	<p>Special Procedure</p> <p>DETERMINATION NOTICE under section 98(2)(a) of the Pensions Act 2004 (the “Act”)</p> <p>The Basil L Leeder & Sons Limited Pension and Life Assurance Scheme (the “Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>TM5784</p>
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1. Summary

The Determinations Panel (the “Panel”), on behalf of the Pensions Regulator (the “Regulator”), met on 2 June 2009 to consider whether to grant an application made by the Regulator under the Special Procedure as set out in Section 97 of the Act.

The Panel was asked to consider whether to appoint an independent trustee to the Scheme pursuant to Section 7 of the Pensions Act 1995. In addition the Panel was asked to issue a vesting order pursuant to Section 9 of the Pensions Act 1995.

In summary the Panel determined that the use of the Special Procedure was appropriate for the reasons given in point 6 ‘Reasons for the use of the Special Procedure’ below. Further that an independent trustee should be appointed pursuant to Section 7 of the Pensions Act 1995 and a vesting order should be issued pursuant to Section 9 of the Pensions Act 1995 for the reasons given in point 7 ‘Reasons for decision to appoint an IT and issue a vesting order’ below.

2. Matter to be determined

Pursuant to Section 97(2) of the Act the Panel was asked to use the Special Procedure, and therefore dispense with the giving of a warning notice, because there is, or the Regulator considers it likely, that if a warning notice were to be given there would be an immediate risk to:

- i. the interests of members of the Scheme; or
- ii. the assets of the Scheme.

In addition the Panel was asked to issue an order under Section 7(3)(a), (c) and/or (d) of the Pensions Act 1995 to appoint a trustee to the Scheme if it was satisfied that it was reasonable to do so in order:

- i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme pursuant to Section 7(3)(a);
- ii. to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c);
- iii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d);

and for the powers or duties of any trustee so appointed to be to the exclusion of other trustees and for any fees and expenses of a trustee so appointed to be paid out of the resources of the Scheme and that an amount equal to the amount paid out of the resources of the Scheme is to be treated as a debt due from the employer to the trustees of the Scheme from the employer's resources.

And, for an order pursuant to Section 9 of the Pensions Act 1995 to be made to order that any property vests in, or transfers to, the appointed independent trustee in consequence of that appointment.

3. Directly affected parties

The following are the parties considered as being directly affected by the regulatory action outlined in point 8.

- (a) Andrew Richard Leeder –Employer Nominated Trustee
- (b) Basil Richard Leeder – Employer Nominated Trustee
- (c) Christopher John Leeder – Employer Nominated Trustee (collectively the “Existing Trustees”)
- (d) Basil L Leeder & Sons Limited (“BLL”) – Principal Employer
- (e) Messrs B L Leeder – Participating Employer
- (f) The Poplars Farm Limited – Participating Employer
- (g) Dalriada Trustees Limited – the appointed Independent Trustee

4. Details of Scheme and the Employer companies

This is an open, defined benefit scheme with 38 members, 12 of whom are active, 16 are deferred and 10 are pensioner members. The value of the funds, as at 9 July 2007, were stated as being £1,139,323.

BLL and the two Participating Employers are all trading and are involved in the agricultural sector. The Poplars Farm Limited has sought to cease participating in the Scheme but no evidence has been seen by the Regulator to confirm that this has been formally effected.

5. Background to application

During the course of an investigation relating to this Scheme, the Regulator was provided with information that the Existing Trustees had persistently breached pension legislation and were in a position in which their interests were conflicted.

i. Specifically it was submitted that the Existing Trustees had:

- failed to pay contributions to the Scheme;
- failed to complete the scheme accounts;
- failed to pay the Scheme's death in service insurance premium;
- failed to furnish the auditor with requested information;
- failed to complete an actuarial valuation, recovery plan or associated documentation.

It was also submitted that:

- the Existing Trustees interests as trustees conflicted with their interests in BLL and the Participating Employers.

XXXXXXXXXXXXXXXXXXXXXXXXXXXX the Regulator became aware that member contributions had not been paid to the Scheme.

ii. **Failure to pay contributions to the Scheme** The Regulator was given to understand that no contributions had been paid to the Scheme since 10 January 2007. The amount of outstanding contributions was considered to be £189,238.01. The Scheme Actuary had confirmed that £11,133.97 of this amount were members' contributions of 6% of pensionable salaries.

iii. **Failure to complete Scheme accounts** The Scheme Auditor reported to the Regulator on 27 February 2009 under Section 70 of the Act that the Existing Trustees had not provided it with the documents required to audit the Scheme accounts as at 9 July 2008 and that the Existing Trustees had not responded to his communications. The Auditor also stated that he had concerns in relation to the Existing Trustees' administration of the Scheme and that members' future benefits might be affected.

