for all purposes as a debt due from the employer to the trustees of the Scheme pursuant to Section 8(2) of the Pensions Act 1995 as amended by Section 35 of the Pensions Act 2004.
5.	<p>This order:</p> <ul style="list-style-type: none"> 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

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| <p>1. The Pensions Regulator hereby orders the vesting in, and the assignation and transfer to, Pi Consulting (Trustee Services) Limited of The White House, 57-63 Church Road, Wimbledon, London SW19 5SB, as trustee of the Hugh Mackay Retirement Benefits 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.</p> |
| <p>2. This order is made by the Pensions Regulator pursuant to section 9 of the Pensions Act 1995, as amended.</p> |
| <p>3. This order will take immediate effect on the date of this order.</p> |

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 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