Wilberforce CHAMBERS

Edward Nugee Memorial Lectures

Lecture Notes June 2021

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Wilberforce Pensions

The Edward Nugee Memorial Lectures

Contents

Foreword

This is a book with the full text papers from the Edward Nugee Memorial Lectures given in June 2021.

Edward Nugee QC, who died in 2014, was the head of our chambers for over 30 years until 2006. He was a pre-eminent trusts lawyer who helped shape the modern law of pensions in seminal cases such as *Re Courage, Imperial Foods* and *Mettoy v Evans*. Under his leadership, Wilberforce Chambers became the leading set of pensions barristers with a strong tradition of expertise and specialisation in pensions law that continues and thrives today. This series of lectures is dedicated to his memory.

The Edward Nugee Memorial Lectures have now been running annually, together with the publication of an accompanying book of full text papers, since 2015. We are very pleased that they maintained their popularity, including this year when the lectures were for the second year in necessarily "virtual" form.

As with previous years, we have attempted to focus not only on issues arising in contentious disputes but also on issues of interest to those working on non-contentious matters. This means that, though the talks are up to date with the latest relevant developments, we try to focus less on litigation and more on technical issues of pensions law that are interest to those working on non-contentious matters as well as to litigators.

1. *Overpayments and underpayments – recent developments*. The first talk was given by Andrew Mold QC, Edward Sawyer, Tom Robinson and Simon Atkinson. It focused on three issues: (i) The latest on recovery of overpayments: limitation, recoupment and s 91 PA 1995, (ii) Equitable set-off in statutory schemes: Re Mr E, PO-29198; and (iii) The potential effect of limitation periods on claims for benefit underpayments following *Lloyds* and (the yet to be decided) *Axminster*.

2. *DB pensions and corporate insolvency - double jeopardy?* The second talk was from Gary Squires (Lincoln Pensions) and Michael Tennet QC and looked at the tricky issues arising for directors given that they are subject to both company law duties and to potential liabilities under pensions legislation. It looked at Directors' duties to stakeholders, timing of insolvency proceedings, competing claims and constituencies and settlement of claims.

3. *Topical issues in public sector pensions*. The third talk was given by Paul Newman QC and dealt with some of the general issues for public service schemes, including the "fiduciary principle", exit credits in the LGPS, the legal effect of strategy statements, investment issues and the current position on discrimination claims: where are we on *McCloud* and *Sargeant*?

4. The last session split into two:

    a. *From the tax tribunals…* Emily Campbell looked at four tax tribunal decisions: (i) *SIPPchoice* and contributions in specie; (ii) *Hymanson* and mistaken contributions; (iii) *Bella Figura*, discovery assessments and waiver of the scheme sanction charge; and (iv) *Gammell v HMRC* and late applications for transitional protection. Ultimately, is there a thread of principle: reasonable taxpayer excuse?

b. *Pensions trustee companies: an update after Lehtimäki*. Robert Ham QC and David Pollard looked at the implications for fiduciaries and those involved with pension trusts of the decision of the Supreme Court in a charity case. The talk looked at what the Supreme Court decided, Courts giving directions to fiduciaries after *Lehtimäki*, the impact on pension trustee companies, and the impact on directors of trustee companies.

We hope the lectures were of interest and that this booklet, with the full texts, will be of continuing use.

If you have any questions arising out of the lectures or these papers, please do feel free to get in touch. We would be very pleased to discuss them further with you.

David Pollard

Speakers

Guest Speaker: Gary Squires
Gary is a Senior Advisor at Lincoln Pensions having previously been a Managing Director at AlixPartners. He is a chartered accountant, insolvency practitioner and CEDR accredited mediator with over 30 years' experience in corporate restructuring and stakeholder advisory roles, across a wide range of industry sectors. Since 2004, Gary has focused on advising pension scheme sponsors, trustees and other stakeholders regarding employer covenant and DB pensions restructuring. He has developed a particular niche acting as an expert witness in pensions regulatory and court proceedings. Gary is a founding member and past chair of the Employer Covenant Practitioners Association and co-author of *'Pensions and Corporate Insolvency – a Practitioner's Guide'* (Jordan Publishing Limited 2013).

Robert Ham QC
Robert was one of the first trust practitioners to specialise in occupational pension work and was invited to join the APL when it was established. He appeared in the first modern case in the Court of Appeal – *Kerr v British Leyland* – and the first modern case to go to the House of Lords – the *National Grid* case. More recently, he has been involved, both as counsel and as an expert witness, in contribution notice and FSD cases as well as the inevitable RPI/CPI cases. He is a longstanding member of the APL Pensions Litigation Committee. Chambers & Partners 2021 describes him as "a *very clever and creative barrister with exceptionally deep knowledge,* [he] *offers superbly pragmatic advice every time*". The Legal 500 2021 notes he is "*absolutely wonderful – user-friendly, always keen to provide a helpful opinion wherever possible, creative, and willing to take a position and stick to it"*.

Michael Tennet QC
Michael's practice encompasses litigation and advice in the fields of pensions (including professional negligence), financial services and private trusts. Has appeared in many of the most high profile and complex pensions cases of recent year. He has a particular knowledge of the work of actuaries, both in relation to pension funds and life assurance funds and is co author of the chapter on actuaries in Professional Negligence Law and Practice (LLP). Michael has a first class degree in law from Oxford. He is a former member of the Main Committee of the Association of Pension Lawyers. Chambers & Partners 2021 says *"if you're in the trenches then you want him with you. He's very, very clever, absolutely determined to get the right results and really cares about winning for the client. He is absolutely top drawer."* The Legal 500 2021 praises his *"huge brain; very passionate and creative; extremely hard working; great lawyer; you really feel he is on your side".*

Paul Newman QC
Paul has represented some of the highest profile pension schemes in the UK and several major life insurers. He acts regularly for The Pensions Regulator and the Financial Services Compensation Scheme. Paul's local government and public sector work includes acting for several administering authorities and participating employers of the various UK LGPS funds. Most recently in this area, Paul is heavily involved in advising local authorities and collective investment entities on issues arising out of the Government's proposals for asset pooling within the LGPS, and he is representing employers and administering authorities in disputes relating to the recent changes in the LGPS exit credit regime. Paul also has extensive experience of advising on and litigating about various industry-wide schemes. Chambers & Partners 2021 refers to him as *"a real go-to for no-nonsense, straightforward advice. He gets to the heart of things very quickly, offers high-quality advice with a commercial feel, has technical knowledge and is very easy to work with."* The Legal 500 says he is *"brilliant at finding clever solutions to problems, will always give a clear view and is utterly reliable and user-friendly"*.

Andrew Mold QC
Andrew's practice covers commercial and traditional chancery work. Within these fields, he has extensive experience in pensions law covering a wide range of matters including proceedings before the Pensions Ombudsman, the High Court, Court of Appeal and Supreme Court. He has also been instructed in many of the recent leading pension cases especially those considering the use of The Pensions Regulator's powers and in the recent *Lloyds GMP equalisation* litigation. He also has significant experience of pensions related professional negligence cases and applications to remedy mistakes in the drafting of scheme documents. He regularly acts for trustees, members, sponsoring companies, professional advisors and the regulatory bodies. Chambers and Partners 2021 praises how he is *"fantastic", "makes complicated matters seem simple. He's also very personable"* and has *"amazing judgement"* while The Legal 500 describes Andrew as *"superb – he combines a formidable intellect with commercial acumen, and is genuinely a pleasure to work with"* and as a *"godsend on our pensions case"*.