The Auditor had attempted to contact Andrew Leeder on 1 and 20 November 2008, 5 and 8 January and 18 and 20 February 2009 but had received no response from him or from any of the other Existing Trustees.

iv. **Non-payment of death in service insurance premium** On 27 May 2009 the Scheme Actuary confirmed to the Regulator that the Existing Trustees had let the death in service insurance policy expire due to the non-payment of premiums and provided the Regulator with

email correspondence on this point. The unpaid premiums amounted to £18,545.79.

- v. **Failure to complete actuarial valuation, recovery plan and associated documentation** The Scheme's first Specific Funding Actuarial Valuation was due as at 9 July 2007 and should therefore have been completed by 9 October 2008 but is still outstanding. Again, the Scheme Actuary has chased the existing Trustees on this on more than one occasion but with no success.
- vi. **Conflict of Interest** The Regulator's records on this Scheme list all three of the Existing Trustees as being employer appointed. Andrew Leeder is Company Secretary for BLL; Basil Leeder and Christopher Leeder are Directors of BLL. In addition, Basil Leeder and Christopher Leeder are shareholders of BLL.

Andrew Leeder confirmed in an email dated 8 January 2009 that the Existing Trustees had implemented a Conflicts of Interest Register on 1 October 2008 and had agreed to seek legal advice wherever there was a risk that a conflict could realistically result in a decision being influenced by improper or irrelevant considerations. Both the Scheme Actuary and Scheme Auditor advised the Regulator that they were not aware of any legal advisers being appointed to the Scheme.

- vii. **Necessary Knowledge and Skill** The Scheme Actuary also advised that he had not attended a single trustee meeting since his appointment five years ago.
- viii. In addition to the above, the Regulator had not been able to establish whether the Existing Trustees had followed any of the required procedures in relation to the appointment of member nominated trustees.

In view of all of the above points the Regulator considered that it would be reasonable and appropriate to seek the appointment of an independent trustee to the Scheme.

6. **Reasons for the use of the Special Procedure**

- i. The Panel felt that the use of the Special Procedure was justified given that there was an immediate risk to the interests of the members and the assets of the Scheme. This risk was present due to the historical, and apparently ongoing, failure to pay members' contributions to the Scheme and the failure to pay death in service insurance premiums. These risks, in the Panel's view, made it appropriate to dispense with the giving of a warning notice.
- ii. Further, the Panel felt, as set out in more detail in point 7 below, that it was necessary to exercise the reserved regulatory functions in

question immediately because of the aforementioned risks to the interests of the members and the assets of the Scheme.

7. Reasons for decision to appoint an IT and issue a vesting order

In making its decision the Panel had regard to the objectives of the Regulator as set out in Section 5 of the Act and to the matters mentioned in Section 100, as set out in **Appendix 1**.

On the evidence before it, the reasons for the Panel's decision were:

- i. there had been a failure to pay the members' contributions, which had been deducted from their salaries, to the Scheme. Such a failure, which appeared to be ongoing, represented a threat to both the interests of the members and the assets of the Scheme;
- ii. the persistent failure by the Existing Trustees to respond to queries from both the Scheme Actuary and Scheme Auditor indicates a lack of skill and knowledge in relation to the administration of the Scheme. This ongoing failure means that there is no accurate knowledge of how the Scheme is being administered;
- iii. the failure to pay the death in service insurance premium means that the relevant policy has now expired. A claim arising from the death of any member would not therefore be payable by the insurers and would have to be met out of the Scheme's assets. This poses a considerable and immediate risk to the assets of the Scheme and to the interests of the generality of members;
- iv. the Existing Trustees all undertake prominent roles in the running of BLL and the Participating Employers and in the absence of any legal advice it appears to be very difficult for the Existing Trustees to separate their roles as trustees in relation to the activities of the Scheme as distinct from their roles with BLL and the Participating Employers;
- v. no action has been taken in relation to the selection and appointment of member nominated trustees which means that members are not properly represented in relation to any decisions concerning the Scheme.

The Panel felt, given the above, that it was reasonable to appoint a trustee in order to:

- (a) 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);
- (b) secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c);

- (c) otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).

