	DETERMINATION NOTICE under section 96(2)(d) of the Pensions Act 2004 (the "Act") DP Dental Laboratory Retirement Benefit Scheme ("the Scheme")	The Pensions Regulator case ref: TM5820 & TM5820A

1. The Determinations Panel (the "Panel") on behalf of the Pensions Regulator (the "Regulator"), met at an oral hearing on 25 September 2009, to consider whether to exercise a reserved regulatory function in relation to the issues raised in the Warning Notice dated 2 June 2009 and the Warning Notice dated 24 June 2009.

2. **Matters to be determined**

   The Panel was asked to consider whether to appoint an independent trustee to the Scheme with exclusive powers pursuant to Section 7 of the Pensions Act 1995 (the "1995 Act"). The Panel was also asked to issue a vesting order pursuant to Section 9 of the 1995 Act if the trustee so appointed was a new trustee to the Scheme.

3. **Parties**

   The Warning Notice specified the following parties (together with the Regulator "the Parties") as being directly affected by the regulatory action that the Panel was asked to consider:

   (a) DP Dental Laboratory Limited (the "Company") as the principal employer to the Scheme;
   (b) ACMCA Limited, c/o Allan Martin as a trustee of the Scheme ("ACMCA");
   (c) Alistair McNair as a trustee of the Scheme;
   (d) Claire MacLachlan as a trustee of the Scheme.

   At the oral hearing on 25 September the Regulator was represented by Ms Frances Ratcliffe of counsel and the Company was represented by Mr Saul Margo of counsel. ACMCA was represented by Mr Allan Martin. Neither Mr McNair or Ms MacLachlan (respectively the "Lay Trustees") attended the hearing. Mr Caplan of DP Dental was also in attendance at the hearing.

4. **Decision**

The Determinations Panel granted the application (the "Application") made by the Regulator to appoint ACMCA as an independent trustee to the Scheme with exclusive powers pursuant to Section 7 (3) (a) and (d) of the 1995 Act. The Panel also decided, for the avoidance of doubt, to issue a vesting order pursuant to Section 9 of the 1995 Act vesting the scheme property in ACMCA. The Panel determined that orders be issued in the following terms:

The Pensions Regulator hereby orders that:

i. ACMCA Limited of Mains of Giffen, Greenhills, Beith, Ayrshire, KA15 1HJ is hereby appointed as trustee of the DP Dental Laboratory Retirement Benefit Scheme (the "Scheme") with effect on and from 6 October 2009.

ii. This order is made because the Pensions Regulator is satisfied that it is reasonable to do so, pursuant to the relevant provisions of the Pensions Act 1995 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 in order to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).

iii. The powers and duties exercisable by ACMCA Limited shall be to the exclusion of all other trustees of the Scheme pursuant to Section 8(4)(b) of the Pensions Act 1995.

iv. ACMCA Limited's fees and expenses shall be paid out of the resources of the Scheme pursuant to Section 8(1)(b) of the Pensions Act 1995 and an amount equal to the amount paid out of the resources of the Scheme by virtue of Subsection (1)(b) is to be treated for all purposes as a debt due from the Employer to the trustees of the Scheme pursuant to Section 8(2) of the Pensions Act 1995 as amended by Section 35 of the Pensions Act 1995.

v. This order:

   (a) will take immediate effect on the date of this order;

   (b) may be terminated, or the appointed trustee replaced, at the expiration of 28 days notice from the Pensions Regulator to the appointed trustee, pursuant to Section 7(5)(c) of the Pensions Act 1995.

The Pensions Regulator also hereby orders:

i. The vesting in, and the assignation and transfer to, ACMCA Limited of Mains of Giffen, Greenhills, Beith, Ayrshire, KA15 1HJ, as trustee of the DP Dental Laboratory Retirement Benefit Scheme, appointed under Section 7 of the Pensions Act 1995 by the Pensions Regulator, of all property and assets of the above scheme, heritable and moveable, real and personal, of every description and wherever situated.

ii. This order is made by the Pensions Regulator pursuant to section 9 of the Pensions Act 1995, as amended.

iii. This order will take immediate effect on the date of this order.

5. **Details of the Scheme and the Company**

The Scheme was established by Definitive Deed on 24 June 1981 and currently has 27 members. The membership of the Scheme can be broken down as follows: there are 6 active members (the "Actives"), 10 deferred members (the "Deferreds") and 11 pensioner members (the "Pensioners"). The Scheme is significantly in deficit.

The Warning Notice, on the basis of a valuation as at 1 October 2006, which has not been finalised by the trustees, but was not disputed by the Company, put the buyout deficit at £1,154,000, the Scheme Specific Funding deficit at £619,000 and the Section 179 deficit at £137,000. Pursuant to a request from ACMCA the Scheme Actuary provided an informal valuation, in the absence of finalised accounts, which put the Section 179 deficit at approximately £594,000 as at 1 June 2009. The Panel recognised that if the Section 179 deficit had increased then the deficit on both a buyout and Scheme Specific Funding basis would have similarly increased.

