

<p>The Pensions Regulator</p>	<p style="text-align: center;">Standard Procedure DETERMINATION NOTICE under Article 7(3) of the Pensions (Northern Ireland) Order 1995</p> <p style="text-align: center;">The Dunnes Stores (Bangor) Limited Management Pension Scheme (“the Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p style="text-align: center;">C85078998</p>
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Introduction

1. The Determinations Panel (the “Panel”) of the Pensions Regulator (“TPR”), met on 9 October 2018 to consider the issues in a Warning Notice dated 16 August 2018.
2. The Warning Notice asked the Panel to make an order under article 7(3)(a)(c) and (d) of the Pensions (Northern Ireland) Order 1995 (“the 1995 Order”) to appoint an independent trustee to the Scheme if it was satisfied that it was reasonable to do so in order:
 - i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the scheme (article 7(3)(a));
 - ii. to secure the proper use or application of the assets of the scheme (article 7(3)(c)); or
 - iii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to article 7(3)(d).
3. The Warning Notice also asked that:
 - i. the powers and duties of the new trustee be exercised to the exclusion of other trustees, under article 8(4)(b) of the 1995 Order;
 - ii. the appointed trustee’s fees and expenses be paid by the sponsoring employer, Dunnes Stores (Bangor) Ltd, under article 8(1)(a) of the 1995 Order; and
 - iii. the property of the Scheme be vested in, or transferred to, the appointed trustee, under article 9 of the 1995 Order.

The Decision

4. The Panel determined that an independent trustee with exclusive powers should be appointed and the requested related orders be made. The terms of the order are recited at the conclusion of this Determination Notice. This Notice gives the Panel’s reasons for that order.

Directly affected parties

5. The following are the parties identified by the case team of TPR (“the Case Team”), and agreed by the Panel, as being directly affected by the regulatory action sought in the Warning Notice:
 - i. Mr John Nugent
 - ii. Mr Brian Daly
 - iii. Dunnes Stores (Bangor) Limited (“the sponsoring employer”).

The Scheme

6. The Warning Notice gives the following information about the Scheme.
7. The Scheme is an associated multi-employer defined contribution pension scheme. The Scheme’s status remains ‘open’ with Dunnes Stores (Bangor) Limited as the principal employer. TPR’s information database, Exchange, records the Scheme as having been registered in January 1994. As at 1 January 2017 the Scheme had 394 members with 120 active, 259 deferred and 15 pensioner members. The last valuation of assets (1 January 2017) reported to TPR was £12,871,645.
8. An insurance based group personal pension (“GPP”) was set up with Standard Life PLC in January 2014 to meet the sponsoring employer’s auto-enrolment obligations.
9. The Scheme has two trustees, John Nugent and Brian Daly (“the Trustees”), both of whom were appointed on 6 November 2006 as employer-nominated trustees. Mr Nugent is also nominated the Chair of Trustees.
10. The Scheme and Mr Nugent both have addresses in Northern Ireland where the sponsoring employer also has its registered office. Mr Daly’s address is in Dublin, Republic of Ireland.

Background to the Request

11. In September 2015 the Trustees submitted a scheme return informing TPR that they had not complied with the Occupational Pension Schemes (Charges and Governance) Regulations (“the 2015 Regulations”). Broadly, these regulations impose a charge cap of 0.75% annually, based on a members’ default arrangement fund value in a pension scheme used for auto-enrolment.
12. Between 8 September 2015 and 3 October 2016 TPR’s Regulatory Transactions Team attempted, unsuccessfully, to engage with the Trustees to understand the extent of the breach of law, member detriment and actions being taken to resolve the issue.

