

 <p>The Pensions Regulator</p>	<p><b>Standard Procedure</b></p> <p><b>DETERMINATION NOTICE</b>  <b>under section 96(2)(d) of the</b>  <b>Pensions Act 2004 (“PA 04”)</b>  <b>Merchant Navy Ratings Pension</b>  <b>Fund</b>  <b>(“the Scheme”)</b></p>	<p>The Pensions Regulator case ref:</p> <p>C124625505</p>
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## A. Introduction

1. By a Warning Notice dated 1 May 2019, the Case Team of the Pensions Regulator (the “**Case Team**”, more broadly “**TPR**”) asked the Determinations Panel of TPR (the “**Panel**”) to determine whether an order should be made under section 7(3)(a) and/or (d) of the Pensions Act 1995 (“**PA 95**”) to appoint a new trustee (the “**New Trustee**”) to the Scheme, on the grounds that the Panel should be satisfied that it was reasonable to do so in order:
  - 1.1. 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 section 7(3)(a); and/or
  - 1.2. otherwise to protect the interests of the generality of the members of the Scheme pursuant to section 7(3)(d)

(together, the “**Grounds**”).
2. The Warning Notice sought consequential orders that:
  - 2.1. The New Trustee should be Pi Consulting (Trustee Services) Limited (“**Pi**”);
  - 2.2. The powers and duties of the trustee of the Scheme should be exclusively exercisable by that New Trustee, that associated orders be made relating to the fees and expenses of the New Trustee, and that vesting orders be made in respect of the Scheme’s assets.
3. The Scheme is a relatively unusual one. It is a multi-employer defined benefit occupational pension scheme, with over 25,000 members and assets of over £1 billion. The Scheme was created in the 1970s to provide pensions for those in the Merchant Navy below the rank of officer (i.e. “ratings”). It is a “*relevant centralised scheme*” such that the ordinary regulations requiring member-nominated trustees or directors do not apply to it.<sup>1</sup> Instead, there is a sole corporate trustee (Merchant Navy Ratings Pension Fund Trustees Limited (the “**Trustee**”)), with provision in the articles of the Trustee for the appointment of a specific number of shareholders, who are also the Trustee’s directors and make up the board of directors of the

<sup>1</sup> Those regulations being the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006/714, with the exemption in regulation 2(e).

Trustee Company (“**the Trustee Board**”). While there is provision for certain independent directors in the articles, directors are also to be nominated (broadly) from the employer group (Employer Directors or “**EDs**”), through MNP EG Limited (the “**Employers**”) and from the membership (Beneficiary Directors or “**BDs**”), through nomination by the National Union of Rail Maritime and Transport Workers (the “**RMT**”). One of the BDs is to be elected from the pensioner membership (the “**Pensioner Director**”). While not material, it should be noted that not all the members are members of the RMT, nor all the employers members of the Employers.

4. For the reasons set out more fully in this Determination Notice, given the significant changes in the factual position between the time when the Warning Notice was issued, the time when the Warning Notice was referred to the Panel and the time of the hearing before the Panel on 27 February 2020, the Panel determined that a New Trustee should not be appointed to the Scheme. Much of this change happened only recently. In particular, the complete change in personnel of the Trustee Board since the preparation of the Warning Notice significantly altered the position and meant that many of the concerns relating to operation of the previous Trustee Board had less significance.
5. In making a decision whether or not to exercise its regulatory functions, the Panel is to have regard to the interests of directly affected parties and of the generality of members of the relevant schemes by section 100 PA 04. The Panel had regard to those matters as well as the main objectives of the Regulator in exercising its functions, as set out in section 5 PA 04. These include protecting the benefits under occupational pension schemes of, or in respect of, members of those schemes and promoting, and improving the understanding of, the good administration of work-based pension schemes.

## **B. Directly Affected Parties and Other Interested Persons**

6. The following are the parties identified by the Case Team that the Panel agreed are directly affected parties:
  - 6.1. The Trustee, as the existing trustee of the Scheme;
  - 6.2. RMT, as a body with the power under the Trustee’s articles to nominate directors of the Trustee under its articles of association;
  - 6.3. The Employers, as the other body with the nominating power under the articles; and
  - 6.4. Pi, as the proposed New Trustee.
7. At the time of the Warning Notice, directors of the Trustee maintained that they were, individually, “directly affected persons” for the purposes of section 96(2) of PA 04. This was disputed by the Case Team. In those circumstances (particularly having regard to its obligations under section 96(2)(d) to consider who is a “directly affected person” at the time of this Determination Notice), the Panel decided to allow any individual directors who wished to do so to make representations and to participate at an oral hearing.

8. In the event, at the oral hearing on 27 February 2020, the following (by now former) individual directors attended and/or made representations including by Counsel:
  - 8.1. Mr Todd, Mr Young, Mr Hall and Mr Douglas (the “**Represented Directors**”), each of whom had been BDs;
  - 8.2. Mr Creed, who was the Pensioner Director;
  - 8.3. Mr Nobbs, an ED. (Mr McGurk, another ED, attended, but did not address the Panel).
9. At the oral hearing, the Panel heard oral submissions as follows:
  - 9.1. For the Case Team, from Mr Fenner Moeran QC leading Mr Tiran Nersessian;
  - 9.2. For the Trustee, from Mr Saaman Pourghadiri instructed by Mayer Brown International LLP (“**Mayer Brown**”);
  - 9.3. For the RMT, from Mr Stephen Docherty instructed by Walkers Solicitors;
  - 9.4. For the Represented Directors, from Mr Tom Robinson instructed by Gowlings WLG (UK) LLP;
  - 9.5. From Mr Creed in person; and
  - 9.6. A very short statement from Mr Nobbs in person.
10. There was, understandably, significant concern on the part of individual directors (both BDs and EDs) that findings would be made against them in respect of which they had no right to reply, and which had not been put to them. The Case Team did not base its application on the making of any findings of fact against individual directors, and the Panel expressly stated at the oral hearing that this regulatory action did not involve the examination of performance or behaviour of former directors, but the general exercise of the governance of the Trustee Board during the relevant period.
11. While by the time of the hearing (as set out in their position statement), the Represented Directors did not pursue their legal argument that they were Directly Affected Parties, it is necessary for the Panel to make a determination under section 96(2)(d) whether or not the individual directors are directly affected parties. The Panel determined that they are not, because the individuals making representations, this includes representations made via Counsel, at the oral hearing were by that time no longer directors, and so would not on any view be directly affected, or affected at all, by any exercise of a regulatory function.

### **C. Facts and Procedure**

12. The underlying facts developed significantly between the issue of the Warning Notice (and its reference to the Panel) and the time of the oral hearing. As such, the underlying facts and procedural history leading to this Determination Notice are intertwined and dealt with together. They can be divided into four phases:
  - 12.1. The background to the Scheme;

- 12.2. The matters giving rise to the Warning Notice;
- 12.3. Events between the issue of the Warning Notice and referral to the Panel on 18 December 2019; and
- 12.4. Events between the reference to the Panel and the oral hearing on 27 February 2020.

## **(1) Background to the Scheme**

13. The Scheme is a defined benefit occupational pension scheme which is closed to new members. It has over 25,000 members, over £1 billion of assets and a deficit of £221 million (on the scheme specific funding basis), all as at 31 March 2017.
14. The Trustee is the sole corporate Trustee of the Trustee Board. While historically the board had 14 directors with 7 EDs and 7 BDs, by the time of the matters relied upon by the Case Team, the relevant articles provided for a maximum of 12 directors, of which 2 were to be independent, and the remainder split with 5 BDs and 5 EDs. One of the BDs was to be a Pensioner Trustee.
15. It was a significant factor of the Scheme that a substantial number of matters of Scheme administration required a dual majority, with the following features (the “**Dual Majority**”):
  - 15.1. The independent directors were excluded from voting;
  - 15.2. An overall majority of the remaining directors was required; but
  - 15.3. Further separate majorities of each of (i) the BDs present, and (ii) the EDs present were required for the motion to pass.
16. The Dual Majority applied not only to constitutional matters (such as amending the Scheme’s deed and rules or a decision to wind the Scheme up), but also to, for example, the appointment or removal of the Chair or any key advisers (such as the actuary or legal adviser), any strategic decision relating to a buy out, and any decision relating to directors’ remuneration.
17. The relevant Scheme personnel involved included:
  - 17.1. Lane Clark & Peacock LLP (“**LCP**”), who acted as the Trustee executive, with [REDACTED] [REDACTED] [REDACTED] the LCP team;
  - 17.2. Mr John Preston who (as set out below) was the Independent Chair of the Trustee between 1 January 2017 and 4 December 2018;
  - 17.3. Mayer Brown, who were the Scheme’s legal advisers.