The Company is currently contributing some £3,250 to the Scheme per month which amounts to £39,000 per year. It has offered, XXXXXXXXXXX to increase this to £4,000 per month. The total costs of administering the Scheme and the annual Pension Protection Fund levy amount to £42,000. Therefore at present the Scheme's deficit is increasing. The informal valuation of 1 June 2009 indicates that for each year the Scheme remains open to future accrual an additional £24,000 is added to the Section 179 liabilities.

The Company makes dental restorations for the dental profession and is based in Glasgow, Scotland. Prior to December 2007 the Company disputed its role of Principal Employer to the Scheme but has accepted this role following litigation in the Court of Session in Edinburgh pursuant to which the Company was subsequently ordered in November 2008 to pay £245,000 (the "Decree Amount"). The Decree Amount comprised both outstanding contributions and expenses XXXXXXXXXXXXXXXXXX.

6. **Background Facts**

Since the Application concerned the Lay Trustees' alleged conflicts of interest and their alleged inability to make any progress towards resolving the Scheme's funding position, which the Regulator argued was evidence of a lack of and/or unwillingness to exercise the necessary knowledge and skill for the proper administration of the Scheme, the Panel had close regard to the background facts.

Following the Company's acceptance of responsibility for the Scheme in December 2007, the previous trustees to the Scheme were removed and new employer-nominated trustees were appointed (Mr McNair and Mr Murphy). The Regulator subsequently suggested that the Company appoint an independent trustee alongside the new appointed trustees. The Company and the newly appointed trustees accepted this approach and ACMCA was appointed on 20 June 2008 (together with Mr McNair and Mr Murphy ""the Trustees"). Mr McNair was a director and shareholder of the Company. Mr McNair was also a creditor of the Company having loaned it money in the past. Mr Murphy was an employee of the Company. The Trustees wrote to the Company regarding payment of the Decree Amount in September and November of 2008 but no proposals were forthcoming. At this stage the Trustees were keeping the Regulator informed of developments regarding Scheme business.

On 3 December 2008 the Trustees met to discuss Scheme business. The minutes of that meeting stated that "*Alistair McNair and John Murphy acknowledged the difficult situation, their conflicts of interest and agreed that the Trustees had no option other than to enforce decree on the Company....It was agreed by all the Trustees that decree be served on the Company for sums due to the Scheme*".

The minutes (the "December Minutes"), which were taken by Alison Shackleton, the Scheme's legal adviser, were circulated to the Trustees for comments. Comments were only received from Mr Martin of ACMCA. The decree was duly served by the Trustees on the Company on 22 December 2008. This prompted a response from the Company to the Regulator on 6 January 2009 in which a proposal (the "Proposal") was made by the Company to increase contributions to £2,500 per month. XXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

On 7 January 2009 Mr McNair and Mr Murphy circulated a note intended to clarify a misunderstanding which they claimed had arisen from the Trustees' meeting on 3 December 2008. They claimed that they had understood that the Trustees had agreed to postpone serving the decree until 7 January 2009 and asked for it to be formally minuted that Mr Martin had instructed solicitors to serve the decree on the Company without being authorised to do so. As a result a note, recording their views, was added to that effect as a post-script to the December Minutes, although the minutes of the meeting were not otherwise amended and were subsequently signed by Mr Murphy. The note also stated that:

(a) any instructions to professional advisers had to be in writing and signed by at least two trustees; and
(b) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

The Regulator responded on 20 January 2009 to the Company regarding its Proposal suggesting that it should be considered at the next Trustee meeting. In the same letter the Regulator stated "*according to our own actuary's preliminary calculations, the company's currently proposed £2,500 per month could take over 50 years to clear the Scheme deficit, without taking expenses into account*." The Regulator went on to state that "*the proposed company contributions do not even cover expenses. Therefore, it does not appear that the proposed company contributions could result in a compliant recovery plan*." The Regulator wrote to the Trustees on 20 January 2009 expressing similar concerns about the Proposal and any subsequent recovery plan. The Regulator also reminded the Trustees of the need to observe the Regulator's Code of Practice regarding the funding of defined benefit schemes and the need for the Trustees to have "*knowledge and understanding of (among other things) the law relating to pensions and trusts, **as well as the principles relating to the funding of pension schemes***" (emphasis added).

The Trustees met to discuss the Proposal on 27 January 2009 immediately prior to which Mr Murphy resigned. Notwithstanding his resignation the remaining trustees, namely ACMCA and Mr McNair, were quorate.

The minutes of the meeting (the "January Minutes") state, at paragraph 2.4, that "*it was agreed by both the Trustees that a sum of £2,500 per month **could not** be accepted by the Trustees. This was supported by Alison Shackleton* (the Scheme's legal adviser)" (emphasis added). The January Minutes record that the Company would be given one last chance to put forward a proposal that would be capable of being accepted. The January Minutes were circulated for approval. Mr Martin approved them in writing and Mr McNair agreed orally that he was content for the minutes to be sent to the Regulator with no changes.

