

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under Section 96(2)(d) of the Pensions Act 2004 (“the Act”)</p> <p>McNicholas Construction (Holdings) Limited Pension Scheme (“the Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p>TM8151</p>
-----------------------------------	--	--

1. The Determinations Panel, on behalf of the Pensions Regulator, met on 17 September 2010 to decide whether to exercise a reserved regulatory function in relation to the issues in the Warning Notice dated 2 August 2010. The Pensions Regulator considered under Section 10(2) of the Act that the exercise of a reserved regulatory function was appropriate.

2. Matter to be determined:

The function the Panel was asked to exercise was the application made by the Regulator for an order to be issued under section 3 of the Pensions Act 1995 to prohibit XXXXXX from being a trustee of trust schemes in general

3. Parties

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

- (a) XXXXXX
- (b) McNicholas Construction (Holdings) Ltd (“McNicholas”)
- (c) Mr Gary Dunleavy (“Mr Dunleavy”)
- (d) Mr Andrew Rogers (“Mr Rogers”)
- (e) Mr Steven McNicholas (Mr McNicholas)

4. Background

1. The Regulator received a Breach of Law report dated 31 July 2009 from Pinsent Masons LLP acting on behalf of McNicholas.

2. The report set out the following (in summary):

a. In or around July 2009, evidence was uncovered to suggest that a trustee of the McNicholas Construction (Holdings) Limited Pension Scheme (“the Scheme”), XXXXXX, had attempted to transfer funds from the Scheme bank account to a bank account in XXXXXX name on three occasions (9 October 2008, 16 January 2009 and 3 June 2009);

- b. The first two transfers were successful and the third was blocked by the bank;
- c. A total of £45,000 was transferred from the Scheme bank account without the knowledge of the two other trustees;
- d. XXXXXX was not a member of the Scheme and the transfers were not made pursuant to legitimate scheme business;
- e. Immediately upon discovery of the transfers, XXXXXX was removed from XXXXXX position as a Scheme Trustee.

3. The Scheme bank statements and the transfer documentation was provided to the Regulator showing the first two transfer amounts of £20,000 and £25,000 debited from the Scheme's bank account .

4. At a disciplinary hearing held on 5 August 2009 XXXXXX admitted to the theft and offered XXXXXX sincerest apologies. XXXXXX said XXXXXX actions were the actions of a desperate XXXXXX. The disciplinary hearing decided to dismiss XXXXXX from employment for gross misconduct with immediate effect.

5. In a letter from XXXXXX to Mr McNicholas dated 9 August 2009, XXXXXX offered XXXXXX sincerest apologies again and stated that XXXXXX actions were totally inexcusable.

Recovery of funds

1. Mr McNicholas contacted XXXXXX in September 2009 to arrange the recovery of the £45,000 misappropriated by XXXXXX. XXXXXX was provided with two options:

- Repayment of the full amount together with any lost interest by way of an immediate transfer to the Scheme's bank account;
- Exercising the trustees' right to set-off the amount against XXXXXX pension scheme benefits. This would require a deed to be effected with XXXXXX signature.

2. XXXXXX agreed to this matter being resolved by way of a set-off against XXXXXX pension and to the amount of the set off and on 10 February 2010 XXXXXX signed a deed to this effect.

3. On 4 May 2010, Mr McNicholas confirmed to the Regulator that in return for XXXXXX co-operation there would be no further action by McNicholas following the theft and that both the trustees and the company believed the matter dealt with; XXXXXX had been dismissed from the company, removed as a trustee and the Scheme had not suffered a net loss (albeit through a deed of recovery).

4. Mr McNicholas also confirmed no other irregular payments appeared to have been made.

5. In line with the Proceeds of Crime Act, Pinsent Masons LLP notified the Serious Organised Crime Agency (SOCA) of XXXXXX actions and sought their consent regarding the arrangement of setting the amount against XXXXXX pension. SOCA consented to this on 21 January 2010.