## **(2) Matters Giving Rise to the Warning Notice**

### *The Panel’s approach to the facts in this Determination Notice*

18. The Warning Notice relied substantially on the contents of two reports, the “**Muse Report**” dated 19 May 2016 prepared by Muse Advisory Limited (“**Muse**”) and a later “**Drake Report**” dated 14 August 2018, authored by Baroness Drake with the

assistance of Mazars LLP (together with the Muse Report, the “**Reports**”). The Case Team provided witness statements from [REDACTED] of Muse and from Baroness Drake confirming they believed the contents of the respective Reports were true. In addition, the Warning Notice relied on witness statements from [REDACTED] and Mr Preston (the “**Statements**”).

19. The Represented Directors disputed the underlying allegations, particularly those set out in the witness statements of [REDACTED] and Preston.

20. In circumstances where (a) the factual situation has changed significantly since the Reports and the Statements such that the detail of those matters is less relevant to the Panel’s decision than it appeared at the time of the Warning Notice, (b) it was common ground that there was to be no determination about individual directors, (c) there was no cross-examination of individual directors to determine the true position, and (d) the Panel’s function is to act as a regulator having regard to risk to the various statutory objectives (rather than act principally as a fact-finding tribunal), the Panel has taken the following approach to the determination of the relevant facts to the extent they are disputed:

20.1. The Panel’s findings are limited to the Trustee Board of the Trustee as a collective.

20.2. As such, no facts have been found as to the conduct of any individual director or sub-group of directors, nor any finding of fault.

20.3. Specifically, the Panel does not make findings of fact about particular incidents or the acts of particular individuals. It reached its conclusions on the basis of a broad assessment of the functioning of the Trustee Board.

20.4. The Panel has preferred contemporaneous evidence, particularly documentary evidence, and independent evidence, rather than those of an interested party, in line with the modern approach to the findings of fact in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) at [15]-[22]. It is evident from the statements and representations provided that there was substantial stress and emotion involved on all sides of the operation of the previous iteration of this Trustee Board, which the issuing of the Warning Notice and threat of proceedings will have enhanced. This will affect the quality of the non-contemporaneous evidence and representations provided (see *Gestmin* at [19]-[20]), which has not been tested by cross examination.

20.5. The facts as set out in the remainder of this section, where they are disputed, have been determined in accordance with the principles set out in the previous paragraph and should be understood accordingly.

21. The Panel has taken this approach in the particular changing circumstances of this Scheme. The Panel’s decision to limit its focus to the structural, behavioural, and governance issues in the Scheme should not be taken as the Panel dismissing or diminishing the seriousness of the issues raised. On the contrary, it is in part the seriousness for the individuals involved of the allegations made in the Warning Notice that has led to the Panel’s approach to make the assessment at a board level.

## *The Muse Report and its Conclusions on Governance*

22. The Muse Report was a “Governance Review Report”. The agreed aim of the governance review, as set out in the Muse Report, was “*to be able to say, at the end of the project that:*

- *decision-making is prompt and effective;*
- *the Trustee board is better organised, things are working well and trust is a key value;*
- *there is clarity regarding the roles of the Trustee Board and LCP...*
- *the Board and Committee arrangements are fit for purpose...; and*
- *there is clarity regarding the reporting to and communication with key stakeholders.”*

23. The Panel notes the following from the wider background leading to the commission of the Muse Report:

23.1. Its scope was prospective, designed to put in place processes to improve decision making, rather than to report, assess or decide on behaviours of any individuals that may or may not have caused the particular issues.

23.2. The then board structure comprising of union-nominated and employer-nominated “sides” of directors was contrary to modern conceptions of appropriate pension trusteeship, particularly as set out in the Regulator’s *21<sup>st</sup> Century Trusteeship* campaign of 2016 (which campaign continues).

23.3. The Muse Report was commissioned after High Court litigation involving the Trustee’s entitlement to recover employer contributions (*MNRPF v Stena Line* [2015] EWHC 448 (Ch), [2015] Pens LR 239). Following a contested (multi-week, multi-party) hearing, the Court approved the Trustee’s application to amend its articles to introduce a new contribution regime which included “historic” rather than simply “current” employers.

24. The Muse Report assessed the situation in its Executive Summary in the following terms:

*“It is vital not to squander what you have achieved because of poor governance. However, **the Board has found it very difficult to work well together** since the conclusion of the Court case [i.e. *MNRPF v Stena Line*]. There has been an **unfortunate loss of trust**, which is holding the Board back.*

*Many have commented that this most recent period has been **dysfunctional for the Board and tough for individuals to deal with**. More than one Board member has expressed the wish to “now put the past behind us and move on as a Board”.*

*We agree. It is time to draw a line under the past and move on.*

*If the Board was being designed from scratch now, it would be a largely independent Board – by which we mean a Board whose members bring no*

*inherent conflict of interest – with the required skills and availability for Board and Committee work.*

*If **TPR** were to get involved in reviewing the Fund's governance, given some of the challenges we believe it **might seek to appoint an independent trustee firm** to run the Fund*

...

*Looking ahead, it is incumbent on the Board to make the best decisions for members that it can. If nothing changes, we are **concerned that decision-making, Fund costs and the rate of progress will not be optimal. This would impair Fund members' interests, for example by delaying decisions, failing to mitigate risks, increasing costs, or missing opportunities to add value for example, in recent months in relation to longevity hedging and an administration review***

(emphases added.)

25. The Muse Report made 10 recommendations (the “**Muse Recommendations**”) for governance improvements to be adopted as soon as possible (with transitional arrangements):

*“(1) A skilled and experienced independent Chairman to lead the Board;*

*(2) Sufficient independent Trustee resource with the right skills for EPIC<sup>[2]</sup> related work;*

*(3) Move to a smaller Board of 11 comprising 3 independent, 4 employer-nominated and 4 beneficiary directors, with an agreed plan to move to a board of 9 (comprising 3/3/3), with the requisite skills and availability for Board and Committee work;*

*(4) Agree and implement a Trustee remuneration policy that is fit for purpose, informed by common trustee board practices;*

*(5) Take advice on the intended operation and possible removal of the dual majority, meanwhile, do not use the dual majority to block or frustrate governance reforms that are needed;*

*(6) Provide practical training for all Directors on roles, conflicts, management of conflicts of interest;*

*(7) Agree a Code of Conduct and adopt it for all work, at and between meetings;*

*(8) Clarify arrangements with the nominating bodies and agree how the Board engages with them;*

*(9) Form a Committee to oversee governance changes and manage governance-related work and a Committee to oversee member administration and related services, and member communications;*

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<sup>2</sup> The “Employer Participation Issues Committee”

*(10) Decide and put in place the required delegations to LCP.”*

26. Examples of matters to be included in the Code of Conduct at recommendation 7 were *“remain polite and professional...; avoid any behaviour that could be construed as bullying or rude to others;...respect confidentiality”*.

#### *Between the Muse and Drake Reports*

27. At a Trustee Board meeting of 25 May 2016:

27.1. The directors agreed unanimously to be bound by a set of values and behaviours;

27.2. Certain of the Muse Recommendations were agreed in principle, including (a) the appointment of an independent chair; (b) the adoption of a recommended remuneration package; and (c) Muse to review the process for appointment of Trustee directors.