On 3 February 2009 Mr. McNair stated by way of an e-mail to Ms Shackleton that "*the draft Minute of the Meeting held on 27 January 2009 is not correct. I accepted the Company's proposal and did not reject it so it needs to be changed. I accept you advised that the offer should be rejected, but a payment this year of £30,000 is a substantial* sum XXXXXXXXXXXXXXX."

On 24 February 2009 Ms MacLachlan was appointed by Deed to replace Mr Murphy. Ms MacLachlan is an employee of the Company. A meeting took place between Mr McNair, Ms MacLachlan and ACMCA (together the "Continuing Trustees") and the directors of the Company (including Mr Caplan). Ms Shackleton was also present. The minutes of the meeting (the "February Minutes") stated that: *"**Tony Caplan stated on behalf of the Company and Alistair McNair** (Trustee) that* XXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXX" (emphasis added).

The February Minutes went on to state that "*Tony Caplan stated that Allan Martin's attitude was intimidating and bullying and that Allan Martin had a hostile attitude. Claire MacLachlan stated that she had that impression from recent correspondence she had been given by Alistair McNair to read*." In reply Mr Martin stated that "*his primary interest is to protect members' benefits. He apologised if he had given the impression to the company and to Alistair McNair that he was hostile XXXXXXXXXXXXXXXXXXXXXXXX*"".

During the oral hearing, in response to a question from the Panel, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
Mr Martin confirmed that if ACMCA was appointed with exclusive powers he would seek to liaise with the Company about the future funding of the Scheme and to try, in the first instance, to plan the ongoing contributions towards the Scheme's deficit.

The February Minutes also reflect that Ms Shackleton was clear that Mr McNair had not accepted the Company's proposal on 27 January and that the January Minutes were accurate in that respect.

At the meeting the Company put forward a revised proposal (the "Revised Proposal"). The terms of the Revised Proposal are set out in the February Minutes which state that "*the company asked the Trustees to accept the offer of £2,500 per month pension contribution by the company for 6 months with a view to increasing contributions thereafter to £4,000 per month XXXXXXXXXXXXX*." The Continuing Trustees did not vote on the Revised Proposal at the meeting but instead agreed that "*the company would quickly pull together a proposal with supporting documentation and send that to the Pensions Regulator and the Trustees*."

Subsequently the Company agreed with the Regulator that the Revised Proposal would be formally submitted by 3 April 2009. The Company was also invited by the Regulator to consider whether it should appoint an independent trustee (possibly ACMCA) with exclusive powers given the Continuing Trustees' inability to make decisions regarding the ongoing funding of the Scheme.

On 17 April 2009 Mr Caplan, by way of an e-mail to Mr Martin, stated that "*realistically the Company cannot forecast with any degree of accuracy its future trading prospects particularly in the current economic climate. In these circumstances the Company thinks it prudent to look at proposals in the short term, say the next 15 months, and then review the position. What the Company proposes subject always to the Company having the required finance to pay the proposed contributions, is to pay a contribution at the rate of £2,500 per month as at present up to and including June 2009, and then increase the contribution to £3,250 per month for the next 6 months, and then increase the contribution to £4,000 per month for the next 6 months*."

There were no further Trustee meetings until 6 August 2009 when the Continuing Trustees met. At that meeting it was noted that the Section 179 deficit had increased to £600,000 and that the Company had increased its contributions to £3,250 per month despite the fact that no formal vote had been taken on the Revised Proposal. Mr McNair subsequently indicated in an e-mail dated 18 September 2009 that "*I would like it to be known that I was always willing to accept the company's proposal of £2,500 rising to £3,250 per month and being reviewed later this year. I think this offers the best solution XXXXXXXXXXXXXXXXXXXXXXXXXX and regular payments would continue to be made to the fund. As the members have agreed to cease any future accrual this should help in the long term*." The reference to ceasing future accrual was in fact inaccurate given that it was only a proposal at this stage and that the necessary steps required to close the Scheme to future accrual had still not been taken.

Ms MacLachlan circulated similar material prior to the oral hearing although like Mr McNair she did not attend the hearing. By way of a manuscript statement dated 22 September 2009 she stated that "*as a trustee I agree to accept the company's proposal to pay companys (sic) contributions at current rate of £3,250 per month in the hope they will increase in time.....I think its in the best interest (sic) of the members if the company keeps paying regular monthly contributions*. *That must be better than XXXXXXXXXXXXXXXXXX getting no contributions."*

7. Issues to be determined

There were two main issues before the Panel namely whether it was reasonable, pursuant to Section 7 of the 1995 Act, to appoint an independent trustee with exclusive powers to:

a. secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme; and/or
b. to protect the interests of the generality of the members of the Scheme.