David Pollard
David is a leading and highly experienced lawyer in the pensions field and related areas. He switched to practice as a barrister at the end of 2017, after 37 years practice as a solicitor, including 25 years as a partner in law firm Freshfields Bruckhaus Deringer. His practice as a solicitor included advising employers and trustees in relation to pension law matters, including corporate transactions, scheme funding, scheme mergers, scheme changes, employer insolvency and Pensions Regulator issues. He was chair of the Association of Pension Lawyers (APL) from 2001 to 2003, and has published five books in the areas of pensions, insolvency and employment law: *"Pensions, Contracts and Trusts: Legal Issues on Decision Making"*; *"The Law of Pension Trusts"*; *"Corporate Insolvency: Pension Rights"*; *"Corporate Insolvency: Employment Rights"* and *"Employment Law and Pensions"*.

Emily Campbell
Emily has significant experience of pensions litigation (including regulatory work, professional negligence and rectification claims) and she regularly advises on issues including scheme funding, the scope of powers in pension schemes, the taxation of pension schemes and the effect of mistakes in pension scheme documents. Emily is ranked as a leading pensions junior in the legal directories and is currently a member of LexisPSL's Expert Pensions Panel. Chambers and Partners describes her as *"a no-nonsense practitioner with a very fine mind. She is so terribly clever and has this ability to scythe through endless reams of paper and muddled thinking to get to clear and sensible solutions".* The Legal 500 praises her *"excellent analytical skills and intellect. [She is] able to grasp a lot of information and assimilate it quickly".*

Edward Sawyer
Edward has extensive experience of pensions litigation and advisory work, having appeared in a number of high-profile recent cases such the *Lloyds* cases on GMP equalisation, *Box Clever* and the ongoing *Mitchells & Butlers* rectification dispute. Edward has been involved in a number of the leading cases on The Pensions Regulator proceedings and the recent *PPF v Dalriada* case on the Fraud Compensation Fund. His pensions practice also comprises pensions-related professional negligence claims. The Legal 500 recommends him as *"probably the best junior at the Pensions Bar. Incredibly hard working. Encyclopedic knowledge of this highly technical and complex area of law."*

Tom Robinson

Tom acts across a wide range of pensions matters, on behalf of scheme trustees, scheme members, employers and bodies such as the PPF and Pensions Regulator. He has advised on matters from the operation of section 67 of the Pensions Act 1995 and section 37 of the Pension Schemes Act 1993 to trustees' duties and the PPF Levy. He has a particular interest in the interplay between pensions and insolvency law, and has written on this topic for pensions and insolvency publications. He is also instructed on rectification matters, both as sole counsel and as part of a team. He was part of the counsel team for the Claimant in the recent Axminster case. According to Chambers & Partners 2021 *"he's really bright, thinks outside the box and is very commercial".*

Simon Atkinson

Simon is an experienced and in-demand practitioner. He has a broad Chancery practice and believes that the giving of practical and clear advice, combined with persuasive and fearless courtroom advocacy and an eye for detail, are qualities which clients rightly demand and which he brings to the cases on which he is instructed. Simon's pensions work encompasses contentious and non-contentious instructions relating to both defined benefit and defined contribution schemes. He has advised upon and has acted in numerous pensions matters: from regulatory proceedings to ombudsman disputes, from claims for rectification of governing documentation to professional negligence actions. Simon has acted for individual and institutional trustees, companies, members and representative beneficiaries; he has also acted for and against the Pensions Regulator. The Legal 500 describes Simon as "*very bright, his knowledge of the law is second to none".*

The effect of limitation periods on claims for benefit underpayments following *Lloyds* and *Axminster*

Andrew Mold QC and Tom Robinson

This part of the talk will consider certain limitation issues that arise in relation to claims for pension underpayments by reference to two recent cases, *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc* and *Punter Southall Governance Services Limited v Hazlett*.

These two cases go well together because in *Axminster* some of the limitation points raised in *Lloyds* were revisited. To add an additional connection, the Judge in both cases was the same – Mr Justice Morgan – and in some respects, he was asked in *Axminster* to depart from his own reasoning in *Lloyds*.

Set out below is an explanation of the approach taken in the *Lloyds* decision towards some of the limitation issues which then featured in *Axminster*.

Lloyds

The *Lloyds* litigation was concerned with GMP equalisation. The first judgment, which dealt primarily with questions of liability and methodology, was handed down in October 2018[1]. One of the additional issues addressed related to arrears of pension payments – or back payments, where pension had been underpaid because it had not included an equalisation adjustment.

It was argued that, in the context of equalisation, the Trustee had a limitation defence to a claim for back payments on account of s.134 of the Equality Act 2010. In short, that section provides that, where there has been a breach of an equality rule, arrears of benefit cannot be claimed going back more than 6 years. On the face of it, that provision, therefore, seemed to provide a fairly straightforward answer to this particular limitation point.

However, during the course of the *Lloyds* hearing (which lasted some 10 days) – the Representative Beneficiary raised a new argument – contending that s.134 was ineffective because it infringed the European law principle of equivalence. That principle requires that a claim to a remedy for breach of a right conferred by European Law (which would encompass a claim for equalisation) is to be treated no less favourably than a similar domestic claim would be treated. It was argued that a similar domestic claim for a pension underpayment, in a non-equalisation context, would not be subject to any limitation period – and thus the 6 year period under s.134 infringed the principle of equivalence.

To make good that argument, it had to be established that a claim by a member of a pension scheme for arrears of pension fell within s.21(1)(b) of the Limitation Act 1980 so that no limitation period applied.

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[1] [2019] Pens LR 5

In *Lloyds*, the Bank was allocated the role of arguing that a 6 year limitation period did apply and was supported on this point by the Crown – no doubt the Crown did not want primary legislation to be declared ineffective.

The critical question, therefore, was whether a claim for a back payment fell within the key wording under s.21(1)(b) as '*an action by a beneficiary…to recover from the trustee trust property…in the possession of the trustee*'. This was not an easy issue for the Judge to decide.

(i) It raised a novel point on which there was no directly relevant authority.

(ii) It is clear that s.21 was not drafted with the problems that occupational pension schemes may give rise to in mind. Indeed, at the date of the enactment of the Trustee Act 1888, in which the original predecessor provision to s.21 is to be found, the modern occupational pension scheme did not even exist.

(iii) Therefore, the Judge was forced to grapple with the application of a statute designed principally to deal with private trusts to the quite different situation of a claim by a member of an occupational pension scheme.

In his 2018 judgment, the Judge dealt with this limitation issue in a fairly summary fashion which reflected the manner in which the argument had arisen towards the end of a long hearing. In brief, the Judge considered that the wording of s.21(1)(b) should not be construed narrowly and that where the trustee has retained assets which are subject to the trust and out of which the trustee is obliged to make the payment to the beneficiary, s.21(1)(b) applied. Accordingly, the Judge concluded that there was no limitation period in respect of a claim for a back payment.

Of interest, the Judge considered but dismissed two particular points made by the Bank:

(i) First, the Bank pointed to the fact that a member who has been underpaid does not have a proprietary claim to any specific asset in the possession of the trustee and thus it was said that a claim for arrears is not a claim to recover trust property. In response to this, the Judge did not think that it mattered whether or not the claim was a proprietary claim in respect of specific property – he nonetheless thought that such a claim fell within the wording of the provision.