13. On 24 October 2016 the matter was passed to the Case Team due to the Trustees' failure to respond to TPR's enquiries. This failure gave rise to concerns regarding the Trustees' abilities.
14. On 18 January 2017, the Trustees attended a conference call with the Case Team during which the Trustees were unable to confirm why the charge control breach had occurred or how it was going to be rectified. During this call the Trustees indicated that they were not sure what was required of them under UK legislation and queried why Prudential, the Scheme provider, would accept funds when the charge was more than 0.75%. At this meeting it was explained to the Trustees that it is the Trustees' responsibility to ensure the fund is compliant rather than an obligation on the fund provider.
15. Mr Nugent also informed TPR of a further challenge facing the Trustees, namely that they had *"hoped to complete on an agreement with Standard Life regarding the transfer of members from the Prudential With Profits Fund ("with profits fund") to a Standard Life GPP but Standard Life have said their pricing was no longer available...The Trustees were unsure what to do now that the Standard Life GPP could not be used."*
16. Minutes from a trustee meeting dated 24 January 2017 confirm that Standard Life would no longer accept new entrants for auto-enrolment and that the employer had no alternative qualifying scheme. At a meeting with TPR on 25 January 2017, the Case Team asked the reason for Standard Life withdrawing the offer. Mr Nugent indicated he could not answer that question but the Warning Notice states that TPR understood the reason as being that a transfer of the Scheme's assets (c. £12m) had not been arranged as had been agreed with Standard Life.
17. On 26 January 2017 TPR issued a Compliance Notice under regulation 26 of the 2015 Regulations requiring the Trustees to prove if the with-profits fund was, or was not, exempt from the charge cap and to provide details of the extent of any member detriment. Prudential responded to the Compliance Notice on behalf of the Trustees. It confirmed that the with-profits fund was not subject to a charge cap but also that it was not a permitted default arrangement for AE purposes.
18. TPR has been unable to establish if the Trustees have informed members of the issue that has arisen regarding the with-profits fund or if they have undertaken remedial action.
19. On 8 March 2017 and 10 April 2017, TPR asked for information about the future of the Scheme and the ongoing plans for member contribution investment. The Trustees failed to provide the information requested and on 5 June 2017 TPR issued a notice pursuant to Section 72 of the Pensions Act 2004 ("PA 04") ("Section 72 Notice") requesting the

Scheme's trust deed and rules, trustee meeting minutes and other information. The Section 72 Notice highlighted that the information was being requested in relation to the appointment of a trustee under section 7 of the Pensions Act 1995 (the equivalent provision to article 7 of the 1995 Order).

20. The information requested was received by TPR on 21 June 2017. It included a copy of a report dated 17 January 2016 produced by the financial advisors to the Scheme, Kerr Henderson Consultants and Actuaries, which advised that the transfer of assets from Prudential to Standard Life was in the members' best interests and that members should be moved to the new scheme. As set out above, this did not, in fact, happen and on 31 January 2017, Standard Life stopped accepting members and withdrew terms.
21. On 12 July 2017, a mandatory Penalty Notice was issued under Regulation 28 of the 2015 Regulations. This followed TPR concluding that, for the Scheme year ending 31 January 2016, the Trustees had not complied with the requirements in relation to the annual governance statement (known as "the Chair's Statement"). These requirements are set out in the Occupational Pension Schemes (Scheme Administration) Regulations 1996 ("the 1996 Regulations"). The penalty notice identified how the Chair's Statement had not met the requirements, including the failure to describe (i) any review of the default strategy and the performance of the default arrangement, (ii) how the core scheme financial transactions had been processed promptly and accurately, or (iii) how the requirements for trustee knowledge and understanding had been met.
22. On the same day the Case Team had a call with the Trustees during which there was a discussion regarding the appointment of a professional trustee. Mr Nugent highlighted that the different jurisdiction had been a challenge for the Trustees and indicated that the employer was considering the appointment of an independent trustee for the Scheme. The Trustees were unsure of the timescale in which this would be done but the Case Team indicated that a period of 6 weeks would be acceptable. Mr Nugent agreed to provide a weekly update to the Case Team.
23. There was a further exchange of email correspondence in which TPR commented that the Trustees' lack of knowledge and understanding was limiting their ability to govern the Scheme. In the final e-mail dated 31 August 2017, the Trustees stated that they had made a provisional selection of a professional trustee and that the decision in relation to the appointment should be made on 12 September 2017.
24. TPR requested updates on the appointment throughout September and October 2017, but no response to these requests was provided. TPR's e-

mails also requested the Chair's Statement for the Scheme year ending 31 January 2017. The Chair's Statement was provided by e-mail on 19 October 2017 but in this statement the Trustees made no reference to the appointment of an independent trustee.

25. A second Penalty Notice was issued on 20 March 2018 relating to the Chair's Statement for the scheme year ending 31 January 2017. This resulted from the fact that TPR was again of the opinion that it lacked the prescribed requirements; this time as set out in regulation 23 of the Occupational Pension Schemes (Scheme Administration) Regulations Northern Ireland 1997. The schedule to the 2017 penalty again set out that the requirements in relation to trustee knowledge and understanding had not been adequately described.
26. On 23 January 2018 TPR issued a further Section 72 Notice requiring the Trustees to confirm if an independent trustee had been appointed. The response dated 31 January 2018 confirmed no appointment had been made without any explanation as to why this was the case.