In order to exercise the power under Section 7 of the 1995 Act the Panel had to have regard to Section 100 of the Act which states that when determining whether to exercise a regulatory function (i.e. the power to appoint an independent trustee) the following matters must be taken into account namely:

a. the interests of the generality of the members of the scheme to which the exercise of the function relates; and
b. the interests of such persons as appear to the Regulator to be directly affected by the exercise.

In addition the Panel had to have regard to the Regulator's statutory objectives. The Panel considered the following objectives, which are set out in Section 5 of the Act, to be relevant namely:

a. to protect the benefits under occupational pension schemes of, or in respect of, members of such Schemes;
b. reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund.

8. **Submissions of the Parties**

There were two broad planks to the Regulator's case. Namely that it was reasonable to appoint an independent trustee with exclusive powers because:

a. the lay Trustees lacked the necessary knowledge and skill to administer the Scheme properly because:

    i. their personal interests conflicted with their duties as trustees; and
    ii. they took account of irrelevant rather than relevant matters.

b. it was in the interests of the generality of the members since, inter alia, the Continuing Trustees have reached a standstill regarding the funding of the Scheme and no progress has been made towards:

    i. the recovery of the Decree Amount; or
    ii. putting an appropriate recovery plan in place.

The Company prefaced its submissions by stating that the appointment of an independent trustee XXXXXXXXXXXXXXXXXXXXXXX. On that footing the Company submitted that the appointment of an independent trustee would not be in the best interests of the Actives XXXXXXXXXXXXXXXXXXXXX. It argued that this was a factor that the Lay Trustees were entitled to take into account and did not constitute bad decision making or evidence that the Lay Trustees had failed to manage a conflict of interest.

The Company submitted that the XXXXXXXXXXXXXXXX was a factor that the Panel ought to take account of when considering to exercise its power under Section 7 of the 1995 Act. In other words the Panel was asked to balance the interests of the Actives and the Deferreds. The Company acknowledged the interests of the Deferreds would be best served by whatever course of action secured the greatest portion of their pension benefits XXXXXXXXXXXXXXXXXXX.

A further argument advanced by the Company was that there was no inherent risk in postponing the decision to appoint an independent trustee to the Scheme since (a) the Scheme would soon be closing to future accrual which would prevent the deficit from increasing and (b) the Company XXXXXXXXXXXXXXX was beginning to make inroads into the Scheme's deficit. Therefore the Continuing Trustees ought to be given time to consider the Revised Proposal and meet with the Company to discuss it. It was therefore premature for the Regulator to allege that the Lay Trustees did not

have or exercise sufficient knowledge and skill, by reason of them accepting the Revised Proposal, since that had not in fact occurred. Further, these proceedings had focussed the minds of all of those involved and that fresh impetus had been given to resolving the issues that the Scheme faced.

While the Company accepted that the Lay Trustees' were faced by conflicting interests it did not accept that this had resulted in bad decision making on their part such as to justify the appointment of an independent trustee. Further the Company submitted that the conflicts of interest which did exist could be managed appropriately going forward notwithstanding the fact that there had been misunderstandings and problems in the past.

9. **Reasons for the Panel's decision**

As set out in paragraph 4 above the Panel determined to appoint ACMCA, as an independent trustee with exclusive powers, for the reasons set out below.

Trust Law:

In reaching its decision the Panel had to consider not only the factual evidence submitted in the Warning Notice and the responses to it both on paper and in the oral hearing, but also the submissions of the parties on a question of trust law. As noted in paragraph 8 above, the Company argued that it was reasonable for the Lay Trustees to take into account the possible XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.
The Company used the same argument as a rebuttal of the allegation that the Lay Trustees had failed properly to deal with their conflict of interest. The Regulator argued on the contrary that the XXXXXXXXXXXXXX was an irrelevant consideration.

The Regulator submitted that a trustee's duty was to the members of a scheme *as members*. To that end the Regulator relied on the authority of *Cowan v Scargill [1985] Ch270*. Since the Company also relied on *Cowan* to support the proposition that the Lay Trustees were entitled to take XXXXXXXXXXXXXXX into account it is necessary to examine this case in detail.

The background facts of *Cowan* relate to the Mineworkers' Pension Scheme. Mr Scargill challenged the right of the trustees of the scheme to invest the scheme's assets in certain classes of investment. In particular, objection was taken to the scheme investing in energies which were in direct competition with coal. The trustees argued that their duty to the members was to maximise the investment return for the scheme and that if they chose not to invest in certain types of investment, such as energies other than coal, then less money would be earned for the scheme and that was in breach of their duty to act in the best interests of the members. Accordingly the court had to determine what was in the best interests of the members.

In giving judgment Megarry V-C said this at paragraph 41:

> *"The starting point is the duty of the trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of the beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment as in the present case, the power must be exercised so as to yield the best return for the beneficiaries."*

From the above it is clear that the duty of the Continuing Trustees is to exercise their powers in the "best interests" of the members and that the members' interests are their financial interests as beneficiaries of the Scheme namely their pension benefits.