(ii) Second, the Bank argued that the Representative Beneficiary's approach was wrong in principle because, for example, a scheme in deficit may not have assets with which to satisfy a claim (other than the ability to call on the employer to fund the scheme). Accordingly, if the Representative Beneficiary was right, the correct limitation period may turn on the state of funding of the scheme at any point in time. The Judge dismissed the relevance of this oddity on the basis that it did not apply to the facts of the case before him.

As mentioned above, the Judge was unable to gain a great deal of assistance from the authorities because there was nothing directly on point. However, he considered that his construction of s.21(1)(b) was supported by two cases: (i) a nineteenth century case called *How v Earl Winterton*

[1896] 2 Ch 626; and (ii) a recent Supreme Court case called *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857. That approach was a little surprising because these were not cases on which the Representative Beneficiary had placed much or any weight at the hearing. These two cases are addressed further below.

Therefore, the upshot was that the Judge concluded there was no limitation period in respect of a domestic claim for pension arrears – and, having rejected some further arguments about the principle of equivalence, he held that s.134 EA 10 was ineffective. So, quite a bold decision. That said, the practical importance of this limitation outcome was reduced in the *Lloyds* case because of the Judge's decision that the forfeiture rules under the *Lloyds* schemes were applicable to forfeit underpaid instalments of pension that were more than 6 years old.

Section 21(1)(b) was again considered in the most recent *Lloyds* judgment handed down in November 2020[2] which dealt with undercalculated pension transfers. Where a statutory transfer has been made but the amount paid failed to take account of an equalisation adjustment, the Court (Mr Justice Morgan again) held that the Trustee is obliged to make a top-up payment to the receiving scheme.

The issue then arose whether a member's right to require the Trustee to make a top-up payment to the receiving scheme also fell within s.21(1)(b) – and therefore no limitation period applied. In other words, could it really be said that a claim for a payment to be made *to a third party* fell within the language of '*recover from the trustee trust property*…'?

In answering this point, the Judge thought it was clear that the word '*recover*', as used throughout the Limitation Act more generally, is not restricted to a case where the claimant was at an earlier point in time in possession of the relevant property, had lost it and was now seeking to regain possession of it. For example, the statute frequently refers to an action to '*recover*' damages – yet those damages will not previously have been in the possession of the claimant. Of course, the usual case in which the term 'recover' is used would still involve a payment being made *to the claimant* – rather than a payment *to a third party*. However, the Judge considered that although that might be the usual case – the language of s.21(1)(b) did not preclude 'recovery' by means of payment *to a third party*. Importantly in his view, s.21(1)(b) is not limited by inclusion of, for example, the words '*recovery by the claimant*'.

The Judge also thought that this extended meaning (so as to apply to a payment *to a third party*) accorded with what he considered to be the policy behind the statutory provision which was to enable a beneficiary to enforce the performance of a trust where the trustee remained in possession of the trust fund. Therefore, the Judge held that s.21(1)(b) also applied to top-up payments.
It is worth making a couple of comments in relation to the relevant policy – and these comments apply to the Judge's decision on s.21(1)(b) more generally including in his 2018 Judgment.

(i) The relevant general policy behind the Limitation Act is to restrict the category of claims to which no limitation period would apply – and thus to discourage the bringing of stale

2 [2020] EWHC 3135 (Ch)

claims. Accordingly, it might be said to be contrary to this policy to give an 'extended' meaning to the verb 'recover' and thereby enlarge the circumstances in which no limitation period applies.

(ii) The exception to that general policy, which is manifested in s.21(1), is to disapply a limitation period where either: (i) the Trustee has acted fraudulently or (ii) the Trustee would derive a personal benefit from a breach (i.e. by retaining trust property for himself or herself). Whereas, neither of these situations arises in the case of pension underpayments.

So that is how s.21(1)(b) was dealt with by Morgan J in *Lloyds.* We shall now consider how various limitation issues arose in *Axminster*.

Introduction

I had hoped that by the time of this talk we would have had judgment in a case called Punter Southall Governance Services Limited v Hazlett, concerning the Axminster Carpets Group Pension Plan ("the Axminster case"). The Axminster case concerned, in particular, the issue of whether a claim by a member of a trust-based pension scheme for arrears of pension was subject to any limitation period under the Limitation Act 1980. That issue had been considered in *Lloyds Banking Pension Trustees Ltd v Lloyds Bank plc* [2019] Pens LR 5 ("Lloyds 1"), which held that such claims were not time-barred. However by the time of the talk judgment in the Axminster case had not been handed down, [3] so I discussed the following:

a) Outline briefly the arguments that were run in the Axminster case, so that when the judgment is available the arguments in it might feel a little more familiar, and

b) Look at one particular issue that arose in the case and ventilated in the skeletons but was not in fact contested so won't feature in the Judgment. That is the application of section 32 of the Limitation Act 1980 to a claim against pension scheme trustees.

Axminster

The case concerned a pension scheme with various deeds and other instruments dating back to 1983 that provided for pensions to be paid with certain rates of annual increase. Issues arose as to the meaning and effect of those deeds and instruments, so that there was uncertainty whether members might be entitled to arrears of pension increases (as well as other arrears arising from failures to equalise for GMP and delays equalising Normal Pension Dates).

That uncertainty was resolved by a compromise, but the compromise left open the possibility that claims to arrears that were more than six years old were time-barred. The Judge (Morgan J, who had also heard Lloyds 1) was asked to look afresh at the issue he had decided in Lloyds 1, with the benefit of fuller submissions and rather more case law. He agreed to do so.

[3] It is now available at PSGS v Hazlett [2021] EWHC 1652 (Ch).

Andrew Short QC and Stephen Butler acted for the Representative Defendant, arguing that such claims were not time-barred. Henry Legge QC and I acted for the Trustee, and took the other side of the argument.

The argument resolved to one of statutory construction. Both parties agreed that a claim by a member of a trust-based pension scheme for payment of pension arrears was a claim in respect of a breach of trust (even if the Defendant argued that it might also be described as a claim to recover trust property), because the trustees' failure to pay what the member was entitled to was a breach of trust. That meant that the claim fell within s.21(3) LA80 and had a limitation period of six years, unless it also fell within s.21(1). On the facts, only s.21(1)(b) was relied on.

Section 21(1)(b) of LA80 provides:

> 21.— Time limit for actions in respect of trust property.
>
> > (1) ***No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action***—
> >
> > > (a) *in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
> > >
> > > (b) ***to recover from the trustee trust property*** *or the proceeds of trust* ***property in the possession of the trustee****, or previously received by the trustee and converted to his use." (emphasis added).*

We argued that these words meant the action by the beneficiary had to be an action to recover property to which the beneficiary had a pre-existing proprietary right, not just claiming an asset that happened to be held on trust.

In *Lloyds 1* it was held that on a straightforward reading of the words in bold, a claim by a member to arrears fell within them. It was a claim to recover money from the trustee (in the sense that a claim for damages was one "to recover" damages; that verb in s.21(1) did not mean "obtain something that was previously yours"), and as long as the trustee had assets that he held on trust and would use to meet the claim then it was a claim to recover money that was trust property. The Judge drew support from two cases: *How v Earl Winterton* [1896] 2 Ch 626 and *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857.