28. At a Trustee Board meeting of 25 July 2016, it was agreed unanimously (amongst other matters) that:

28.1. An independent chair should be appointed;

28.2. As to Dual Majority, it would be limited to rule/article amendments, the appointment and removal of independent trustees and key advisers, and buy-out decisions; and the independent directors would have a vote within a “consensual decision making framework”; and

28.3. A Trustee Board size of 12 (2 independent, 5 EDs and 5 BDs) would be maintained, with a commitment to review for a possible further reduction in a year’s time, notwithstanding Muse’s recommendation to move to a Trustee Board of 9 (with a 3/3/3 structure).

29. Muse’s involvement ceased in October 2016, and LCP took over responsibility for the progression of the Muse Recommendations.

30. On 3 November 2016, the Articles of Association were amended. The matters agreed on 25 July as “Directors’ Reserved Matters” were so treated, as was director remuneration.

31. Following a recruitment process, Mr Preston was appointed as the independent chair effective from 1 January 2017. According to his letter of appointment, his term of office was for *“four years, though will be subject to a review after the first 12 months.”*

32. In the course of 2017 there was a significant breakdown in some of the relationships between, it appears from the contemporaneous documentation, Mr Preston on the one hand and the BDs on the other. This led to the commissioning of the Drake Report.

#### *The Drake Report*

33. By a paper of 29 November 2017, Mr Preston proposed to the Trustee Board a *“fully independent and comprehensive review by an external party, the conclusions*

*of which are to be accepted by third parties*” in order to resolve the position. By that same paper, Mr Preston stated that there was “*extreme concern*” among the Employers’ Group, that LCP was unwilling to continue acting in the current circumstances, certain EDs were not prepared to continue, and that he himself was unwilling to continue in the long term absent a change. By this time, Mr Preston had already contacted TPR over his concerns.

34. At a Trustee Board meeting of 6 December 2017, Mr Preston put to the board his proposal for a further review. The proposal recorded offers from Mr Preston to resign if “significant criticism” was made against him by the independent review, and an expectation that if any other director was significantly criticised they would resign.

35. A majority of the Trustee Board voted in favour of the proposal, but all the BDs either abstained or voted against the proposal.

36. Baroness Drake was duly appointed, with terms of reference dated 1 March 2018, and produced her report on 14 August 2018. It is clear from those terms of reference that her instructions were to review the “*effectiveness of the board together with the behaviour and conduct of the Trustee Directors*” from 1 January 2017 against legitimate expectations, law and regulatory requirements (including *21<sup>st</sup> Century Trusteeship*), and the Code of Conduct and other standards of behaviour set following the Muse Report. Unlike the Muse Report, which was about setting frameworks and standards of governance, this was a report into whether those standards were being complied with.

37. Within the “General Conclusions” of the Drake Report at paragraph 16.2 were:

*“The [Trustee] has many positive features which include making progress on some of the Muse recommendations: a strong team of Advisers, well managed by an experienced Fund Executive, LCP; an independent Chair working hard to raise governance standards and a focused approach to integrated risk management with close working between EPIC and Investment and Valuation & Funding Strategy Committee”*

*“Although all Trustees are committed to the interests of the scheme members, this is not a Board at ease with itself. Its **relationships are influenced by a lack of trust, tension, disputed decisions and past grievances.**”*

*“Issues such as **lack of trust** are impacting on the quality of the Fund’s governance. Memories of the past combined with more recent manifestations of underlying tensions, which can consume time and resources, are holding back the Board from achieving the very high standards of governance that are desirable.”*

*“The Board has to move on and create the new culture recommended in the Muse Review. It must demonstrate clearly and confidently that the observations in the Muse Review that “[i]f TPR were to get involved in reviewing the Fund’s governance, given some of the challenges we believe it might seek to appoint an independent trustee to run the Fund” is no longer valid.”*

***“It is my view that the failures to meet the required standard, as detailed in my report, are serious.** Therefore I recommend that the Trustee Directors must*

*take action to address these failures because if they continue they could eventually undermine the progress made in addressing the bigger issues facing the Fund and give rise to the potential risks identified in Section 16.4 below*.  
[emphases added]

38. Paragraph 16.3 then set out certain “shortcomings” in behaviour, which was described as “*not what I would expect from a Board member*”. Those behaviours included the following specific examples, each referable to an applicable legal, regulatory, or behavioural standard:

*“(c) In making a decision, the Trustees must exercise reasonable skill and care, exercising sound and prudent judgment, having considered advice received. A generalised feeling of mistrust and suspicion would not, in my view, provide a sufficiently robust line of reasoning for a member of the Board in discharging their role as a Trustee, as required by TPR and the Trustee Role Profile”.*

*“(d) It is apparent that the lack of trust evident between members of the Board can impinge on the efficient working of the Fund and negatively impact on LCP’s relationship with the Board.”*

*“(e) The tensions amongst the Trustees is captured in the recording of the votes of individuals as evidenced in the Trustee Meetings Minutes. In my view, this indicates that some Trustee Directors do not fully understand their role as a Trustee to act as a team, seeking to proceed by consensus.*

*Similarly, a Board which needs to audio record its meetings as a matter of practice as it cannot reach a consensus that its own decision making is correctly minuted is becoming dysfunctional and such a proposal demonstrates a lack of understanding of the role of the Trustee to “[w]ork as one team”.*

*“(f) It is important for all Trustees to accept that notwithstanding any personal sense of grievance, Trustees cannot act in a manner that would contradict their role as Trustees. For example, the Trustees should put their professional responsibility to the Fund before their personal concerns and accept that they cannot act in a manner that is outside their fiduciary capacity”.*

*(h) To continue to hold side meetings militates against the Board working as one team and coming to consensus decisions. Trustees not at the side meetings would not know the views expressed by their fellow Trustees who were there. However, all Trustees share collective responsibility for making decisions on behalf the fund [sic]. Such conduct is inconsistent with the Trustee Role Profile, bearing in mind that the Trustees are “jointly and severally liable for your actions”.*

*(i) Breaches of confidentiality undermine the effectiveness of the Board. The Trustee Directors that caused that breach clearly did not understand their duty of confidentiality to the Fund”.*

*“(j) A lack of understanding by some Trustees of how the transition to a non-executive strategic Board would work in practice, including the system of greater delegation and the Board oversight role needs to be addressed if they are to fully understand their role as Trustees.”*

*(k) If all Trustees cannot operate on the basis of trust and respect for each other, modifying their behaviours, then the Board will not be able to improve their governance to the high standards desired, could expose the Fund to governance risks, and restrict further improvements in the effectiveness of the Board.”*

39. Various recommendations to build on the Muse Recommendations were made (the “**Drake Recommendations**”, together with the Muse Recommendations the “**Recommendations**”). The Drake Recommendations further indicate an independent objective observer’s concerns with the functioning of the board at this time:

39.1. A ten-year limit on the period served by all Trustee Directors;

39.2. A reduction in the number of EDs and BDs by one, as recommended by the Muse Report;

39.3. An annual review for each Trustee Director with the Chair;

39.4. The implementation of seating arrangements that integrate EDs and BDs;

39.5. A clear documented process for individual Trustee Directors to follow when requesting substantial information or legal advice;

39.6. Decisions to be made on a consensual basis by the Trustee Board with recorded votes being a matter of exceptional circumstances;

39.7. Trustee Directors to receive training on the working implications of the “Key Responsibilities Framework” and what over-sighting should look like on a well-functioning non-executive strategic board;

39.8. Trustee Directors, “*without exception*”, must adhere to the principles of the Trustee Code of Conduct;

39.9. All Trustee Directors must meet the Regulator’s requirements on trustee knowledge and understanding; and

39.10. Minutes of the Trustee Board should be more focused on clearly recording the decisions made and the reasons for decisions.