Megarry V-C then stated that it was not always the case that this meant acting in a way that was solely concerned with the financial benefit of the members. He stated, by way of example, at paragraph 48 that:

> *"if the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainment, as well as armaments, I can well understand that it might not be for the "benefit" of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities than they would have received if the trustees had invested the trust funds in other investments. The beneficiaries might well consider that it was far better to receive less than to receive more money from what they consider to be evil and tainted sources. "**Benefit" is a word with a very wide meaning, and there are circumstances in which arrangements which work to the financial disadvantage of a beneficiary may yet be for his benefit**".* (emphasis added)

The Company relied on the bolded section above for the proposition that "benefit" could include XXXXXXXXXXXXXXXXXXXXXXXX and this was a relevant consideration that the Lay Trustees were right to take into account. The Panel did not agree.

In the view of the Panel the passage of *Cowan*, on which the Company relied, should be considered in its proper context namely that in certain cases trustees may decline to invest in certain asset classes even if that meant a lower rate of return since that might still be for the "benefit" of the beneficiaries. The Panel did not consider that this was authority for the proposition that the trustees ought to take account of XXXXXXXXXX but was a rare example, as Megarry V-C emphasised, of situations in which a trustee could act otherwise than in accordance with a beneficiaries' best financial interests under a scheme.

Secondly paragraph 41 of *Cowan* makes it clear that the duty of trustees is to the members of the scheme and to protecting their interests *under the scheme*. There was no duty as set out in *Cowan* to consider wider interests of the members such as the issue of their employment with a third party. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, if they are continuing to accrue benefits as active members, it is reasonable for the trustees to take into account these members' interests in obtaining further accrual. In the present case however, it is proposed that the Scheme should be closed to future accrual. More generally, it can also be reasonable for trustees of a pension scheme to take account of the interests of the sponsoring employer, for example in reaching a compromise on the length of a satisfactory recovery plan which achieves the statutory funding objective. This is why the trustees have a duty to consider the interests of a sponsoring employer since it is the employer who contributes to the ongoing funding of a scheme (*Edge v Pension Ombudsman [2000] Ch 602*).

Even where there are still Actives who are continuing to accrue benefits, the judgement in *Cowan* would not justify the Continuing Trustees accepting proposals from the Company which would result in the Scheme's finances continuing to deteriorate, with no realistic prospect of a satisfactory recovery plan being implemented, XXXXXXXXXXXXXXXXXXXXXXXXX. Nor in these circumstances would the duty to have regard to the interests of the Company necessarily justify XXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXX.

Accordingly, merely because a factor is relevant does not mean that it is necessarily material. The materiality of a factor needs to be judged on the facts of the particular case and in the wider context of the interests of the generality of the members under the scheme.

<u>Knowledge and Skill:</u>

The Panel concluded that the Lay Trustees either did not have or in any case did not exercise the necessary knowledge and skill to administer the Scheme properly for four main reasons

i **Funding of Defined Benefit Arrangements**. Firstly the Panel considered that the Lay Trustees either did not have, or did not exercise, sufficient knowledge and understanding of the principles regarding the funding of defined benefit arrangements. Trustees are required to have appropriate knowledge of the principles relating to funding as set out in Section 247 of the Act the material parts of which state:

> *"(4) an individual to whom this section applies must have knowledge and understanding of-*
> *(b) the principles relating to-*
> *(i) the funding of occupational pension schemes, and*
>
> *(5)The degree of knowledge and understanding required by subsection (4) is that appropriate for the purposes of enabling the individual properly to exercise his functions as trustee of any relevant scheme."*

The purpose of the Proposal and the Revised Proposal (together "the Proposals") was to ensure that a recovery plan could be put in place in order to achieve the Scheme's Specific Funding Objective. There was no evidence before the Panel that the Lay Trustees even considered the Scheme Specific Funding Objective or whether the Proposals would result in an appropriate recovery plan which is a requirement of Section 226 of the Act. Both Lay Trustees in their final written submissions to the Panel made it clear that they continued to be prepared to accept the Company's proposals to increase its monthly contributions to levels, which would leave the scheme deficit getting worse, despite having been warned by the Regulator that this would not constitute an acceptable recovery plan.

By way of illustration, the Revised Proposal assuming (a) an immediate cessation of future accrual and (b) no allowance for interest or inflationary increases would result in a recovery plan of approximately 100 years based on a Section 179 deficit of circa £600,000. Given that the recovery plan is meant to address the Scheme Specific Funding Objective, which would be a higher figure than the Section 179 deficit, the recovery plan would in fact be considerably longer. It was clear to the Panel that these factors had not been considered or had been ignored by the Lay Trustees, since otherwise they could not have been in a position to agree to the Proposals. The issue was exacerbated by the fact that XXXXXXXXXXXXXXXXXXXXXXXXXXX the Company was unable to offer the Continuing Trustees any form of security for the Scheme's deficit. In those circumstances, where the Scheme is an unsecured creditor, agreeing to the Proposals showed a clear lack of understanding of Scheme Funding principles or a failure to apply them. In addition Mr McNair acted contrary to legal advice when he was advised by Ms Shackleton that the Proposal should not be accepted.