In the Axminster case we sought to argue that those cases did not assist on the proper construction of s.21(1)(b) LA 80 as it concerned a member's claim for arrears. The first case, *How*, concerned a claim against a trustee to require him to pay money <u>into</u> a trust fund (following his breach of trust in not accumulating rents). Such a claim was described in the case as one to "recover trust property", but it is not analogous to a member's claim to require money to be paid to them <u>out of</u> the trust fund.

The second case, *Burnden*, included a claim for equitable compensation for breach of fiduciary duty by company directors. The relevant breach of duty was misappropriation of a piece of company property, namely the issued shareholding in a company. The Court of Appeal and Supreme Court held that the claim for equitable compensation fell within s.21(1)(b), but we stressed that they were not stating that all claims for equitable compensation would do so. Instead they limited their approach to claims that relate to the beneficiary's interest in the particular piece of property that had been misappropriated. The claim for equitable compensation was ancillary to a claim for that property.[4]

Although we discussed a number of other cases, none really answer the point. As the Judge remarked in argument "we've been to the cupboard marked "Helpful Authorities" and found it is bare." We also discussed a number of examples of how the rival interpretations would work in practice. We wait to see what the Judge made of them.

Section 32

Perhaps more interesting is an issue raised by the Defendant as a fallback in case he lost on s.21(1)(b) and the claims were time-barred. That issue is that limitation was postponed in respect of certain members because the trustees had deliberately committed a breach of trust by underpaying benefits, in circumstances in which the breach was unlikely to be discovered for some time. This would engage s.32 LA80, which provides for the postponement of limitation periods under LA80 if, among other matters, "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant" (s.32(1)(b) LA 80). Section 32(2) adds to this:

> *for the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.*

In the Axminster case the issue arose because the trustees in 2000 took advice as to the meaning and effect of the Plan's governing documents regarding entitlements to pension increases. They were told that the Plan's pension increase practice did not match the legal position, albeit there was some uncertainty. They were told that members were not receiving their entitlements and continuing this would represent a breach of trust. They were advised to obtain the informed consent of members to the Plan's actual practice, although the advice recognised that might be difficult in the case of deferreds and pensioners.

The trustees duly sought that informed consent from actives, but not deferreds or pensioners. Having done so, they recorded in the minutes of a trustee meeting that the Plan's pension increase practice may not be strictly in line with legal advice, but that it had always been the intention when the relevant documents were entered into to maintain the present practice. On that basis they continued that practice.

The Defendant argued that this amounted to a "deliberate" breach of trust as the trustees had been advised they were not paying benefits in accordance with the Plan's rules.
The issue was compromised, but would have been an interesting one to fight. That is because it is not at all clear that trustees are committing a "deliberate" breach of trust if:

[4] See paragraph 38 in the Court of Appeal ([2016] EWCA Civ 557) and paragraph 13 in the Supreme Court ([2018] AC 857).

a) they receive advice that entitlements are uncertain and that continuing current practice would be a breach of trust, but

b) take their own view of the matter and conclude that the entitlements being paid are those that were intended so the documents must be in error if they meant otherwise.

One can say that such trustees are reckless, but not that they intend to act in breach of trust or know that they are doing so.

Unfortunately for such trustees, the Court of Appeal has very recently held that recklessness is enough, in a case called *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339. That seems to conflict with some older House of Lords authority, and the case seems likely to go to the Supreme Court. However as matters stand, the law is that where the defendant was aware of a risk that he had committed a breach of duty, and it was in the circumstances known to him objectively unreasonable to take that risk but he continued regardless, he acted recklessly and "deliberately" committed the breach so that limitation is postponed. That is quite a striking proposition for those of us advising trustees as to the risks that they may be acting in breach of trust, or indeed breach of contract or any other breach of duty. The remainder of this paper considers the case in detail.

Canada Square: Summary

In *Canada Square* the Court of Appeal considered s.32(1)(b) and s.32(2) of the Limitation Act 1980, which extend limitation periods in cases of "deliberate concealment". The context was a claim under the Consumer Credit Act 1974 alleging an "unfair relationship" due to non-disclosure of payment protection insurance commission. However the decision is of far wider relevance. The Court held:

(i) S.32(1)(b) covers cases where any fact relevant to the claimant's right of action has been "deliberately concealed" from him by the defendant. There is no need to show "active concealment" of a fact relevant to the claimant's cause of action, nor to show the defendant was under a pre-existing legal duty to disclose it. It is enough that the defendant was under an obligation to disclose arising from "utility and morality", but deliberately failed to disclose.

(ii) An alternative to s.32(1)(b) is s.32(2), allowing the claimant to postpone limitation by showing deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time. The relevant "breach of duty" need not be contractual, tortious or fiduciary. Any "legal wrongdoing" giving rise to the claimant's right of action is sufficient.

(iii) For both s.32(1)(b) and s.32(2), the defendant's act or failure must be deliberate. That is satisfied by recklessness, in the *R v G and anor*[5] sense. It is enough that the defendant was aware of a risk (that he ought to disclose the fact, or that he had committed a breach

[5] [2003] UKHL 50

of duty), and it was in the circumstances known to him objectively unreasonable to take that risk, but he continued regardless.

This last point is controversial: other cases appear to hold that the defendant must be aware of his wrongdoing, not just aware of a risk of the wrongdoing.

Legal Background

The Law Commission has described the purpose of limitation as being:[6]-

(a) To protect defendants from stale claims;

(b) To encourage claimants to institute proceedings without unreasonable delay and thus enable actions to be tried at a time when the recollection of witnesses is still clear; and

(c) To enable a person to feel confident, after a lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.

That purpose is given effect by statutory rules requiring claims to be brought within a set period of the accrual of a cause of action. After that period, the defendant is entitled to certainty (statutes of limitation have been called "statutes of peace"[7]), and to defeat a claim by relying on no more than the passage of time.

Part II of the Limitation Act 1980[8] can qualify this certainty, and mitigate the potential harshness of the rules. It covers extensions to the statutory time limits found in Part I of that Act. One such extension is where a claim is based on the fraud of the defendant.[9] Another is where the claim is for relief from the consequences of a mistake of law or fact.[10] A third, and the subject of this article, is where the defendant has "deliberately concealed" any fact relevant to the claimant's right of action.[11] In all three cases, time does not run until the claimant discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it. Section 32 thus recognises the unfairness of time running against a claimant before he could reasonably be expected to bring his claim.

Canada Square: The Facts

In 2006 Mrs Potter took out a loan with Canada Square for £16,953. When it offered the loan, Canada Square also suggested Mrs Potter take out payment protection insurance, which she did. Canada

[6] Final Report on limitations of actions, 1977, Cmnd 6923, para 1.7.
[7] *Cave v Robinson, Jarvis & Rolf (a firm)* [2003] 1 AC 384 at 390E.
[8] References to section numbers hereafter are to sections of the Limitation Act 1980 unless otherwise stated.
[9] S.32(1)(a).
[10] S.32(1)(c), recently considered by the Supreme Court in the *FII Group* litigation [2020] UKSC 47.
[11] S.32(1)(b).

Square acted as the insurance intermediary in relation to that insurance and received commission. The amount of the commission was over 95% of the sum Mrs Potter was told she was paying for the insurance. This fact was not disclosed to Mrs Potter.