#### *Events subsequent to the Drake Report*

40. The position did not improve following the Trustee Board’s receipt of the Drake Report. No director resigned, notwithstanding Mr Preston asking those whom he understood the Drake Report to have seriously criticised to do so.

41. The position did not improve. Certain allegations were made by two BDs against Mr Preston, ██████████ LCP, and Mayer Brown. Wider criticisms were made in relation to the findings in the Drake Report.

42. The Panel here records that the BDs do not accept the findings of the Drake Report (as recorded in the Warning Notice itself).

43. The position continued to deteriorate in late 2018, with criticism of Mr Preston and Mayer Brown continuing to be made from certain BDs. As set out above, the Drake

Report did not criticise Mr Preston or Mayer Brown. Various reports were made to TPR about the position, by [REDACTED] and others. As a result, TPR formally began the investigation process leading to the Warning Notice and attended a Trustee Board meeting on 21 November 2018 where the process was set out to the board.

44. Following the Drake Report, Mr Preston also sought to engage with the RMT [REDACTED] and provided a copy of the Drake Report on confidential terms. Following a series of communications, between Mr Preston and [REDACTED] (and others at the RMT), [REDACTED] wrote to the Employers on 20 November 2018. As well as expressing concern over the approach to the Drake Review and TPR's involvement, he told the Employers that the proposal that criticised trustee directors should resign and that the RMT should no longer nominate four directors "*could seriously damage the relationship between my members...and Shipping Employers.*" The Employers responded the same day, emphasising that any regulatory action or other trustee action was outside the control of the Employers.

45. On 4 December 2018:

45.1. Mr Preston tendered his resignation as the independent chair of the Trustee; and

45.2. LCP, by a letter from [REDACTED] reserved the right to resign immediately under the terms of its contract with the Scheme given the governance issues. LCP were comforted by TPR's involvement.

46. Some progress was made in early 2019, with meetings between the Case Team and nominating bodies, a proposed revised code of conduct, and consideration of governance arrangements.

47. However, the position was not resolved, and the Case Team issued its Warning Notice on 1 May 2019.

48. It is appropriate to record that "business as usual" for the Scheme (such as payment of benefits, collection of contributions, investments) was not affected by the matters set out in the Warning Notice or in this section. However, it does not follow that the Scheme or its members were unaffected by the above matters; on the contrary, the strategic decision-making of the Scheme was impeded, and Scheme funds were being spent which would otherwise have been available for members' benefits or other Scheme matters. The Trustee provided a breakdown of costs incurred in relation to governance matters as at March 2019, which indicated that nearly £1 million had been spent by that date (relating to the Drake Report and responses to it, ongoing Trustee issues, and the Case Team's investigation). Substantial further costs will have been incurred in the further year to March 2020.

### **(3) From Warning Notice to Referral to the Panel: May to December 2019**

49. Following the issue of the Warning Notice, the Case Team received the following representations in July 2019 (which can be summarised as they have been substantially superseded by events):

- 49.1. From Mr Creed, who asked the Case Team to withdraw its investigation and let the Trustee Board get back to looking after members' best interests;
  - 49.2. From the Employers, stating their understanding that all the EDs fully accept the Muse and Drake Recommendations (with one ED, writing to similar effect, as he was concerned that all directors were being treated the same);
  - 49.3. From Pi confirming its willingness to act;
  - 49.4. Two sets of representations from the Represented Directors, arguing that a New Trustee should not be appointed;
  - 49.5. From the RMT, seeking withdrawal of the Warning Notice, failing that asking the Panel to determine that a New Trustee should not be appointed. The RMT also sought an oral hearing.
50. Unsurprisingly, given the parties' positions, discussions were continuing to resolve the matter. By its letter of 31 July 2019 to the RMT's solicitors, the Case Team set out seven conditions (described as its "**Red Lines**") for the cessation of the regulatory action. The Red Lines were:
- 1) "[a] *The resignation or removal of all incumbent Trustee Directors of the Trustee* [b] *who would not be allowed to act again as Trustee Directors of the Trustee*" [letters added];
  - 2) Maximum terms of office for a Trustee Director of two five-year terms;
  - 3) A nine-member board split 3/3/3 (independent/ED/BD), with one of the three BDs being the Pensioner Director;
  - 4) Removal of dual majority, with its replacement of a 75% majority for amendments, appointment/removal of independent directors, and winding up the Scheme;
  - 5) Nominating bodies with the power to remove their respective directors. (By this time, the nominating bodies had agreed to establish a "Maritime Pension Committee", which was (amongst other matters) to oversee the conduct of the directors).
  - 6) The Board to select the chair from amongst the independent directors. It was proposed to appoint Pi as the chair.
  - 7) Certain requirements of trustee knowledge and skill, and compliance with the code of conduct and a performance review."
51. Following a Trustee meeting on 20 September 2019, the RMT's solicitors responded to the Case Team, setting out its position on the Red Lines (by a letter of 26 September 2019). In summary:
- 51.1. As to Red Line (1), the RMT was not prepared to remove the BDs.

51.2. The remainder of the Red Lines were agreed. In relation to the Red Line (4) (Dual Majority/75%), there was a minor outstanding issue as to against what the 75% was to be measured.

52. On 30 September 2019, LCP by letter gave the Trustee six months' notice of its resignation, such that LCP's resignation would take effect at the end of March 2020. LCP stated that "*if as a result of the [Case Team's] investigation a different Trustee Board is in place before 31 March 2020, then we would be very happy to discuss the position with a view to continuing to provide these services if the new Trustee board wished us to.*" The very significant impact on the Scheme (and so its members) of losing the services of LCP, which had been praised in the Drake Report, gave the regulatory action a significant degree of urgency, particularly since the ongoing regulatory proceedings created difficulty in finding a willing replacement for LCP.

53. On 15 November 2019, the Case Team served its Response to Representations, to which Pi and the RMT served a reply. The Case Team told the Represented Directors that, as they were not considered directly affected parties, they could not serve a reply (nor were they served with the Response) but could submit representations. All involved maintained their position as set out in their principal representations.

54. The Case Team referred the Warning Notice to the Panel on 18 December 2019.

#### **(4) December 2019 to the Oral Hearing on 27 February 2020**

##### *Setting the Oral Hearing*

55. The Panel agreed to the RMT's request for an oral hearing. Having considered all the representations made to it, the size of the Scheme and the issues raised, the RMT's request was granted and an oral hearing fixed. The Panel found the oral hearing of significant benefit to clarify the different positions and reasoning of the parties, particularly given the way the position developed over time.

56. When circulating draft directions to the parties on 17 January 2020, the Panel stated its understanding that the Grounds did not require the Panel to make any assessment or finding in respect of any individual trustee director's knowledge, understanding, competence or integrity. As such, it proposed not to allow oral evidence at the hearing. The Case Team subsequently confirmed that the Panel's understanding of the position was correct, nor did any attendee seek to adduce oral evidence on that basis.