In summary the Panel considered that the Lay Trustees were unable or unwilling to recognise the enormity of the Scheme's deficit and that no realistic proposal had been made to address that deficit. The Lay Trustees seemed to have focussed on the fact that, in the words of Ms MacLachlan's statement of 22 September 2009, getting some contributions "*must be better than* XXXXXXXXXXXXXXXXXXXXXXXXXXXX *getting no contributions"*. The Panel concluded that this showed that there was no real understanding of the Scheme's funding position or the Lay Trustees' role in resolving the Scheme's difficulties. Further that while the Lay Trustees were able to outvote ACMCA no progress could be made towards properly evaluating the Proposals and if necessary, in the event that no appropriate recovery plan could be agreed, taking the necessary steps to protect Scheme members benefits XXXXXXXXXXXXXXXXXXXXXXXXXX.

ii **Relevant and Material Factors**. Secondly, a further example of a lack of knowledge and skill was the fact that the Lay Trustees, most notably Mr McNair, when considering whether to accept the Proposals, gave overriding weight to XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX to the exclusion of other considerations such as the interests of the Deferreds and the general state of the Scheme's finances.

The Panel noted that there were a number of instances in which Mr McNair had clearly regarded XXXXXXXXXXXXXXXXXXX as being a material factor for consideration by the Continuing Trustees. The first was in his e-mail of 3 February in which he stated that by accepting the Proposal XXXXXXXXXXXXX. The Panel notes that on this occasion Mr McNair was taking XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX into account when considering what was in the best interests of the members. That was plainly inappropriate and there was no suggestion by the Company that this would be relevant consideration as it clearly was not. The second instance was Mr McNair's e-mail of 18 September 2009 in which he stated that he was always prepared to accept the Revised Proposal on the grounds that it would result in the members retaining "*pensions XXXXX*".

There was no explicit evidence that Ms MacLachlan had taken XXXXXXX into account as a material factor and therefore the Panel did not find as a fact that she had done so. However, the fact that she was prepared to agree to the Proposals and that she raised no objection to Mr McNair's reasoning indicates to the Panel that she saw nothing wrong with taking the XXXXXXXXXXXXXX into account as a material factor.

As noted in the discussion of *Cowan* case above, the Panel's view is that XXXXXXXXXXXXXXXX is only relevant to the Continuing Trustees' deliberations to the extent that it affects their interests through the continued accrual of benefits, which the Company has proposed to bring to an end.

iii **Balancing Members' Interests**. However, even if the Lay Trustees were right to regard XXXXXXXXXXXXXXXX as a material consideration, in the Panel's view it has to be considered in the wider context of the interests of the generality of the Scheme's members and in the light of the overall effect of the Company's proposals on the Scheme Funding Objective. There was no evidence before the Panel that the Lay Members also had regard to the interests of the Deferreds or the Pensioners. It appeared to the Panel that the Lay Trustees had not considered how the Deferreds or the Pensioners might be affected.

Given that the Scheme was expected to be closing to future accrual and that no realistic proposal had been put forward to clear the funding shortfall, the interests of all the members were plainly best served by considering whether the Company could be persuaded to agree to an acceptable recovery plan or, if that was regarded as unrealistic, considering what steps should be taken XXXXXXXXXXXXXXXXXXXXXXXX. There was nothing to show that the Lay Trustees had considered this. Rather they had regarded the XXXXXXXXXXXXX as the most important, if not the only, factor to be considered.

Finally the Panel had regard to what the Lay Trustees should have done if, as the Company submitted, they were entitled to have regard to XXXXXXXXXXXXXXXXXX as a relevant factor even after the Scheme had closed to future accrual. The Panel felt that there was no evidence to suggest that the Lay Trustees had balanced the XXXXXXXXX XXXXXXXXXXXX against the fact that with the large funding deficit there was a risk that both the Actives and the Deferreds stood to receive significantly reduced pension benefits. As set out in the above paragraph there was no evidence to suggest that the Lay Trustees considered how the various competing interests would be impacted XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

iv. **Conflicts of Interest.** Finally the Panel considered that the actions of the Lay Trustees demonstrated that they either lacked, or failed to exercise, the necessary knowledge and skill regarding their duty as trustees to identify, record and properly manage the conflicts of interest to which they were subject.

It was undisputed that trustees are not entitled to put themselves into a position in which their personal interests conflict with their duties as a trustee. This is known as the no-conflict rule (see Lewin on Trustees; 18th edition 20-01).