Mrs Potter made the payments required of her and the agreement ended in 2010. In 2014 the Supreme Court ruled[12] that non-disclosure of a very high commission charged to a borrower made the relationship between the creditor and borrower 'unfair' within the meaning of section 140A of the Consumer Credit Act 1974 ("s.140A").

In December 2018 Mrs Potter brought proceedings against Canada Square, relying on s.140A. She relied on s.32(1)(b) and s.32(2) as postponing the running of time until she discovered the commission.

Analysis

As noted in the Summary above, the Court of Appeal (Sir Julian Flaux C., Males LJ and Rose LJ) held that for s.32(1)(b) there did not need to be active concealment of the fact in question. Rose LJ said that "*inherent in the concept of "concealing" something is the existence of some obligation to disclose it*", but that the obligation need not arise from a pre-existing legal duty. It could arise "from a combination of utility and morality", as had occurred in a case called *The Kriti Palm*.[13] In that case the majority in the Court of Appeal held that a party that had been instructed to certify the quality of a cargo, who later learns of a material inaccuracy in his certificate, is obliged as a matter of "common sense" to disclose it. For Canada Square, the obligation to act fairly that was imposed by s.140A was a sufficient obligation to disclose for s.32 purposes.

Turning to s.32(2), the Court discussed the phrase "commission of a breach of duty" and followed the insolvency case of *Giles v Rhind and anor* (No. 2) [2008] EWCA Civ 118 in holding that the breach did not need to be a breach of contract, in tort or of fiduciary duties. A "legal wrongdoing" was enough. In *Giles* it was held that a claim under s.423 of the Insolvency Act 1986 was a claim for "breach of duty" within s.32(2), given "the context of a debtor's responsibilities to his creditors generally". Following that approach, the creation of an unfair relationship under s.140A was a "breach of duty."

The most controversial conclusion the Court reached is likely to be on the meaning of "deliberate". The parties agreed that it meant the same in s.32(1)(b) and 32(2). The Court held that it meant reckless, with both a subjective and an objective element. It adopted the approach of Lord Bingham in *R v G and anor*[14]: a person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk. It reached this conclusion by holding (i) there is no natural meaning of "deliberate" in this context, (ii) the case law was inconclusive, (iii) recklessness was enough for the doctrine of "concealed fraud" pre-1980, and s.32 was not intended to be any more restrictive for the claimant than the previous law as regards the mental element of the defendant's conduct.

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[12] In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61.
[13] *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601.
[14] [2003] UKHL 50.

Each of these three steps seems debatable. As to (i), "deliberate" may not have one natural meaning, but it is possible to say that it does not naturally mean the same as reckless. This is particularly so as what must be construed is a phrase in s.32: "deliberately concealed" or "deliberate commission". In that context, "deliberate" imparts a sense of the concealment or commission being an intended consequence as opposed to an unintended result. As to (ii), Lord Scott in *Cave v Robinson Jarvis & Rolf*[15] said that deliberate commission of a breach of duty is to be contrasted with a breach "that the actor was not aware he was committing". He considered that the defendant must know he was committing a breach, or intend to do so, for s.32(2) to apply. As to (iii), reliance on the pre-1980 law must be secondary to the words of s.32 itself.

The case seems destined for the Supreme Court. The case law is unclear and the point is one of real importance. As Rose LJ said, "*it is unlikely that Canada Square are pursuing this appeal for the sake of the £7,953 they may owe to Mrs Potter*". The ramifications of a "recklessness" test are very significant. If a board of trustees receives advice that a proposed course of conduct poses a 15% risk of breaching a contract, underpaying benefits, or breaching any other duty, and the circumstances are such that either any breach is unlikely to be discovered for some time, or there might be said to be an obligation in "utility and morality" to tell the counterparty, can the trustees safely proceed without disclosing? They would appear unable to rely on a limitation defence unless a court later concludes that it was objectively reasonable for them to act as they did.

This seems a long way from the certainty for defendants that limitation is supposed to advance.

[15] [2003] 1 AC 384.

Recovery of overpayments of pension

Edward Sawyer and Simon Atkinson[1]

1. This paper considers some of the legal and practical issues which can arise when pension payments are, or may have been, overpaid and trustees/administrators seek to recover them. While trustees' attempts to recover overpayments frequently end up either in court or before the Pensions Ombudsman, thorny issues concerning the extent of the trustees' right to do so can and do regularly arise. Limitation periods, the application of the doctrines of equitable recoupment and equitable set off, and the scope and effect of s. 91 of the Pensions Act 1995, are just some of the issues which trustees and members may have to grapple with. This paper considers a few of these matters. Part one of the paper looks at some general issues arising; part two looks at some issues specific to statutory schemes and also at s. 91 in the context of recovering time-barred overpayments.

Part One

Setting the scene: the legal context

2. It is helpful to recapitulate briefly the basic principles and the types of claims and defences typically met in pension overpayment cases.

3. The starting point is of course that a member of a pension scheme has a right to such benefits only as are set in the trust deed and rules ("TDR") or other instrument (such as regulations) governing the scheme. Trustees have a duty to manage the scheme in accordance with the TDR and the general law. Where a member has, by mistake, been paid a sum to which he or she is not entitled under the TDR then in principle a trustee/administrator should be able to recover such overpayments.

4. Anecdotally, the sorts of mistakes which are presently being encountered with some regularity are (i) overpayments arising from miscalculations by the trustees/administrators of the pensionable earnings of the member in question and (ii) miscalculations of the lump sum entitlements of members.

5. In accordance with well-settled restitutionary principles, where overpayments are mistakenly made by a trustee then the trustees are likely to have a claim in unjust enrichment to recover the overpaid sums, the unjust factor being a mistake of fact or law. In addition to trustees of private pension schemes, it is generally assumed that a public body (such as the administrators of a public sector pension scheme established pursuant to legislation) can

[1] Simon Atkinson is responsible for part one of this paper; Edward Sawyer is responsible for part two.

bring a claim in restitution for overpaid sums in exactly the same way as a private individual who has made a mistaken payment: *Goff & Jones, The Law of Unjust Enrichment* (9th ed.), §23-42.[2]

6. An alternative claim which is often considered, though not often brought, is a proprietary claim for recovery of trust property where the member has retained the overpayment or its traceable proceeds. It is of course rare in practice that such a proprietary claim will be available given the amount of time which generally elapses between an overpayment being made and the mistake being discovered.

7. A public authority may also have a claim to recover sums paid out without authority as being *ultra vires* under the principles articulated in *Auckland Harbour Board v R* [1924] AC 318 and *Woolwich Equitable Building Society v IRC* [1993] AC 70.

8. How can members meet such claims for recovery of overpayment? We summarise below some of the general defences which *may* be raised.

9. First, negligence. A member may seek to argue that the mistaken overpayment has been caused by the trustee/administrator's own negligence and should somehow therefore operate as a defence to the claim. It is not, however, generally a defence to a claim in unjust enrichment that the claimant has acted negligently, at least where the claimant was at the time unaware of the risk that his belief or assumption that the payee was entitled to the payment in question was mistaken: *Goff & Jones*, §9-34. If, however, the trustee/administrator had suspicions at the time of the payment that the member was not entitled to the payment in question, then that fact *may* operate as a defence to the claim; some authorities suggest that a claimant's restitutionary claim based on mistake may fail on the independent ground that the payer assumed the risk that the payee was not entitled to the sum in question: *Goff & Jones*, §9-35 – §9-39. While this is obviously a very fact-dependent defence, in our experience it is rare for a court to conclude that a trustee is precluded from recovering anything simply because a negligent error was made. The premise of an unjust enrichment claim of this sort is that a mistake has been made; frequently that mistake will have been a negligent one and if negligence defeated an unjust enrichment claim, few claims would be successful.