##### *Composition of the Trustee Board*

57. In late January 2020, the position of the Trustee Board changed significantly. All of those directors involved in the matters giving rise to the Warning Notice either resigned or were removed in accordance with the relevant articles of association. Specifically:

57.1. By a resolution on 24 January 2020, the RMT removed the Represented Directors (save for Mr Todd, who resigned);

- 57.2. On 28 January 2020, the Employers confirmed that they had removed the relevant EDs (save one ED, Mr Kitchen, having been appointed in October 2019 and so not involved at the material time);
- 57.3. Mr Creed was removed by the RMT by resolution on 29 January 2020.
58. Further, on 4 February 2020, Pi were appointed as Chair of the Trustee (with the consent of the Case Team, given they were also proposed as the New Trustee).
59. Following these changes, the Trustee Board comprised Mr Kitchen and Mr Mcleod (as EDs), Mr Gordon and Mr Norris (as BDs, with Mr Norris' appointment intended to be long term) and Pi as independent chair.
60. The practical effect of this change was that Red Line (1)[a] was satisfied. Given the broad agreement on the remainder, only Red Line (1)[b], that the directors in post at the relevant time would never be appointed to the Trustee Board again, was outstanding. The Employers were prepared to give the assurance that the former EDs would not be re-nominated, but the RMT, the Represented Directors, and Mr Creed refused. The RMT's solicitors confirmed that the BDs had a right to appeal their removal to the RMT's National Executive Committee (NEC). Mr Creed expressly asked the Panel to reinstate him to the Trustee Board. The RMT noted that the Case Team had the power (under section 3 of the PA95) to apply to prohibit individuals from acting as a trustee (or trustee director) but had not done so. As such, the outstanding issue was Red Line (1)[b] in respect of the now former BDs only.
61. In view of the changing circumstances, on 3 February (before Pi's appointment), the Panel sought to understand how the change in the situation affected the determination it had to make and directed the parties to state the impact of these changes. The Case Team maintained that the current removal was interim, potentially only temporary, and in the absence of a guarantee that none of the previous directors would be reinstated, an order was appropriate, particularly set against the long-standing governance issues with the Scheme; the RMT opposed any such order. Pi and the Trustee provided helpful information as to its initial appointment and steps that were being taken.
62. On 4 February, the Trustee Board resolved:
- 62.1. To appoint Pi as independent director and chair;
- 62.2. To instruct the Trustee's lawyers to prepare amendments to the articles including to give effect to (a) the agreed term limits; (b) the change to a 3/3/3 structure; (c) interim changes to reduce the scope of the Dual Majority issues pending agreement on the 75% threshold; and (d) the agreement that the chair be an independent trustee.
63. The Case Team and the RMT remained in disagreement over Red Line (1)[b]; the RMT's position being that the RMT's NEC would consider the past conduct of any nominated or elected BD, including what was said in the Reports, in deciding whether they were fit and proper to be nominated as a BD. In response to the Panel's request, the RMT's solicitor set out the process and constitutional requirements regarding the election and nomination of BDs:

- 63.1. The constitutional requirement is nomination by the NEC;
- 63.2. The process to be adopted is “*uncharted territory*”;
- 63.3. The process is envisaged as being (a) a nomination period; (b) an assessment of any potential fitness and propriety issues in respect of a nominee; (c) any nominee investigated for fitness and propriety will attend a meeting to put his case, the pensions subcommittee then make a recommendation to the NEC, who makes the final decision on fitness and propriety; (d) if required because of the number of nominees allowed to go forward, there is then an election;
- 63.4. If a former BD is re-nominated, the process would likely take until late summer or early autumn to conclude.
64. The Panel received updates from the Trustee on the factual circumstances in relation to the Scheme on 21 and 26 February:
- 64.1. LCP would not withdraw its notice of resignation if a New Trustee were not appointed, but would agree to a one-month extension to the end of April to effect a handover;
- 64.2. Pi was confident that alternative arrangements could be made to appoint a replacement service provider, in circumstances where the Trustee has a newly constituted Trustee Board including Pi as independent chair with further independent appointments to be made. Interest from service providers had been received;
- 64.3. Mayer Brown reserved the right to reconsider its position if any of the previous governance issues were to recur;
- 64.4. The Trustee’s articles were amended to give effect to the matters proposed on 4 February;
- 64.5. The Trustee was “*confident that the board can continue to operate effectively*” with its current five-member structure pending appointments to the 3/3/3 board;
- 64.6. Pi had met with the various advisers and service providers and obtained confirmation that the Scheme was operating well on a “business as usual” basis;
- 64.7. The Trustee Board endorsed Pi’s view that it “*sees real advantages in its current position as an independent chair, where trustee decision-making benefits from the deep industry knowledge and diversity of opinion on the Trustee board.*”
65. In the course of their representations before the final hearing, the RMT invited the Panel to adjourn the hearing of the Warning Notice, or the making of a decision on the Warning Notice, to allow the new board to be fully constituted. After considering representations, the Panel declined to adjourn the oral hearing, but it left open for argument at the oral hearing the question of adjourning the Warning Notice.

66. The Panel recognised it imposed tight case management deadlines for updates at points after the Warning Notice was referred to it. Given the March deadline of LCP's resignation and the change in circumstances, the Panel needed to understand the position as it developed before it. It found the information provided, particularly in the week before the hearing, helpful. The Panel is grateful to those involved for adhering to the timetable to allow the oral hearing to proceed effectively.

#### **D. Submissions**

67. The parties' submissions are summarised below. The Panel considered all the arguments in position statements, witness statements, and other representations oral and written. The Panel was grateful for the high quality of the written and oral submissions, and the manner in which all involved worked to enable an efficient oral hearing.

##### **(1) Case Team Submissions**

68. On the legal test to be applied, the Case Team argued that section 7 (as interpreted in two previous Panel decisions *London Quantum RBS*, and *Telent*) operated as follows:

68.1. What was reasonable was a matter of judgment for the Panel to decide;

68.2. The Case Team needs to show on the balance of probabilities that the proposed action is reasonable to secure and protect the statutory objectives in the Grounds;

68.3. Both "secure" and "protect" in the relevant grounds look to the future, such that section 7 is a preventative or prophylactic provision;

68.4. Section 7 requires a "realistic prospect" or "real risk" of the statutory objectives in the Ground not being achieved. There is no need to find a high chance of harm taking place, but rather the power is engaged when there is a reasonable fear or threat of harm.

68.5. Once such a realistic prospect is found, the question then becomes whether or not the Panel is satisfied the appointment is reasonable.

69. The Case Team further submitted that the section 3 test (to prohibit a trustee from acting) is a different test, at a higher standard and for a different purpose. It was said cases may overlap section 3 and section 7, but the task for the Panel was simply to apply the section 7 test. As such, the Case Team denied that, by seeking regulatory action to avoid the former BDs from being trustee directors, it was circumventing its statutory power by seeking a section 3 prohibition indirectly through a section 7 appointment.

70. On the facts of this case, the Case Team submitted that the Grounds were satisfied, notwithstanding the recent developments and changes to the Trustee, as follows:

70.1. Scheme governance had been seriously lacking for a long period, from at least 2016 and the commissioning of the Muse Report. Those problems

were getting worse, and continued well into late 2019, substantially after TPR was involved and after the Warning Notice. There is evidence of significant tangible financial negative impact to the Scheme caused by the board's problems.

- 70.2. The recent activity in early 2020 changing the directors and governance structure is not sufficient to ensure the statutory objectives were protected. This is on the basis that (a) it is a temporary situation given the Trustee Board is not complete, and (b) given the former BDs have not agreed not to stand, nor has the RMT undertaken not to nominate them if they do stand, the current protection does not "secure" the exercise of knowledge and "protect" members.
  - 70.3. The RMT's proposed vetting of the nomination is insufficient: it is the wrong test (being fitness and propriety, not the section 7 test), applied by the wrong person (the RMT not the Panel), with different pressures ( [REDACTED] having given evidence that removing the BDs was "*an incredibly painful process*" given the "*close-knit community*" of the merchant navy).
  - 70.4. Similarly, while the RMT did remove the BDs in January, they did not act for a substantial period of time, and instead initially acted strongly to defend their members, the BDs, rather than acting on the problems in the Scheme. As such, there are concerns over whether the RMT would, or would be able to, vet appropriately.
  - 70.5. The evidence is clear that the former BDs will stand again: Mr Creed said he would, the Represented Directors have refused to say they would not.
  - 70.6. Given the problems with the vetting process, there is therefore a real risk that they would be nominated or elected.
  - 70.7. There is a real prospect that, if appointed, the problems of the past would recur. The members' interests should not be put at risk. In cases of doubt, the benefit of the doubt should go towards protecting the Scheme and exercising the regulatory function.
  - 70.8. There is a method, under section 7(5)(c) of the Pensions Act 1995, for the cessation of the appointment of the New Trustee, such that if the position with the current Trustee was regularised, it could be re-instated. This was submitted as a legally-available option to TPR, but it did not commit or bind the Regulator to such action; that would be a matter for future assessment.
  - 70.9. As to the potential disadvantages of a New Trustee in losing industry knowledge, it was submitted that such knowledge could be obtained through consultative committees rather than directly as part of the Trustee.
71. The Case Team confirmed that the outstanding point on the Dual Majority issue was not something that on its own would trigger the appointment of a New Trustee. Thus, the Case Team's case was put solely on Red Line (1)[b].
  72. The Case Team strongly opposed any adjournment.