8. Decision

A. Application under Section 7 of the Pensions Act 1995

The Panel granted the application for an order to be issued pursuant to Section 7 of the Pensions Act 1995. The Panel determined that an order be issued in the following terms:

1. Dalriada Trustees Limited of Chamber of Commerce House, 22 Great Victoria Street, Belfast BT2 7BA is hereby appointed as trustee of the Basil L Leeder & Sons Limited Pension and Life Assurance Scheme (“the Scheme”) with effect on and from 2 June 2009.
2. 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 as set out below, in order:
 - i. to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the Scheme pursuant to Section 7(3)(a);
 - ii. to secure the proper use or application of the assets of the Scheme pursuant to Section 7(3)(c);
 - iii. otherwise to protect the interests of the generality of the members of the Scheme pursuant to Section 7(3)(d).
3. The powers and duties exercisable by Dalriada Trustees Limited shall be to the exclusion of all other trustees of the Scheme pursuant to Section 8(4)(b) of the Pensions Act 1995.
4. Dalriada Trustees 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 Act.
5. 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 form the Pensions Regulator to the appointed trustee, pursuant to Section 7(5)(c) of the Pensions Act 1995.

B. Application under Section 9 of the Pensions Act 1995

The Panel granted the application for an order to be issued pursuant to Section 9 of the Pensions Act 1995. The Panel determined that an order be issued in the following terms:

- (i) the Pensions Regulator hereby orders the vesting in, and the assignation and transfer to, Dalriada Trustees Limited of Chamber of Commerce House, 22 Great Victoria Street, Belfast, BT2 7BA, as trustee of the Basil L Leeder & Sons Limited Pension and Life Assurance 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.

9. Important Notices

This Determination Notice is given to you under Sections 98(2)(a) of the Act. The following statutory rights are important.

10. Representations to the Pensions Regulator

Take notice that you have the opportunity to make representations to the Pensions Regulator which will make up your defence to the allegations.

In your reply to this notice, please say whether you accept that the Determination Notice is accurate and if you intend to oppose it. You may believe that:

- the determination is wrong in some particular detail; or
- the Regulator should not have used its power in this case.

In any of these circumstances you will need to provide evidence to support your argument.

11. Compulsory review

This determination is subject to a compulsory review by the Regulator under Section 99 of the Act. Any representations received will be considered by the Regulator before a determination is made on review. This review must be determined as soon as reasonably possible.

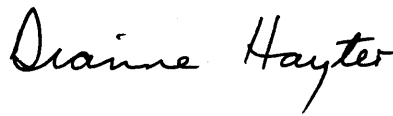
The Regulator's powers on a review under this section include power to:

- i. confirm, vary or revoke the determination;
- ii. confirm, vary or revoke any order, notice or direction made, issued or given as a result of the determination;
- iii. substitute a different determination, order, notice or direction;
- iv. deal with the matters arising on the review as if they had arisen on the original determination, and
- v. make savings and transitional provision.

You will be informed of the outcome of the review by way of a "Final Notice".

12. Referral to the Pensions Regulator Tribunal

After the compulsory review, you will have the right to refer the matter, to which this Determination Notice relates, to the Pensions Regulator Tribunal (the "Tribunal") under section 99(7) of the Act. The Final Notice will give more details regarding referrals to the Tribunal.



Signed:

Chairman: Dianne Hayter.....

Dated: ...5 June 2009..

Section 5 of the Pensions Act 2004
Regulator's objectives

- (1) The main objectives of the Regulator in exercising its functions are –
- (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
 - (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
 - (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
 - (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.
- (2) For the purposes of subsection (1)(b) the members of personal pension schemes within this subsection are-
- (a) the members who are employees in respect of whom direct payment arrangements exist, and
 - (b) where the scheme is a stakeholder pension scheme, any other members.
- (3) In this section-
- “stakeholder pension scheme” means a personal pension scheme, which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c.30)(register of stakeholder schemes);
- “work-based pension scheme” means-
- (a) an occupational pension scheme,
 - (b) a personal pensions scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
 - (c) a stakeholder pension scheme.

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

- (1) The Regulator must have regard to the matters mentioned in subsection (2) –
- (a) when determining whether to exercise a regulatory function –
 - (i) in a case where the requirements of the standard or special procedure apply, or
 - (i) on a review under section 99, and
 - (b) when exercising the regulatory function in question.

- (2) Those matters are –
- (a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
 - (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.