10. Secondly, change of position. If a recipient can show that he or she has so changed position that it would be inequitable for him or her to be required to repay sums, then the recipient will not be required to do so. Change of position is the defence most frequently encountered and usually the one with the best prospects. The classic case is of the person who takes a more extravagant holiday on the basis of the higher pension payments than he or she would otherwise have done. The payee must have acted in good faith, though negligence will not

[2] Although, as noted in *Goff & Jones*, in Canada some doubt has been cast on this, where the Supreme Court of Canada has held that claims to recover money paid as tax not due should be understood as a *sui generis* restitutionary claim *"based on the constitutional principle that taxes should not be levied without proper authority"*: *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1. Goff & Jones consider it unlikely that English courts would develop the law in this way: *Goff & Jones*, §23-43 – §23-44.

per se bar the defence. The defence is a *pro tanto* one: the court can order partial repayment if it would not be inequitable for the payee to repay some of the overpaid monies.

11. Thirdly, estoppel. This is often pleaded but rarely successful. The problem is that there must have been (i) an unambiguous representation by the trustee/administrator or (ii) a shared assumption that the recipient was entitled to the greater payment than that to which he or she is entitled under the rules. The payment itself is not normally sufficient to amount to such a representation or assumption. This defence usually founders because members are almost invariably told to refer to the TDR, which sets out their entitlements. There is thus usually no unambiguous representation that the payee is entitled to the amount received.

12. Fourthly, contract. Sometimes a member will allege that there was a binding agreement (supported by consideration) to the effect that he or she was entitled to the overpayment. If such a contract can be proved, then that will be a good and complete defence to the claim. But it is obviously rare in practice to come across facts to support such an agreement.

13. So much for the frequently encountered general defences. We turn now to consider some other potential defences which may be identified by overpaid members. These defences have raised difficult issues of fact and law, some principles of which have not yet been resolved by the higher courts.

Limitation

14. It is well established that a claim in unjust enrichment to recover a mistaken overpayment is 6 years from the date of payment: *Aspect Contracts v Higgins Construction* [2015] 1 WLR 2961 (by application of s. 5 of the Limitation Act 1980 ("LA 1980")). It has generally been assumed in case law that each individual payment of a pension instalment gives rise to a separate claim to recover it: *Webber v Department for Education* [2017] ICR 198.

15. One question which obviously arises in the context of an unjust enrichment claim to recover overpaid pension sums paid by mistake is the extent to which payers can rely upon the provisions of the LA 1980, s. 32(1) and obtain the benefit of a postponement to the commencement of the limitation period.

16. This sub-section relevantly provides as follows:

"*…where in the case of any action for which a period of limitation is prescribed by this Act, either—*

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it…"

17. Courts are generally chary of trustees' invocation of this section. In our experience, courts are ready to find that trustees, particularly professional trustees, could with reasonable diligence have discovered a mistake, thereby preventing or at least limiting any postponement to the commencement of the limitation period. So, for example, in *Webber v Department for Education* [2015] ICR 544 (a Teachers' Pension Scheme case) the complainant Mr Webber received a letter in November 2009 explaining that the administrator had discovered overpayments for each tax year from 2002/3 to 2008/09 and that an abatement would be applied to recover gross overpayments amounting to c. £37,500. In allowing Mr Webber's appeal on this point only, the court held that the administrator could with reasonable diligence have discovered the fact of overpayments in the 2002/03 tax year (i.e. the year the overpayments started). The court held that the scheme administrator had in October 2001 all the information necessary to appreciate that it was inevitable that if the complainant continued in his employment throughout the next tax year his salary would exceed his earnings limit and there would be a need for an abatement. The court said that if a person knows or has the information available to him to know that, unless circumstances change, he will inevitably be making an overpayment, then he could not escape a finding that he could have discovered the mistaken overpayment with reasonable diligence by saying he did not know, and did not trouble to inquire, whether circumstances had indeed remained the same: [78]. Accordingly, time started to run for limitation purposes from the moment the overpayments commenced in 2002/03.

18. To similar effect is the decision of the Deputy Pensions Ombudsman in *Clift* (PO-2066). Again, the trustee's attempt to rely on LA 1980, s. 32(1) was given short shrift. The trustees should have had a sound enough knowledge of the scheme's rules to realise there was an issue; trustees should carry out checks on a regular basis to avoid the sorts of errors that arose in this case.

19. An interesting issue which might arise is the extent to which the application of the *"reasonable diligence"* test is informed by the identity of the person making the original mistake. So, for example, where the mistake has resulted from errors by the trustee / administrators it may well be difficult for the trustee to show that it could not with reasonable diligence have discovered the fact that the payments were being made in error. It certainly looks unattractive for a trustee, who has made the error in question, to argue that the commencement of time running for limitation purposes should be postponed because it could not with reasonable diligence have discovered that error.

20. On the other hand, in making certain overpayments a trustee *may* have been reliant on information provided by a third party in respect of which information the trustee has no legal right, or practical way, to audit it or otherwise check its accuracy. One example might be information provided by an employer as to the amount of the member's pensionable earnings. In those circumstances, it seems far less objectionable for the trustee to rely upon the benefit of LA 1980, s. 32(1) given that it was not the author of the mistake.

21. This, however, sets up a distinction, which might seem entirely serendipitous to a member, between a mistake made by the trustee/administrator itself (which is less likely to result in the trustee obtaining the benefit of a postponement of the commencement of a limitation period) and a mistake made by a third party (which is more likely to result in the trustee obtaining that benefit). How to explain such a divergence in outcome to a member?

22. On this issue, it seems to us that whether the trustee can successfully invoke LA 1980, s. 32(1) is ultimately likely to come down simply to the particular facts of each case.

Equitable recoupment

23. Even if limitation proves to be a problem for some or all of the overpayments made by a trustee to a member, the member is not necessarily off the hook for repaying those sums. Certain equitable doctrines may be available to the trustees to enable them in practice to circumvent a limitation defence.

24. One such doctrine is that of equitable recoupment.

25. Equitable recoupment permits a paying party such as a trustee to recover past overpayments from a recipient by making deductions from future payments due to be made to the recipient. Equitable recoupment is essentially a self-help remedy.

26. The first instance decision of ***Burgess v BIC UK*** [2018] EWHC 785 (Ch) has confirmed that the LA 1980 does not apply to equitable recoupment. This is because equitable recoupment is not a claim (whether in restitution or otherwise) but it is a self-help remedy. The 6-year limitation period that applies to an unjust enrichment claim simply has no application to the exercise of a right of equitable recoupment by a trustee.

27. There are, however, several points to note.

28. First, as equitable recoupment is an equitable doctrine, it is subject to the defence of laches. Recoupment will be prevented where it would be inequitable for the trustee to exercise the right. Delay can of course bar equitable relief, though some sort of detrimental reliance by the payee is usually required in order to make it inequitable for a payer to seek to recoup overpaid sums. Whether there has been detrimental reliance or not will obviously depend upon the facts. We note, however, that trustees' and members' legal advisors alike will have presumably considered whether the member has acted to his or her detriment when considering an estoppel or change of position defence to any unjust enrichment claim in any event.

