

	<p><b>DETERMINATION NOTICE</b>  <b>under section 96(2)(d) of the</b>  <b>Pensions Act 2004 (“the Act”)</b></p> <p><b>The Harvie Tyre Supplies Limited</b>  <b>Retirement Benefits Scheme</b>  <b>(“the Scheme”)</b></p>	<p>The Regulator  case ref:</p> <p><b>TM 4273</b></p>
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1. The Determinations Panel, on behalf of the Pensions Regulator (the “Regulator”), met on 14 May 2008 to decide whether to exercise a reserved regulatory function in relation to the issue in the Warning Notice dated 6 April 2008. The 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 Regulator for an order to be issued under section 7(3)(c) of the Pensions Act 1995 to appoint a trustee of the Scheme and for that trustee’s powers and duties as a trustee to be exercisable to the exclusion of the other trustees. That, if the Panel was content to so appoint, Independent Trustee Services Ltd (ITS) should be appointed, and for any fees and expenses of ITS as a trustee to be paid out of the Scheme’s resources.

3. **Parties**

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

- (a) ITS
- (b) Wilson Owen Strutte (Mr Strutte)
- (c) Susan Strutte (Mrs Strutte) (beneficiary of Mr John Strutte, a former trustee of the Scheme)

4. **Decision**

The Panel granted the Regulator’s application for an order to be issued under section 7(3)(c) of the Pensions Act 1995. The Panel determined that an order be issued in the following terms:

The Regulator hereby orders that:

- (i) Independent Trustee Services Limited of 1<sup>st</sup> Floor, 6 Crutched Friars, London EC3N 2PH is hereby appointed as trustee of the Harvie Tyre Trade Supplies Limited Retirement Benefits Scheme with effect on and from 14 May 2008;
- (ii) this order is made because the Regulator is satisfied that it is necessary to do so in order to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3) (c) of the Pensions Act 1995;
- (iii) the powers and duties exercisable by Independent 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;
- (iv) Independent Trustee Services Limited's fees and expenses shall be wholly paid out of the Scheme's resources pursuant to section 7(5)(b) of the Pensions Act 1995;
- (v) this order:
  - (a) will take immediate effect on the date of this order;
  - (b) may be terminated at the expiration of 28 days notice from the Regulator to the trustees, pursuant to section 7(5)(c) of the Pensions Act 1995.

The Panel has made this order in the expectation that Independent Trustee Services Limited, before initiating the payment of Mrs Strutte's benefits, should be reasonably satisfied that no claim against Harvie Tyre Supplies Ltd or any other creditor could still be pursued on behalf of the Scheme.

## **5. Submissions of the parties**

In making the determination the Panel took into account the evidence and submissions included in the Warning Notice. No responses to the Warning Notice were received.

## **6. Details of Scheme and sponsoring employer**

The application is in relation to a Small Occupational Pension Scheme (SOP), formerly known as a SSAS. The Scheme is winding up and has one remaining member. As at 13 March 2008 the fund stood at £400,500. The sponsoring employer, Harvie Tyre Trade Supplies Limited (the Employer) was wound up as a result of a compulsory liquidation on 20 July 2001 and dissolved on 10 August 2004.

## **7. Background to application**

- (i) The Scheme was established on 1 December 1981 to provide benefits for Mr Strutte and his brother Mr John Strutte who died in 2003. Following his death his share of the benefits became payable to Mrs Strutte, his widow.
- (ii) The two trustees of the Scheme are Mr Strutte and ITS.

- (iii) On 1 February 2008 ITS's legal advisers wrote to the Regulator stating that Mr Strutte was refusing to sign the necessary documentation to pay the benefits owed to the remaining beneficiary Mrs Strutte.
- (iv) A Resolution dated 25 March 1997 amended the provisions of the Scheme to state that all decisions had to be made unanimously.
- (v) Mr Strutte is receiving his benefits following an agreement that the funds would be split 50/50. Mr Strutte gave his written agreement to this split in a letter to ITS dated 6 December 2006.
- (vi) Correspondence has been supplied to the Regulator which shows that Mr Strutte continues to refuse to sign the necessary documentation which would enable Mrs Strutte's benefits to be released. The winding up of the Scheme cannot be completed until payment of these benefits has been finalised.
- (vii) Mr Strutte's refusal to agree to sign the necessary documentation stems from a historic dispute between him and Mr John Strutte, his brother, in relation to sums lent from the Scheme to the Employer.
- (viii) In considering this dispute the Panel noted that, if any sums were owed to the Scheme, they were owed by the Employer which had borrowed the sums in question. As the Employer was dissolved on 10 August 2004, any claim the trustees may have had was effectively extinguished. Further, section 91 of the Pensions Act 1995 applies in that Mrs Strutte's benefits are inalienable and cannot, save for very limited circumstances which do not apply in this case, be subjected to a lien, charge or set off. Those limited circumstances include situations in which criminal, negligent or fraudulent acts have been committed. There was no suggestion, nor any evidence, that these circumstances applied.
- (ix) ITS have reminded Mr Strutte of his obligations as a trustee to act impartially towards all scheme members. It has asked that, if he will not give his authority to settle Mrs Strutte's benefits, he tender his resignation as trustee to enable ITS to act. To date he has not done this.
- (x) The Panel could not see how the dispute should affect the payment of Mrs Strutte's benefits. Therefore the Panel was of the view that Mr Strutte could not refuse to put Mrs Strutte's benefits into payment in accordance with the Scheme rules.
- (xi) The Regulator did not take a view on the dispute. The Regulator's objective is to ensure the proper use and application of the assets of the Scheme. The Scheme cannot be finally wound up until Mrs Strutte's benefits have been put into payment.

**8. 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**.

**9. Reasons for decision**

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

- (i) currently all decisions relating to this Scheme must be made unanimously, save for some exceptions which are not relevant to this matter;
- (ii) the only matter which remains outstanding is the signing of the documentation which will allow Mrs Strutte's benefits to be paid to her. Mr Strutte refuses to sign the necessary documentation;
- (iii) Mr Strutte had agreed to the 50/50 split of the benefits;
- (iv) as a trustee Mr Strutte should act impartially towards all scheme members. Mr Strutte's continued refusal to allow Mrs Strutte's benefits to be paid to her means that he is not ensuring the proper use and application of the assets of the Scheme and is therefore not fulfilling his fiduciary duties;
- (v) the Panel could see no reason why the dispute over money lent by the Scheme to the Employer should affect the payment of Mrs Strutte's benefits;
- (vi) XXX  
XXXXXXXXXXXX;
- (vii) the winding up of the Scheme cannot be finalised until payment of Mrs Strutte's benefits commences;
- (viii) appointing ITS under 7(3)(c) of the Pensions Act 1995 will enable them to secure the proper use or application of the assets of the Scheme. Giving exclusive powers to ITS will enable them to take the steps needed to secure payment of Mrs Strutte's benefits.

**10. 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: 16 May 2008.....

**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 Regulator Tribunal**

You have the right to refer the matter to which this Determination Notice relates to the 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 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:

The 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 Regulator. Any copy reference notice should be sent to:

Determinations Support  
The Regulator,  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW.  
Tel: 01273 627698