## **(2) Trustee Submissions**

73. The Trustee was neutral but made helpful submissions (a) taking the Panel through the amendments to the articles referred to in paragraph 63.2 above, and (b) confirming the view of the chair of the Trustee that there “*is an advantage to having industry knowledge and a diversity of opinion informing the Trustee’s decision making*”, but recognising a consultative process could provide some of those advantages.

## **(3) RMT Submissions**

74. The RMT made four summary submissions on the Warning Notice:

74.1. The Panel should be cautious in disrupting the Trustee, given that it is acknowledged that it is desirable to have member representation on Trustee boards (by reference to the Goode Report and TPR’s own consultation materials including *21<sup>st</sup> Century Trusteeship* and its July 2019 consultation on *Future Trusteeship and Governance*).

74.2. There is no real criticism of the structures of the Trustee, particularly given the recent amendments. Rather, the outstanding criticisms were behavioural;

74.3. The current Trustee has operated successfully despite these various issues, and a New Trustee risks undermining the Scheme’s good position and losing members’ confidence in it.

74.4. The outstanding behavioural complaints had been resolved by the change in appointments. The Case Team’s concerns about the former BDs are matters which ought to be addressed by section 3 prohibition proceedings, and not indirectly by section 7.

75. On the current situation, the RMT submitted by reference to the Grounds that:

75.1. Given the constitution of the current board and its actions in January-February 2020, there can be no suggestion of a failure to have or exercise the relevant knowledge and skill; and

75.2. The limited concern, as to whether the former BDs would be re-appointed, is not a basis to conclude that appointing a New Trustee is reasonable to protect members’ interests. The RMT (a) took steps to remove the former BDs; and (b) would vet any proposed nominee. There is no justification for concluding that the RMT will not act in a proper and carefully considered manner.

76. The RMT characterised Red Line (1) as behavioural and the remainder as structural. The RMT submitted there were five questions the Panel needed to address on the outstanding behavioural Red Line (1)[b]:

76.1. Is the Trustee currently dysfunctional? RMT submitted not.

76.2. Is there reason to believe that the Trustee will become dysfunctional? RMT submitted there is no reason to suppose that given (a) the evidence and

the fact that no findings of individual wrongdoing are sought, (b) RMT's vetting procedures and (c) the structural changes already made.

76.3. Is the risk of any future dysfunction sufficient to justify regulatory action? It was said that, given the changes, process, and current approach of the RMT, there was at most a minor risk and the Panel should decline to appoint a New Trustee.

76.4. Are there relevant factors weighing against appointing a New Trustee? The desirability of member representation, the disadvantages of sole trusteeship, the fact the current chair is the proposed New Trustee, that the Scheme is functioning well (and Pi say so) mean that there are significant factors against a New Trustee.

76.5. Is it reasonable to appoint a New Trustee? RMT said not.

77. The RMT submitted that the Panel should either adjourn the hearing to "wait and see" whether there were any concerns after the election process or dismiss on the basis the Grounds were not made out.

#### **(4) Represented Directors' Submissions**

78. The Represented Directors made the following submissions on the facts:

78.1. The Represented Directors were each different individuals, and the Case Team's approach was one of "guilt by association", seeking a prohibition order by a different procedure. The Case Team's approach is wrong, and the Panel cannot assess the relevant risk without making individual findings, which the Panel has not been asked to do.

78.2. The Scheme can be and is currently being run properly, and the current independent chair and the Trustee Board should be left in place. There is no risk to assets or failure to exercise knowledge or skill.

78.3. The Represented Directors want, and have not had, a proper opportunity to respond to allegations "*half made*" against them. They have never had an opportunity to respond to the case that if they re-join the Trustee Board, they will cause problems.

78.4. A possible future section 7(5) termination of the New Trustee's appointment is impracticable in this case, because the Trustee company had been advised by Mayer Brown that it should strike itself off if a New Trustee were appointed.

79. Their case on the law was:

79.1. Section 7 is focussed on the trustee as a collective. In substance, given the structural changes and the appointment of a new board, the "*change that section 7 seeks to bring about has already been made*".

79.2. By reference to *Telent*, it was argued that the relevant test is a "sufficiently proximate" threat.

79.3. The Panel needs to be “satisfied” that it is reasonable to appoint a New Trustee and given the availability of section 3 to prohibit individual trustee directors and the evidence before the Panel, it should not be so satisfied.

80. Finally, they submitted that the Panel could not make the necessary findings to be satisfied that a New Trustee should be appointed:

80.1. The Case Team put its Warning Notice on the basis of a collective, and disavowed findings against individuals. There is no case set out against each of the particular individuals and their (alleged) behaviours.

80.2. The relevant risk is the risk of problems recurring if particular individuals are re-appointed to a board that is otherwise different. That is an allegation that particular individuals joining the Trustee Board are a risk.

80.3. Without making findings against and about particular individuals, it is not possible to assess or find a risk to the new collective of the Trustee Board.

#### **(5) Mr Creed’s Submissions**

81. In writing, Mr Creed asked for the Panel to reinstate him as a Director of the Trustee and allow him to complete his term of office.

82. Orally, Mr Creed agreed and endorsed Mr Robinson’s submissions for the Represented Directors, informed the Panel of the history of how a pensioner member came to be introduced, and that he was that Pensioner Trustee.<sup>3</sup> Mr Creed confirmed that he was not happy with the Drake Report and stated that he considered he had worked to obtain the necessary knowledge and skill.

#### **(6) Mr Nobbs’ Submissions**

83. Mr Nobbs stated his belief that none of the independent trustees or EDs had been criticised under the Reports or in the Case Team’s investigations, but that the Case Team’s position is that none of them should be reappointed. Mr Nobbs was concerned this amounted to an implication that all the directors were in the wrong and asked the Panel to bear in mind the professional reputations of the EDs and the independent directors.

84. The Panel had in mind the importance of professional (and other) reputations, and this Determination Notice is not intended to imply, and does not make any findings, that any specific individual was in the wrong. The Panel has not been asked to decide that and does not have the evidence to do so.

### **E. Analysis I: Adjournment**

85. The Panel decided not to adjourn the proceedings to “wait and see” the position of the fully constituted Trustee Board. While this was technically the RMT’s primary position, its submissions were advanced largely on the basis of both dismissal of

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<sup>3</sup> Mr Creed was the Second Defendant in *MNRPF v Chambers* [2001] Pens LR 137, the Trustee’s application seeking the Court’s approval for certain changes to the Scheme including the closure of accrual and how to deal with the deficit.

the Case Team's request and "wait and see". The Case Team opposed "wait and see".

86. The Panel considered that the uncertainty and costs associated with an adjournment would be significant. The Panel considered a material change in circumstances as a result of an adjournment to be unlikely, such that it saw limited advantage in a delay. The practical question of how and to whom the necessary reporting and managing of the position in the interim would operate was not easy to answer, and those involved had expressed concern about the costs of the same. The Panel felt able to make a decision without an adjournment.

## **F. Analysis II: Independent Trustee**

### **(1) Applicable Law**

87. The relevant wording of section 7 is as follows:

*"The Authority [i.e. the Regulator] may also by order appoint a trustee of a trust scheme 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,*  
*... or*  
*(d) otherwise to protect the interests of the generality of the members of the scheme."*

88. The Panel understood the following propositions not to be disputed, and in any event applied them to its exercise:

88.1. The purpose of these provisions (at least in part) is preventative, in that the Panel can be satisfied it is reasonable to exercise those functions when there is a risk of the statutory objectives not being fulfilled.