29. Secondly, and allied to this first point, the rate of recoupment must not be so high as to be inequitable. What an appropriate rate would be is very obviously highly fact dependent. Most obviously it will depend upon the period of time over which recoupment is sought. The Pensions Ombudsman takes the view that recoupment is permissible where the recovery period is at least as long as the period over which the overpayments were made, but the

financial position of the member and hardship should be taken into account: *Re E* (PO-29198) (30 November 2020); *Re T* (PO-19417) (17 September 2019).

30. Thirdly, it is probably the case that the doctrine of equitable recoupment has no application to unfunded statutory schemes, such as public sector schemes. This is because the doctrine is applicable to trusts and estates; statutory schemes are generally not constituted as trusts: *Re E* (see further below).

31. Fourthly, equitable recoupment is also potentially subject to the operation of the Pensions Act 1995, s. 91 (see further below).

32. The long and the short of the above is that, provided a trustee of a trust-based pension scheme is obliged to make further future payments to a member, the trustee will likely be able to recoup past overpayments notwithstanding that the trustee would be unable to recover some or all of those overpayments in court by reason of the application of the 6-year time limit applicable to unjust enrichment claims.

Part Two

33. The rest of this paper will look at some issues that potentially arise where the scheme seeking to recover the overpayment is a statutory occupational pension scheme, namely:

 33.1. a statutory occupational pension scheme's right to recover overpayments;

 33.2. the concept of equitable set-off in the overpayment context;

 33.3. the recovery of time-barred overpayments and the impact of s. 91 of the Pensions Act 1995 (the "PA 1995") – the discussion of this question is relevant to all schemes, not just statutory schemes.

A statutory occupational pension scheme's right to recover overpayments

34. As noted above, statutory occupational pension schemes are often not constituted as trusts. The definition of occupational pension scheme is very wide and it can take any number of legal forms (see s. 1 of the Pension Schemes Act 1993 and *Westminster City Council v Haywood* [1998] Ch 377, CA). For example, statutory occupational pension schemes might take effect as wholly statutory public service pension schemes promulgated by the relevant Minister or Secretary of State under the Superannuation Act 1972. While it is possible for a trust to be created by statute, these public service schemes do not purport to create trusts.

35. For example, in the Scottish case of *Re Bain* 2002 SLT 1112, it was held that the superannuation fund of a housing association made pursuant to delegated legislation under the 1972 Act was not a trust. There were no trustees appointed separately from the statutory scheme to which funds had been transferred to be held subject to fiduciary duties owed directly to the beneficiaries. Therefore the superannuation fund was not a "trust scheme" as

defined in PA 1995, s. 124 ("an occupational pension scheme established under a trust") and was not subject to the obligations imposed under that Act on a "trust scheme".

36. HM Treasury's guidance "Managing Public Money" (latest edition May 2021)[3] states that recovery of overpayments of pay, allowances and pensions to public sector workers should be pursued, taking proper account of how far recipients have acted in good faith. The guidance suggests that recovery through deduction from future salary or pension is often convenient: see the guidance at Annex 4.11.

37. Therefore it can be expected that public service pension schemes will often seek to recover overpayments of pension. Not infrequently, "Managing Public Money" is cited before the Pensions Ombudsman by scheme managers of public service pension schemes as justification for seeking recovery: e.g. *Re N, Teachers' Pension Scheme* (PO-21882) (3 September 20), *Re S, NHS Pension Scheme* (PO-10128) (16 December 2016) etc.

38. If a wholly statutory pension scheme not constituted under a trust makes a mistaken overpayment of pension, then in principle it is recoverable under the law of unjust enrichment, subject to the usual defences, as discussed earlier in this paper. There is no general principle excluding statutory bodies from the law of unjust enrichment, so the remedy of restitution for mistaken payments is in principle available. By way of example, the Secretary of State routinely recovers mistaken benefit overpayments made under social security schemes, including under the law of unjust enrichment (unless specifically excluded by statute: see *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54). In principle, the same restitutionary remedy should be available to the managers of statutory non-trust based occupational pension schemes. Potentially, the special causes of action for recovery of unauthorised and ultra vires payments might be available too: *Auckland Harbour Board v R* [1924] AC 318, mentioned above.

39. Public service pension schemes may also contain express rules permitting or requiring recovery of overpayments by deduction from future payments (see e.g. the Teachers Pensions Regulations 2010, regulation 114, relied on in *Re E, Teachers’ Pension Scheme* (PO-29198) (30 November 2020)).

40. A more difficult question is whether the doctrine of equitable recoupment applies to wholly statutory non-trust based schemes, to which this paper now turns.

Equitable recoupment and non-trust schemes

41. As mentioned earlier in this paper, on the face of things the doctrine of equitable recoupment is applicable to trusts and estates, and a statutory non-trust based scheme is neither a trust nor an estate, so the doctrine could be said to be inapplicable.

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[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994901/MPM_Spring_21__without_annexes_180621.pdf

42. There is much to be said for the view that equitable recoupment is really concerned with accounting between trustee and beneficiary. It permits the overpaid benefit to be treated as a part-payment of the true entitlement and allows it to be taken into account when paying the balance of the benefit: see *Livesey v Livesey* (1827) 3 Russ 287 at 296.[4]

43. If the doctrine of equitable recoupment is confined to trusts, it would be inapplicable to non-trust based statutory pension schemes. This is the conclusion reached by the Pensions Ombudsman in *Re E, Teachers' Pension Scheme* (PO-29198) (30 November 2020). The Teachers' Pension Scheme, a statutory unfunded public service scheme, had made mistaken overpayments of pension to Mr E, a headmaster. Teachers Pensions sought to recover the overpayments by reducing Mr E's future pension. The Pensions Ombudsman held that the doctrine of equitable recoupment was inapplicable, as the scheme was not constituted as a trust. However, he also held that a similar result could be achieved by instead applying the doctrine of equitable set-off, to which this paper now turns.

Equitable set-off

44. The well-established principles governing equitable set-off were recently explained in *CIS General Insurance v IBM* [2021] EWHC 347 (TCC) at [338] ff, following the Court of Appeal decision in *Geldof v Simon Carves* [2010] 1 CLC 895, CA.

45. In short, equitable set-off allows cross-claims to be deducted from a claim. The essential test is whether the cross-claims are so closely connected with the claim that it would be manifestly unjust to allow the claimant to enforce payment without taking into account the cross-claims.

46. In *Re E*, the Pensions Ombudsman considered that the test was satisfied: the pensioner, Mr E, had a claim for future pension instalments; the scheme had a cross-claim to recover prior overpayments; it was, in the Pensions Ombudsman's view, unjust to allow the pensioner to claim future pension without giving credit for the cross-claim; therefore the scheme could reduce his future pension instalments to recover the prior overpayments.

47. If it is permissible for the scheme to rely on equitable set-off, it can apply the set-off without any need to bring a Court claim. Equitable set-off, like equitable recoupment, is a self-help remedy and can be relied on outside the litigation process. This has important limitation consequences, discussed below. It is worth noting that equitable set-off could in principle be relied on by a traditional trust based scheme, but since such a scheme can rely on equitable recoupment anyway, equitable set-off might add nothing.