The Regulator considered that the Lay Trustees were in a conflicted position since (a) they were either employed by the Company, received a salary as a result of being a director and/or were a creditor of the Company and therefore had a personal interest XXXXXXXXXXXXXXXXXXXXXXXXX and (b) as trustees they needed to give proper consideration to measures which XXXXXXXXXXXXXXXXXXXXXXXXXXXXX Accordingly the Lay Trustees needed to manage these conflicts in an appropriate way.

In considering what was appropriate the Panel had regard to (a) the Scheme's "Trustee Policy and Procedure for Managing Conflicts of Interest" and (b) the Regulator's guidance on conflicts of interest[1]. The Panel considered that the material parts of the Scheme's policy were as set out in paragraph 4 (under the heading Policy and Procedure) and paragraph 2 (under the heading Trustee Business) which stated respectively that:

> *"(4) Each Scheme Trustee, Trustee Adviser and member of the in-house personnel will periodically confirm their interests, potential conflicts and undertake to advise of any changes to their position. Such matters will be recorded in the Trustee Minutes;*
>
> *(2) The management of confidential information - The Pensions Regulator has made it very clear, and the Scheme Trustees accept that, a Scheme Trustee who could be involved in both sides of a negotiation needs to consider their position very carefully. Accordingly a conflicted Scheme Trustee will do one of the following: (i) resign; (ii) leave the room and not take part in the relevant discussion; or (iii) abstain from voting."*

The guidance from the Regulator, at paragraph 62, states that:

> *"In some cases conflicts may be so acute or pervasive that they should be avoided entirely, by not appointing a person so conflicted, or even by the resignation of an existing trustee. This may be preferable to having to make arrangements designed to prevent the person in question from influencing decisions of the trustees (or even to prevent the person from gaining knowledge of the other trustees' plans or negotiating position). By way of example only, such conflicts might arise:*

[1] A copy of which is available at:
http://www.thepensionsregulator.gov.uk/guidance/guidance-conflicts-of-interest.aspx

(1) where the trustees of a scheme in deficit have to assess either over a short or extended period whether to demand a substantial contribution from an employer in financial difficulties or to exercise a power to put a scheme into wind-up, triggering a similar demand under section 75 of the Pensions Act 1995."

The Panel considered that while the Scheme's policy referred to situations in which the Lay Trustees were on "both sides of a negotiation" the spirit of the policy was that the Lay Trustees should not take part in decisions in which they were strongly conflicted. The Panel was reassured in reaching this view by the guidance from the Regulator which gave a pertinent example as to when trustees ought to avoid a conflict XXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX.

The Panel considered that there were plainly instances in which the Lay Trustees had failed to manage their conflicts of interest appropriately and had allowed themselves to participate in decisions and agreed to a course of action which, at the least, could give the appearance of them giving preference to their personal interests.

(i) Firstly, Mr McNair's reversal of his position on whether the Company's offer should be accepted after the meeting of the trustees on 27 January. (The Panel accepts the evidence of the minutes of the meeting, supported by Mr Martin, that at the meeting itself Mr McNair agreed that the offer should be rejected and changed his mind later).

The Panel considered that Mr McNair ought to have excused himself from the decision making process and at the very least indicated that he was conflicted and sought appropriate advice.

(ii) Further, and of more concern, was the e-mail dated 18 September 2009 as set out above in paragraph 6. The e-mail clearly showed that Mr McNair, if he had not already done so, plainly still thought that it was appropriate for him to vote on the Revised Proposal. The Panel considered that this was a clear example of an acute conflict of interest which he ought to have (a) recognised and (b) taken steps to manage.

Instead Mr McNair proceeded on the basis that he could properly vote to accept the Revised Proposal apparently on the grounds that its XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXX. In taking this line Mr McNair ignored the fact that the Revised Proposal was plainly inadequate to reduce or even to stop the increase in the Scheme deficit.

(iii) The Panel also noted that Mr McNair allowed Mr Caplan, as a representative of the Company, to speak on his behalf as a trustee at the meeting on 24 February 2009. The Panel took the view that this was wholly inappropriate and demonstrated that Mr McNair did not appreciate the need for him, as a trustee, to act and be seen to act independently of the Company.

(iv) As with Mr McNair, the Panel felt that Ms MacLachlan was plainly conflicted and she should have realised this and taken appropriate steps, such as absenting herself from the decision making process.

The Company's defence in relation to the issue of conflict of interests amounts to a reassertion that the actions described above did not amount to a mismanagement of conflicts of interest, because it was reasonable for the Lay Trustees to have regard to XXXXXXXXXXXXXXXXXXXXXXXXXX. The Panel has dealt with this issue in its discussion of the *Cowan* case and in discussion of the Lay Trustees' knowledge and skill.

Best interests of the generality of the members:

The Panel concluded that it was in the best interests of the generality of the members to appoint an independent trustee with exclusive powers for reasons which flow from those given above.

