

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under Section 10(2)(b) and Section 96(2)(d) of the Pensions Act 2004 (the “Act”)</p> <p>XXXXXXXX XXXXXXXXXXXX XXXXXXXX XXXXXX (the “Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>C7378430</p>
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Introduction

1. The Determinations Panel (the “Panel”) of the Pensions Regulator (the “Regulator”), met on 4 August 2015 to consider the issues in a Warning Notice dated 23 March 2015.
2. The Warning Notice asked the Panel to make an order under Section 9 of the Pensions Act 1995 (“the 1995 Act”) to vest the Scheme assets in the trustee of the Scheme, XXX XXX XXXXXXXXXXXX XXXXXXXX XXXXX XXXXXXXXXXXXXXXX XXX (“the Trustee”).
3. The power to make a vesting order is a reserved regulatory function under section 10 of the Act and is, therefore, only exercisable by the Determinations Panel of the Regulator.

The Decision

4. The Panel determined that a vesting order should be made to vest all of the Scheme’s property and assets in the Trustee. The terms of the Order are recited at the conclusion of this Determination Notice. This Notice gives the Panel’s reasons for that Order.

The Scheme

5. The Warning Notice gives the following information about the Scheme. It is a defined benefit occupational pension scheme. The status of the Scheme is not certain. It was believed to be closed to new joiners and to accrual but it is unclear whether the Scheme has entered winding up.
6. As at 31 March 2014, there were 702 members, being 380 deferred members and 322 pensioner members. At the last valuation of 31 March 2010, the scheme had a funding deficit of £8,986,000 (assets £11,982,000 and liabilities of £20,968,000); section 179 deficit of £10,082,446 (assets of £11,981,883 and liabilities of £22,064,329). The Scheme’s property and assets include a number of commercial and residential properties.

Background to the application

7. On 11 April 2013 the Regulator was asked to appoint a trustee to the Scheme because those then acting as trustees recognised uncertainty about the validity of their appointment. This arose because those trustees had been appointed by a purported principal employer and there was doubt about the validity of that employer's own appointment.
8. In response to the request for an appointment, the Regulator issued a Warning Notice and, after consideration of representations made by directly-affected parties, appointed the Trustee as trustee of the Scheme with exclusive powers, by way of an Order dated 29 August 2013. This Order was made under s. 7(3)(b) of the 1995 Act and, as a non-reserved regulatory function, was exercised by a member of the Regulator's staff with appropriate delegated authority. This Order did not contain any vesting order under s.9 of the 1995 Act which, as a reserved regulatory function, can only be exercised by the Panel.
9. On 2 May 2014 the Regulator received a request from the Trustee for the Regulator to make a vesting order in its favour in relation to the Scheme Assets.
10. The Trustee explained that a vesting Order was required to address difficulties that the Trustee had encountered in managing the assets of the Scheme. In particular, the Land Registry had refused to recognise the Trustee's title to a commercial property held as an investment of the Scheme. Consequently the Trustee has been unable to grant a new lease over the property. The Trustee has also indicated that the lack of a vesting order is also likely to hamper the Trustee's future ability to sell or lease this and other residential and commercial properties held by the Scheme.
11. The Panel also understands that the Trustee has encountered difficulties with managing the Scheme's bank account held with HSBC, although these difficulties may now have been resolved.
12. It is the Case Team's recommendation that the Determinations Panel should issue the vesting order as it will ensure the appointed Trustee can perform its trustee duties and will be advantageous as far as the Scheme's assets are concerned.
13. The Panel notes that the Trustee could seek a vesting order from the High Court under s.44 of the Trustee Act 1925. However, the Case Team considers that it would be unreasonable and disproportionate for the Regulator to appoint the Trustee without vesting rights and then expect it to incur the expense of seeking a vesting order from the High Court when the Regulator itself has the power to vest assets under s.9 of the 1995 Act.

Representations

14. Following issue of the Warning Notice dated 23 March 2015, the Regulator received separate Representations made on behalf of the employers and from the Trustee. Summarised briefly these representations (i) clarified the list of employers as directly affected parties, (ii) asked that any vesting order cover all Scheme assets and (iii) asked that the order be made retrospective to the date of the Trustee's appointment, essentially to validate any actions taken in relation to the Scheme property to date.

The Law

15. Section 9 of the 1995 Act provides:

“Where the Authority have power under this Part to appoint or remove a trustee or a trustee is removed under section 3A, they may exercise by order the same jurisdiction and powers as are exercisable by the High Court or, in relation to a trust scheme subject to the law of Scotland, the Court of Session for vesting any property in, or transferring any property to, trustees in consequence of the appointment or of the removal.”

Reasons for the Decision

16. In making its decision the Panel had regard to the objectives of the Regulator as set out in Section 5 of the Act and to the matters listed in Section 100.
17. The Panel is satisfied that it has the power to vest the Scheme property and assets in the Trustee and that it can do so following an earlier appointment by the Regulator. In the Panel's view, it is not necessary that the appointment and the vesting be effected contemporaneously.
18. The Panel considers it is reasonable to exercise the power to vest the Scheme's assets in the Trustee given that the request to do so is supported by all of the directly affected parties and the Case Team of the Regulator, and given the difficulties the Trustee has encountered in dealing with the Scheme's assets. The Panel is not aware of any reason why the Scheme's property and assets should not be vested in the Trustee. The Panel agrees with the Case Team of the Regulator that it would be unreasonable and disproportionate for the Trustee to have to seek a vesting order from the High Court when the Regulator itself has power to issue a vesting order.
19. As to the terms of the Order, the Panel agrees with the representations received that the Order should vest all Scheme property and assets. The Panel is not persuaded that there is any need for the Order to be made to operate retrospectively, even if this were legally permissible.

Conclusion

20. For these reasons the Panel determined that an Order should be made in the following terms:

“The Pensions Regulator hereby orders that all property and assets of the XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX (the “Scheme”), heritable, moveable, real and personal, of every description and wherever situated be vested in, assigned to and transferred to XXX XXX XXXXXXXX XXXXXXXX XXXXXX XXXXXXXXXX XXX of XXXXX XXXXX, XXX XXXX XXXXXXX, XXXXXXX, XXXX XXX as trustee of the Scheme appointed under Section 7 of The Pensions Act 1995 by The Pensions Regulator.

This Order is made by The Pensions Regulator pursuant to Section 9 of The Pensions Act 1995.

This Order will take immediate effect as at the date of this Order.”

Directly Affected Parties

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

- i. XXX XXX XXXXXXXXXX XXXXXXX XXXXXX XXXXXXXXXXXXXX XXX (the “Trustee”)
- ii. The employers in relation to the scheme (the “Employers”) namely:

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22. This list was subsequently updated following representations from the Trustee and the Employer’s representative to include the following additional employers:

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23. The Panel noted from the representations to the Warning Notice that the Employer's Committee no longer exists.
24. The Panel accepted that the above named parties, including the additional employers, are directly affected by this determination.
25. **Appendix 1** to this Determination Notice contains important information about the rights of appeal of the parties against this decision.

Signed:

Chairman: XXXXXXXXXXXX

Dated: 6 August 2015

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”). Under Section 99(7) of the Act 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 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 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