The grounds for exercising the power

27. The Warning Notice summarises the reasons for asking the Panel to appoint an independent trustee as follows:-
 - i. **Lack of trustee knowledge and understanding.** The Trustees have acknowledged their own lack of knowledge and understanding, including but not limited to, a difficulty understanding how UK pension legislation applies to the Scheme.
 - ii. **Scheme Governance.** The Trustees' governance of the Scheme has been deficient, including, but not limited to, failures in relation to understanding the Scheme's charging structure and the reviewing of the Scheme's investments. As matters remain unresolved, an independent trustee appointment is required to ensure the proper use or application of the Scheme's assets.
 - iii. **Failure to maintain a trustee board consisting of one third Member Nominated Trustees (MNT).** Despite this requirement being raised in trustee meetings dating back to April 2014 by the Trustees' advisers and minuted as an action for the Trustees, no process for the appointment of a MNT has been undertaken. The minutes from the trustee meetings evidence that the appointment was postponed pending the outcome of the Scheme closure and the minutes from the last known meeting on 24 January 2017 confirm that the issue was still outstanding.

- iv. **The Trustees have agreed the need to appoint an independent trustee.** The Trustees indicated on 12 July 2017 that the employer was considering appointing an independent trustee. However to date, and despite further enquiries by TPR regarding the appointment, no such appointment has been made.
- v. **No action has been taken to correct the Scheme's governance issues.** The Warning Notice sets out that TPR has provided sufficient time for the Trustees to address the governance failings they have acknowledged exist, but the Trustees have chosen not to act or meaningfully engage with TPR's intervention.

The Law

- 28. The Panel agreed that the relevant legal test for the appointment of a trustee is under article 7(3) of the Pensions (Northern Ireland) Order 1995 and the associated statutory provisions allowing other orders consequential on the appointment of a trustee under that article. Whilst there are mirror provisions in the Pensions Act 1995, this is stated not to apply to Northern Ireland. The Panel agreed that the Northern Ireland Order was the appropriate legislation given that the Scheme address is in Northern Ireland and the majority of members are located within Northern Ireland as is one of the trustees.
- 29. Article 7(3) of the 1995 Order allows TPR to appoint a trustee where they are satisfied that it is reasonable to do so in order:
 - “(a) to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the scheme,*
 - (b) to secure that the number of trustees is sufficient for the proper administration of the scheme,*
 - (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.*
- 30. Articles 224-246 of the 2005 Order create a statutory regime detailing the knowledge and understanding required for trustees of occupational pension schemes.
- 31. The statutory regime requires trustees to be conversant with key documents including the trust deed and rules, the statement of investment principles and any other document recording policy adopted for the scheme's administration.
- 32. Each individual trustee must also have knowledge and understanding of the law relating to pensions and trusts and the principles relating to the investment of assets. The standard of knowledge and understanding

required is set out in article 224(5) of the 2005 Order as being that appropriate for the purposes of enabling the individual properly to exercise his functions as a trustee.

Reasons for Decision: Appointment of a trustee

33. The Panel was satisfied that it was reasonable to appoint an independent trustee. It considered the purposes in article 7(3)(a) and (d) were met. Taking each in turn:

Knowledge and skill

34. The Trustees have acknowledged their own lack of knowledge and understanding, including but not limited to difficulty understanding how UK pensions legislation applies to the Scheme. The Panel agreed that the Trustees, who have been employer-nominated trustees for 11.5 years, have had ample time to familiarise themselves with the requirements of UK pensions legislation.

35. Moreover, the Trustees' actions have demonstrated that they do not have or are not exercising their knowledge and understanding for the proper administration of the Scheme. This is evidenced in particular by the following:-

- i. A failure to complete the trustee toolkit. Whilst this is not a mandatory requirement, the toolkit was drawn to the Trustees' attention and it is notable that they have not completed it in spite of their stated lack of understanding;
- ii. The Chair's Statements for the years ending 31 January 2016 and 31 January 2017 having both been subject to mandatory penalty notices as a result of them lacking the prescribed requirements. It is notable that the penalties were issued in respect of consecutive years and in part in relation to the same requirements;
- iii. The Trustees' failure to comply with the 2015 Regulations in relation to the charge cap in a default arrangement. The Trustees failed to appreciate that the requirement to ensure the cap was met was their responsibility and not that of the insurance provider. Moreover, the Trustees' failure to address the issue or engage properly with TPR led to TPR issuing a Compliance Notice requiring the Trustees to evidence whether the fund was exempt from the charge cap;
- iv. The limited number of trustee meetings, including in the period May 2010 to 10 May 2016 when trustee meetings were held on only 22 April 2010, 3 April 2014 and 10 May 2016. Given the issues affecting the Scheme, including the breach of the charge control cap reported to TPR in September 2015, the number of meetings appears inadequate for the effective running of the Scheme;

- v. The lack of a member-nominated trustee despite the Trustees being aware of this requirement since at least April 2014. The trustee meeting minutes show that the Trustees were aware of this issue but postponed dealing with it.