88.2. Both "protect" and "secure" include a prospective element. Particularly in this case, the question for the Panel is whether the statutory objectives are at risk in the future.

88.3. Future risks are to be (and indeed can only be) evidenced, and assessed, by reference to past events and material.

88.4. Since the Panel's analysis is concerned with risks into the future, it needs to make an assessment of (a) were any risk to materialise, the seriousness of harm to the relevant statutory objectives, and (b) the likelihood of any risk materialising. The timescale in which any risk may materialise will usually be a relevant factor to the likelihood of it materialising, but, for instance, where it is very likely or inevitable that a risk will materialise, the fact it is expected to occur in the medium or long term would not lead to the risk being given less weight.<sup>4</sup>

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<sup>4</sup> As vividly put in argument by the Case Team: in respect of seriousness of harm, a 0.1% prospect of "a nuclear bomb going off" may make intervention reasonable even given the small prospect; in respect of a risk distant in time but very likely to materialise, that distance in time was not necessarily relevant was illustrated by "a vision of a man stuck in tar with a steamroller slowly approaching."

- 88.5. The risk-based analysis includes not only the risks of not appointing a New Trustee, but also the countervailing risks (such as loss of knowledge) were an appointment to be made.
- 88.6. The Case Team has the burden of proof, but that is to establish that it is reasonable to appoint a New Trustee on the Grounds, having regard to the risks. It is not necessary for the Case Team to establish that it is more likely than not that a given risk sufficient to engage the Grounds will materialise.
89. Both the Case Team and the Represented Directors argued for a particular interpretation of this statutory wording, in order to establish or describe the risk that it was necessary to find in order to be satisfied it was reasonable to appoint a New Trustee:
- 89.1. The Case Team did so by reference to a “real prospect”, taken from *London Quantum*, which it argued was a relatively low threshold; and
- 89.2. The Represented Directors a “sufficiently proximate cause” on the other, taken from *Telent*, which, it was argued, points away from risks that are too speculative or hypothetical.
90. The Panel did not find such interpretations to be of assistance. The Panel’s task is to apply the statutory criterion, which is the reasonableness of the appointment to secure the statutory objectives. As the Case Team stated in its reply, the wording of the statutory test is to be applied. In neither *Telent* nor *London Quantum* were the Panel purporting to lay down principles of general application (which would not in any event bind a later Panel). To the extent that either party was arguing that there is some sort of threshold requirement to the exercise of the Panel’s decision in respect of any risk, the Panel does not accept this analysis. The degree of proximity or the reality of the prospect of a particular risk is simply a factor in how much weight to be given to that particular risk in the overall assessment of whether it was reasonable to appoint a New Trustee to secure the statutory objectives.
91. As such, the Panel took the following four-stage approach:
- 91.1. To identify the relevant risks, present and future, said to threaten the statutory objectives;
- 91.2. To assess the likelihood of those risks materialising and the likely degree of harm to the statutory objectives were the risk to materialise;
- 91.3. To assess the countervailing risks and disadvantages of an appointment of a New Trustee;
- 91.4. Having carried out those assessments, to decide whether it is reasonable to appoint a New Trustee on the Grounds.
92. On the particular facts of this Warning Notice, no party sought to distinguish the Grounds, in that the same risk factors were relied upon for both Grounds. The Panel agreed with this analysis.

## **(2) The Identified Risks**

93. By the time of the hearing (but certainly not at the time of Warning Notice), there were no present risks identified to the Scheme.
94. The only relevant future risk identified was Red Line (1)[b]: that the re-appointment of the former BDs would lead to the re-emergence of the dysfunctionality of the Trustee Board. The Panel considered this a small risk, which would only crystallise if a number of speculative individual assumptions were to materialise.
95. Given the assessment by Pi at the time of the hearing that a replacement could, if necessary, be found for LCP, the future risk of losing the Trustee executive (i.e. the administrator), which had appeared as a very significant risk earlier in the procedure, was not a relevant risk by the time of the hearing.

## **(3) Assessment of Risks**

### *Seriousness of Harm*

96. There can be no doubt that, were the Trustee Board to revert to the mode of operation it had prior to the recent changes, the risks to the Scheme would be significant. While the Scheme was functioning acceptably in respect of “business as usual” before the changes to the board, the following factors indicated a significant risk of the Grounds being made out:
- 96.1. The inability of the board to make certain strategic decisions;
  - 96.2. The actual loss of an independent chair, and the impending loss of independent trustee advisers; and
  - 96.3. The very substantial additional and avoidable costs to the Scheme of dealing with the governance issues arising out of the manner in which the Trustee Board operated.<sup>5</sup>
97. Further, the Panel noted that this is a very large and complex Scheme, with over £1 billion of assets, and relatively complex issues in relation to deficit repair and employer liabilities because of its unusual and historic nature. Given the number of members and the size of the Scheme, its good governance is of paramount importance.
98. Nevertheless, the Panel noted the wider functioning of the Scheme and its relative stability even in the period prior to 2020. It took this into account in its overall assessment of reasonableness.

### *Likelihood of Risk Materialising*

99. The Panel considered that, on the available evidence, there was only a small risk of board dysfunction materialising.

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<sup>5</sup> For the avoidance of doubt, this does not include costs associated with updating the Scheme’s governance structure, which would have to have been incurred in any event.

100. In order for the relevant risk to materialise, (a) the former BDs would have to succeed in being appointed to the Trustee Board; (b) the former BDs would have to act in a way contrary to good standards of trusteeship; and (c) their acting contrary to good standards of trusteeship would need to materially affect the acts of the Trustee Board in a way that would threaten the statutory objectives.

101. As to appointment:

101.1. The following steps would be required for the former BDs to be re-appointed to the board: that they wanted to stand; that they passed the vetting procedure; and that they succeeded in any election were there to be one.

101.2. While the Panel considered the Case Team's submissions on the prospect of the former BDs standing again to be overstated (other than Mr Creed, who stated expressly that he wished to serve until 2021), the Panel agreed that there was a reasonable likelihood that the former BDs would seek the nomination. This is principally on the grounds that they refused to give undertakings to the Case Team that they would not do so; while it may well be that the refusal was a matter of principle, it indicated a relevant prospect of their seeking nomination.

101.3. In the absence of any evidence on the views or practices of the electorate, other than that Mr Creed has been successful four times, the Panel concluded that there is a material prospect of the former BDs being elected, not least as they have served as Trustee directors in the past and would be able to state to the electorate that they know the Scheme and had undertaken relevant training.

101.4. The more difficult question is whether there is a risk of the vetting process not identifying any inappropriate BDs (assuming without deciding that the former BDs may indeed be such at this stage). The Panel recognised that this is a risk, but considered it a relatively small one for the following reasons:

(a) While the RMT could be criticised for its immediate reaction on being informed of the position at the Scheme, and its automatic response was to defend its members the BDs, it has, more recently, recognised the seriousness of the situation. The Panel does not accept that the RMT's earlier decision to defend the BDs meant it had taken a positive view that there was nothing to the allegations; rather, it appeared to the Panel that the RMT started from a position of defending its members and taking a procedural objection. That procedural objection may not have been the most productive way to engage with the Case Team or Trustee, but it does not mean the RMT took a view on the substantive issues.

(b) In recently recognising the situation, the RMT has been involved in a process which has resolved six-and-a-half of the seven Red Lines, making all the necessary structural changes and removing the BDs. This is significant progress. Given that change in behaviour, the Panel is not satisfied that there is "manoeuvring" on the part of the RMT. Rather, after a slow start, it now appears fully engaged.

(c) The Panel agrees with the Case Team that the RMT has indicated it will apply a different test, that is a test for fitness and propriety, to the section 7 test, and the RMT has different pressures. However, the RMT has indicated that it will consider all the matters in the Reports and the regulatory process, and the Panel does not consider there is the evidence to conclude that the RMT will fail in the responsible discharge of its obligations to Scheme members as a nominating body.