The Lay Trustees are currently in a position where they can outvote ACMCA and there is seemingly little or no progress towards a proper consideration of how realistically the Scheme Specific Funding Objective is going to be achieved. The Panel accepted the Regulator's submission that the Lay Trustees on the one hand, and ACMCA on the other, have effectively reached a standstill where no further progress can be made given that the Lay Trustees can outvote ACMCA.

The Panel considered that the appointment of an independent trustee was not premature. The Continuing Trustees had reached a standstill and the Lay Trustees appeared to have fixed their minds to allowing the position to continue. The Panel concluded that there was nothing to be achieved in allowing the status quo to continue while the liabilities of the Scheme continued to increase and no steps were likely to be taken in the foreseeable future to address fundamentally the Scheme's funding position.

The exercise of the Panel's discretion:

As set out above the Panel has to have regard to the statutory objectives of the Regulator as set out in Section 5 of the Act. One of these objectives is to protect the Pension Protection Fund. It appeared to the Panel that the longer the Scheme stayed open to future accrual the greater the risk of the deficit continuing to increase and therefore the greater the risk to the Pension Protection Fund.

Although the Company had indicated that it would be closing the Scheme to future accrual there had been very little progress in this regard. By appointing an independent trustee with exclusive powers the Panel considered that more rapid progress could be made towards closing the Scheme to future accrual and protecting the Pension Protection Fund as a result.

The Company submitted that the Panel ought to take XXXXXXXXXXXXXXX XXXXXXXXXXXXXX into account when considering whether appointing an independent trustee would be in the interests of the generality of the members as set out in Section 7 (3)(d) of the 1995 Act.

The Panel did not consider that XXXXXXXXXXXXXXXXXXXX was a material consideration in determining whether it was reasonable to exercise its power under Section 7 of the 1995 Act. Firstly Section 7 (3)(d) referred to the interests of the *members of the Scheme*. This language strongly implied to the Panel that, as with the Continuing Trustees, the relevant interests are those that arise as a result of membership of the Scheme namely pension benefits. Further the Regulator's statutory objectives refer explicitly to protecting benefits under occupational pension schemes of, or in respect of, members of such schemes. Again this strongly implies that the wider interests of the Active members was not a material consideration for the Panel.

The Panel formally recorded the fact that Mr Caplan had stated that he had not received some of the papers for the oral hearing. However, his counsel had received all of the documentation and it was accepted by his counsel that Mr Caplan had suffered no prejudice.

<u>The appointment of ACMCA:</u>

When considering who to appoint as independent trustee with exclusive powers the Panel felt that appointing ACMCA was the most appropriate course of action. ACMCA is already familiar with the provisions of the Scheme and has experience of the issues that the Scheme faces. Further, the appointment of another independent trustee would result in the Scheme, which is already much under funded, in paying two sets of independent trustee fees which it could ill afford to do. Therefore the Panel decided to appoint ACMCA with exclusive powers.

10. **Right of appeal**

Appendix 1 contains important information about the right to appeal.

Signed: Olivia C Dickson

Chairman: **Olivia C. Dickson**

Dated: 26 October 2009

Appendix 1

Section 5 of the Pensions Act 2004
Regulator's objectives

(1) The main objectives of the Regulator in exercising its functions are –

(a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
(b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
(c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
(d) to promote, and to improve understanding of, the good administration of work-based pension schemes.

(2) For the purposes of subsection (1)(b) the members of personal pension schemes within this subsection are-

(a) the members who are employees in respect of whom direct payment arrangements exist, and
(b) where the scheme is a stakeholder pension scheme, any other members.

(3) In this section-

"stakeholder pension scheme" means a personal pension scheme, which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c.30)(register of stakeholder schemes);
"work-based pension scheme" means-
(a) an occupational pension scheme,
(b) a personal pensions scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
(c) a stakeholder pension scheme.

Section 100 of Pensions Act 2004
Duty to have regard to the interests of members etc

(1) The Regulator must have regard to the matters mentioned in subsection (2) –
(a) when determining whether to exercise a regulatory function –
(i) in a case where the requirements of the standard or special procedure apply, or
(i) on a review under section 99, and
i. when exercising the regulatory function in question.
(2) Those matters are –
(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

Appendix 2

Referral to the Pensions Regulator Tribunal

You have the right to refer the matter to which this Determination Notice relates to the Pensions Regulator Tribunal ("the Tribunal"). Under section 103(1)(b) of the Act you have 28 days from the date this Determination Notice is given to refer the matter to the Tribunal or such other period as specified in the Tribunal rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice. The Tribunal's address is:

The Pensions Regulator Tribunal
15-19 Bedford Avenue
London
WC1B 3AS

Tel: 020 7612 9649.

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal Rules.

You should note that the Tribunal rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to The Pensions Regulator. Any copy reference notice should be sent to:

Determinations Support
The Pensions Regulator,
Napier House
Trafalgar Place
Brighton
BN1 4DW.

Tel: 01273 627698