Interests of members

36. The Panel was satisfied that the failings identified above demonstrate that it is also reasonable to appoint an independent trustee in order to protect members' interests. In particular the Panel took account of the following:-
- i. the Trustees' failure to comply with professional advice they obtained that it was in members' best interests to transfer the Scheme's assets from Prudential to Standard Life;
 - ii. the apparent failure to properly address the issues arising from the breach of the charge cap regulations. Consequently it is not clear whether members have suffered detriment as a result of the charges applied and it is in members' interests to have this investigated by an independent trustee;
 - iii. the Trustees' (and apparently the sponsoring employer's) acknowledgement that the appointment of an independent trustee is in the best interests of the Scheme. Whilst it was hoped that this would happen by September 2017, no such trustee has been appointed and no explanation provided as to why. The fact that the Trustees told TPR they intended to appoint an independent trustee and then did not do so caused TPR to defer action in the expectation that the appointment would be made and so has prolonged the problem and increased the period of any detriment to members.

Conclusion

37. The Panel was satisfied that the various failures identified have not been adequately addressed over a significant period of time and in spite of assurances from the Trustees that they would be. Moreover, those assurances that action would be taken have inevitably delayed the issues being properly addressed. The Trustees' apparent unwillingness or inability to address the issues identified, and the lack of proper engagement with TPR, demonstrates systemic failures justifying the appointment of an independent trustee.
38. In light of these failures the Panel was satisfied that the appointment was reasonable under article 7(3)(a) and (d).
39. Given the Panel's findings in relation to article 7(3)(a) and (d) it was not necessary to also make a finding as to whether it was reasonable to appoint an independent trustee "to secure the proper use or application of the assets of the Scheme" (article 7(3)(c)). Whilst the Panel recognised

the Case Team's concerns regarding the detriment to members and the uncertainty regarding the assets being transferred to a new arrangement, the Panel was not persuaded on the evidence before it that it was reasonable to appoint an independent trustee on that ground.

40. The Warning Notice stated that Dalriada Trustees Ltd is proposed as the independent trustee following a selection process. The Directly Affected Parties raised no objections to the proposed independent trustee and the Panel had no objections. The Panel therefore accepted that Dalriada Trustees Ltd be appointed as the independent trustee.

Consequential Directions and Provisions

41. The Panel considered it appropriate that an order be made that the fees of the independent trustee be met by the employer, Dunnes Stores (Bangor) Limited.
42. Finally it considered whether to order that the powers and duties exercisable by Dalriada Trustees Ltd should be exercised to the exclusion of all other trustees, under Article 8(1)(a) of the 1995 Order, and whether to order the property of the Scheme to vest in Dalriada Trustees Ltd as trustee of the Scheme under Article 9 of the 1995 Order.
43. It decided it was appropriate in all the circumstances to make those orders. Given the inability of the Trustees to address the issues raised by TPR over a significant period of time, it is appropriate that the independent trustee appointed should be able to act alone and without the agreement of the existing trustees.

Conclusion

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

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1. *Dalriada Trustees Ltd ('the New Trustee'), of Linen Loft, 27-37 Adelaide Street, Belfast, BT2 8FE is hereby appointed as trustee of The Dunnes Stores (Bangor) Limited Management Pension Scheme ('the Scheme') on and from the date of this order, 9 October 2018.*
2. *The order at (1) is made because the Pensions Regulator is satisfied that it is reasonable to do so, pursuant to the relevant provisions of the Pensions (Northern Ireland) Order 1995 as set out below, in order:*
 - i to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme pursuant to article 7(3)(a); and*

- ii otherwise to protect the interests of the generality of the members of the Scheme pursuant to article 7(3)(d).*
3. *The powers and duties exercisable by the New Trustee shall until further order be to the exclusion of all other trustees of the Scheme pursuant to article 8(4)(b) of the Pensions (Northern Ireland) Order 1995.*
 4. *The New Trustee's fees and expenses in respect of the Scheme shall be paid by the Sponsoring Employer, Dunnes Stores (Bangor) Limited, pursuant to Article 8(1)(a) of the Pensions (Northern Ireland) Order 1995.*
 5. *Pursuant to Article 9 of the Pensions (Northern Ireland) Order 1995, it is hereby ordered that all property and assets of the Scheme, heritable, moveable, real and personal, of every description and wherever situated and all rights pertaining to that property be vested in, assigned to and transferred to the New Trustee as trustee of the Scheme.*
 6. *This appointment of the New Trustee may be terminated, or the New Trustee replaced, at the expiration of 28 days' notice from the Pensions Regulator to the New Trustee, pursuant to article 7(5)(c) of the Pensions (Northern Ireland) Order 1995 and such power to terminate or replace the appointment shall be exercised by the Pensions Regulator in accordance with its delegation policy.*
45. In making its decision the Panel had regard to the objectives of TPR as set out in article 4 of the Pensions (Northern Ireland) Order 2005 and to the matters it must have regard to as set out in article 95 of that Order.

Signed: 

Chair: **Alasdair Smith**

Date: **24 October 2018**