(d) Overall, therefore, the Panel did not consider that there was a particularly large risk in the vetting process given the change in approach of the RMT and the matters it has indicated it would take into account.

102. As to conduct:

102.1. The Panel has not been asked to, and does not, find that the BDs – or any director – has personally acted inappropriately.

102.2. The Panel is not engaging in “*guilt by association*” as submitted for the Represented Directors, nor did it understand the Case Team’s argument to be put on that basis. The question is not one of guilt, but of risk.

102.3. The Warning Notice is put on the basis of the collective failings of the previous board, rather than on any individual findings. Therefore, the Case Team cannot put its case in respect of individuals on any *causative* basis, i.e. that individual X caused problems in the past therefore risks causing problems in the future. At its highest, its case in respect of individuals can only be *correlative*, i.e. that individual X was on the board when there were problems in the past, such that there is risk that problems will recur if individual X re-joins the board.

102.4. This is particularly so where individuals are not directly affected parties, have not had the opportunity to fully respond to indirect allegations against them, and disputes of fact in respect of individuals have not been tested by evidence and cross-examination.

102.5. Given the Panel is assessing future risk and is not making findings of misconduct or of past fact, the Panel considers this correlative argument for risk is one that can reasonably be advanced and taken into account. However, correlation is not causation. The Panel needs to take account that a correlative connection is less strong than a causative one. In assessing likelihood, it may be that the relevant individuals were present but not a cause of the problems, such that the problems would not arise in the future. The risk having been put on a correlative basis only in respect of individuals, the Panel concludes there is a lower prospect of the risk materialising than if there had been proof of individual wrongdoing in the past.

103. As to the Trustee Board being affected, there have been significant changes in the board structure itself such that the Panel considered there was a low risk of behaviours reoccurring that would impact the board’s functioning:

103.1. The amendment to the articles has introduced a 3/3/3 structure to the board, with an independent chair (although at the moment the board only has five members, and the appointment process is not complete). It is

proposed that Mr Norris' appointment as a BD be long term. That leaves only two positions available for a former BD to be appointed. Any former BD re-joining the Trustee Board will therefore be joining a board with different personnel, and with a greater level of independent members. This different structure, in that the Trustee Board is smaller and with less of a structural design of two different "sides" (with their associate risk of stalemate or silo behaviour), reduces the risk of an ineffective trustee board.

- 103.2. Assuming Mr Norris' conduct as a BD is appropriate (and nothing has been suggested otherwise), that leaves at most 2 of 9 directors who could act inappropriately (without making any finding that they would do so). This would not affect day-to-day decision-making, since a simple majority would suffice, nor could it block a 75% threshold. It could increase time and costs were there to be inappropriate behaviour but given the change in the Trustee Board structure and the other matters set out in this paragraph, the Panel considered that a relatively low risk.
  - 103.3. The RMT and Employers are more engaged with the Scheme. The RMT has established a forum with the Employers. The Panel considered that these steps reduce the risk of the Trustee Board becoming the vehicle for wider pension issues being debated between employers and members, in that (a) they can be discussed at the forum and not at the board, and (b) were any BDs (wrongly) to use the board for such matters, they would be doing so aware of the RMT's involvement and commitment to good governance of the Scheme including its power of removal (in circumstances where the RMT have already shown itself willing, albeit reluctantly, to remove BDs in the past).
  - 103.4. This regulatory action itself will affect behaviour. Each of the new BDs has indicated that they wish there to be good governance in the Scheme. As such, and particularly if Mr Norris as a BD is also present on the Trustee Board, the risk to members' interests or the functioning of the Board is reduced by the steps already taken.
  - 103.5. It is important not to overstate the risk associated with members on trustee boards. Of necessity, they are not usually pensions professionals and may start from a position of thinking about members' interests alone or suspicion of changes that would adversely affect members. This is why there are processes in place to bring such member-nominated trustees to the necessary standard (e.g. through TPR's toolkit). The countervailing advantage is that there is member input, which has been long recognised as valuable.
104. Taking those matters together, the Panel considered that there was a relatively low risk of events occurring that threatened harm to the statutory objectives set out in section 7 PA 95. The Panel did not consider the cumulative series of hypotheticals that would lead to harm to the statutory objectives to be likely (that term being used as an identifier of levels of risk, not as a finding of fact on the balance of probabilities).

#### **(4) Assessment of Countervailing Risks on Appointment**

105. The Panel identified the following risks against an appointment of a New Trustee:

- 105.1. The current good administration of the Scheme, both on a “business as usual” level throughout, and the information and expert views of Pi as the current chair on the advantages of maintaining the current new Trustee Board structure into the future. This is particularly so when Pi is satisfied that, if there were to be a change in trustee executive, there would likely be an appropriate handover. Consequently, members would not be adversely affected by a change in trustee executive;
- 105.2. The advantages derived from the presence of member (and employer) knowledge and voices on trustee boards, which is a long-standing element of modern pensions legislation and best practice, including being TPR’s own position. Consultative committee members would not be subject to fiduciary duties or the other legal obligations of pension trustees, for example, as to knowledge and skill, and so would be less effective and valuable than member and employer participation directly on the board;
- 105.3. Maintaining Pi in place as the current chair of the Trustee rather than a New Trustee avoided the risks and uncertainties associated with the current Trustee company ceasing to be involved as trustee: there would be no risk of it winding up, nor would the uncertain section 7(5) process be required to re-instate the Trustee. A decision not to appoint would avoid the countervailing risk of not being able to remove the New Trustee in due course.
- 105.4. To a lesser degree, the wider impact and possible loss of confidence of the membership were a New Trustee to be appointed.
- 105.5. While a relatively small factor, there would be costs and administrative burden associated with a New Trustee, but, given Pi has already been appointed as chair and LCP would stay on in those circumstances, the Panel did not attach much weight to these matters.

#### **(5) Overall Reasonableness Analysis**

106. Overall, the Panel was not satisfied that it was reasonable to appoint a New Trustee to secure the statutory objectives, on either of the Grounds. Significant changes had been made as a result of the regulatory action in that the structural changes required had been made, and the Trustee Board personnel had been entirely changed. The new chair of the Trustee was the very person whom the Case Team sought to be appointed as New Trustee.
107. The Panel particularly took into account as part of that assessment the views of Pi on the advantages of the existing Trustee Board structure and composition, and that it was functioning well.
108. Set against that, the Panel considered the risks of former BDs being appointed to the two remaining BD positions, conducting themselves in a way that risked the statutory objectives (bearing in mind no individual findings of fact had been made against them), and such conduct risking the statutory objectives to be a

series of cumulative hypotheticals that amounted to such a degree of speculation that it would not be reasonable to appoint a New Trustee on that basis.

109. The Panel was concerned by Red Line (1)[b] and saw considerable force in the submission that the Case Team ought not to obtain what constituted a prohibition order against an individual without going through a section 3 process. However, ultimately, the Panel was satisfied that, in principle, were the Grounds made out, it could have made the order sought in the Warning Notice. The absence of findings in respect of individuals on the overall risk analysis together with all the other elements of the risk analysis, meant the Panel was not satisfied of the reasonableness of the regulatory intervention requested in the Warning Notice.

### **G. Analysis III: Mr Creed's Application**

110. The Panel does not have the power to re-appoint Mr Creed or otherwise procure his re-instatement. As such, it is not able to grant that application and does not need to consider whether it would do so.

### **H. Conclusion**

111. Accordingly, for the reasons given, the Panel declines to appoint a New Trustee under section 7 of the PA95 or make the consequential orders requested in the Warning Notice.

112. **Appendix 1** to this Determination Notice contains important information about the Directly Affected Parties' rights to challenge this decision.

**Signed:**

**Chair:** David Latham

**Date:** 16 March 2020

**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 9730

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 TPR. 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](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043)