Regulator's submissions

1. Based on the actions of XXXXXX detailed in this notice, and XXXXXX admission to the misappropriation of funds, the Regulator submitted that XXXXXX was not a fit and proper person to be a trustee of trust schemes in general. The Regulator was of the understanding that XXXXXX was not a trustee of any occupational pension schemes as at the current date however that would not prevent XXXXXX becoming a trustee of an occupational pension scheme in the future.

2. In published guidance on the Prohibition of Trustees, the Regulator stipulates the criteria for 'fit and proper persons'. Under the headings 'Standards expected by the Regulator' the Regulator states that it would consider information which raises concern about a trustee's honesty and integrity; competence and capability; and financial soundness.

3. In regards to honesty and integrity, trustees often have beneficial ownership and bank signatory rights in respect of large amounts of scheme funds held on trust for scheme members. Trustees have a duty to act in the best interests of the scheme beneficiaries and are expected to act with complete honesty and integrity with respect to their trustee functions. Clearly, by misappropriating funds directly from the Scheme for XXXXXX own benefit, XXXXXX, by XXXXXX own admission, had not acted with honesty or integrity, and had breached XXXXXX duty to act in the best interests of the beneficiaries of the Scheme.

4. Furthermore, the misappropriation or theft of scheme funds is a criminal offence, and whilst the company was not minded to take further action in respect of the theft, it remains a serious breach of law by XXXXXX.

5. For these reasons the Regulator submits that XXXXXX should be prohibited from acting as trustee to trust schemes in general.

5. Decision

The Panel granted the application for an order to be issued under Section 3 of the Pensions Act 1995. The Panel determined that an order be issued in the following terms:

The Pensions Regulator hereby prohibits XXXXXX from acting as a trustee of trust schemes in general with effect from the date of this order, pursuant to section 3(1)(c) of the Pensions Act 1995.

This Order prohibits XXXXXX from exercising any functions as a trustee of trust schemes in general.

This Order remains in effect unless and until revoked pursuant to section 3(3) of the Pensions Act 1995.

6. Submissions of the parties

In making the determination the Panel took into account the evidence and submissions included in the Warning Notice. It also took into account the response and submissions to the Warning Notice sent by:

(a) Steven McNicholas on behalf of the Trustees.

No response or submissions were received from XXXXXX or McNicholas.

7. Statutory issues

In making their 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**.

8. Reasons for decision

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

1. The actions of the then trustee, xxxxxx, in transferring a total of £45,000 from xxxxxx employer's pension scheme to a private account amounted both to deliberate breaches of trust and a criminal offence.
2. xxxxxx admitted in xxxxxx letter of 9 August 2009 to xxxxxx employer that xxxxxx actions amounted to a betrayal of trust.
3. In a Deed of Set-Off dated 10 February 2010 and signed by xxxxxx following legal advice, xxxxxx agreed that the misappropriation of these funds constituted a criminal and/or fraudulent act and was in breach of trust.
4. Although under the Deed of Set-Off, xxxxxx agreed terms for the recovery of the misappropriated funds by the pension scheme and resigned as a trustee, the Panel is required to consider in the circumstances whether xxxxxx is a fit and proper person to be a trustee of trust schemes in general.
5. Having had regard to the matters of xxxxxx honesty and integrity and xxxxxx significant and deliberate breaches of trust, the Panel determined to prohibit xxxxxx from being a trustee of trust schemes in general, in accordance with Section 3(1)(c) of the Pensions Act 1995.

9. **Appendix 2** to this Determination Notice contains important information about the rights of appeal of the parties against this decision.

Signed: 

Chairman: **Duncan Campbell**

Dated: 20 September 2010

Section 5 of the Pensions Act 2004
Regulator's objectives

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

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

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

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

Referral to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under section 103 of the Pensions Act 2004 (“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 Tax and Chancery Chamber of the Upper Tribunal
45 Bedford Square
London
WC1B 3DN
Tel: 020 7612 9700

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 811852