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[4] Interestingly, in the different context of GMP equalisation, the equalisation method which found most favour with Morgan J – method C – involved treating equalisation payments as "an advance payment on account of the sums due to be paid" at a later date and setting them off in reduction of the later payments: see *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch) at [379]. Arguably this is the same sort of accounting process as takes places under equitable recoupment. However, in *Lloyds* the setting-off process was justified by reference to EU and domestic sex equality legislation rather than trust recoupment principles.

Recovery of time-barred overpayments

48. As discussed earlier in this paper, a 6 year limitation period generally applies to restitutionary claims to recover mistaken overpayments. Therefore, subject to LA 1980, s. 32, no Court proceedings may be brought against a member to recover time-barred overpayments made more than 6 years ago. But, as also mentioned earlier, according to *Burgess v BIC* at first instance, as equitable recoupment is not caught by the LA 1980, recoupment of time-barred overpayments is permissible, subject to laches.

49. The Pensions Ombudsman considers that the same holds true for equitable set-off: see *Re E*. His reasoning appears to be that as equitable set-off is a self-help remedy not requiring Court proceedings, it does not involve the bringing of "an action" within the meaning of the LA 1980[5] and is therefore not caught by the Act. This is consistent with the case-law confirming that time-barred claims can be deducted under the doctrine of equitable set-off: for example, *Filross Securities v Midgeley* (1999) 31 HLR 465, CA, 472.

50. Interestingly, the case-law on equitable set-off does not suggest that laches applies. This gives rise to the possibility that a scheme might, by relying on equitable set-off rather than equitable recoupment, be able to circumvent a laches defence advanced by a member to prevent equitable recoupment. However, it may be that the Court could escape this apparent inconsistency by saying that equitable set-off cannot be used to deduct cross-claims that are so stale and remote in time that they bear no close connection with the main claim. There is some support for this view in the *obiter* comments in *Guidance Investments v Guidance Hotel Investments* [2013] EWHC 3413 (Comm) at [44] and following.

51. The overall result in *Re E* was that the Pensions Ombudsman held that the Teachers' Pension Scheme could deduct the overpayments of pension against Mr E's future pension instalments over a reasonable recovery period, irrespective of the LA 1980, in much the same way as under the doctrine of equitable recoupment.

52. Thus it appears to be the established practice of the Pensions Ombudsman that pension trustees can recover time-barred overpayments of pension via equitable recoupment or equitable set-off. Implicit in this practice is the proposition that the PA 1995, s. 91 poses no impediment to the recovery of time-barred overpayments. This proposition merits some further examination.

The impact of PA 1995, s. 91 on recovery of time-barred overpayments

53. The relevance of PA 1995, s. 91 to claims to recover pension overpayments was discussed and considered in Paul Newman QC's paper for the 2019 APL conference,[6] and the present paper will not go over the same ground. In summary, as Paul Newman explains, the Pensions Ombudsman's present view is that s. 91 does catch equitable recoupment even though s.

[5] Defined in LA 1980, s. 38(1) as "*any proceeding in a court of law*".

[6] "*Owing me, owing you – Legal issues arising from the overpayment and underpayment of occupational pension scheme benefits*", November 2019.

91(1) does not expressly refer to recoupment (and this view was also common ground between the parties in Burgess v BIC). It appears that s. 91 would catch equitable set-off, as s. 91 specifically refers to "*set-off*".

54. PA 1995, s. 91 provides so far as material:

"*(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme — …*

(b) the entitlement or right cannot be charged or a lien exercised in respect of it, and

(c) no set-off can be exercised in respect of it … ."

There is an exception to this in s. 91(5)(f)[7] for:

"*a charge or lien on, or set-off against, the person in question's entitlement, or right, for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension*."

This exception seems apt to allow a charge, lien or set-off for mistaken overpayments, but the exception is itself "*subject to subsection (6)*". Subsection (6) provides:

"*Where a charge, lien or set-off is exercisable by virtue of subsection (5)…(f) –*

(a) its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right, and

(b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator … " (underlining added).

55. For present purposes, it is the underlined wording in s. 91(6) that is of particular interest. As appears from earlier in this paper, the prevailing view, at least in some quarters, appears to be that equitable recoupment and equitable set-off can be used to recover time-barred overpayments because they do not require an "action" brought in Court. However, assuming s. 91 covers both equitable recoupment and equitable set-off, the underlined words in s. 91(6) permit deduction of mistaken payments under subsection (5)(f) only if (in the event of a "dispute" as to amount) the member's repayment obligation "*has become enforceable under an order of a competent court*" etc.

[7] Inserted by the Pensions Act 2004, s. 266.

56. That being so, it could be said that, if there is a dispute as to amount, the trustees or managers are required to comply with s. 91(6) before they can recoup or set-off a time-barred overpayment; but such compliance is impossible because no Court could make an order to enforce the member's repayment obligation, any claim in Court proceedings being time-barred.

57. The Pensions Ombudsman appears to take the view that he is a competent Court for s. 91(6) purposes,[8] and thus can determine the amount of any disputed overpayments and authorise their recovery by recoupment or set-off. However, it could be said against this that: the Pensions Ombudsman is bound to give effect to limitation periods (*Arjo Wiggins v Ralph* [2009] EWHC 3198 (Ch)); therefore he cannot make a direction to enforce repayment of a time-barred overpayment; the only basis on which a time-barred overpayment could potentially be recovered is by the self-help remedies of equitable set-off or recoupment; as they are self-help remedies, the Pensions Ombudsman has no role to play in making an order to enforce them; the trustees or managers cannot resort to self-help in respect of disputed time-barred overpayments in the absence of an order under s. 91(6); and neither the Court nor the Pensions Ombudsman can make such an order if the limitation period has expired. On this analysis, equitable set-off and recoupment cannot be used to recover disputed time-barred overpayments.

58. For the present, however, it seems that the Pensions Ombudsman is continuing to allow trustees and managers to recover time-barred overpayments, either by equitable recoupment or, in the case of statutory non-trust schemes like Mr E's, by equitable set-off.[9]

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[8] See the Pensions Ombudsman's factsheet issued in April 2019, disagreeing with the *obiter* comments to contrary effect in *Burgess v BIC*.

[9] This paper reflects the law as at 11 June 2021, the date of the Edward Nugee lecture on which the paper is based.

DB Pensions and Corporate Insolvency – Double Jeopardary? Tensions between TPR's Regulatory Powers and Restructuring/Insolvency Law and Practice

Gary Squires and Michael Tennet QC

Introduction

1. Historically, while the threat of TPR's powers may have led to consensual outcomes, they have tended to be used to their fullest extent post insolvency. Examples include:

    a. FSDs – Sea Containers, Nortel, Lehman, Box Clever

    b. CNs – Bonas, Carrington Wire, Silentnight, BHS

2. TPR powers have therefore often been used against the backdrop of insolvency proceedings, when debts have crystallised and any damage is clear - making it easier for TPR to demonstrate that there has been loss – or 'detriment' - to members' benefits, and there has been time to investigate events. This can cause tensions between the pensions and insolvency regimes, where directors and office holders have responsibilities to the general body of creditors, whereas TPR's powers are solely for the benefit of the scheme creditor or PPF.

3. This tension is likely to be further increased by two matters:

    a. First is TPR's apparent willingness to attack those running employers, not only for trading too long and so badly that it damages the outcomes for the scheme in the ultimate insolvency (BHS), but also for bringing about what TPR terms an "unnecessary insolvency" (as in the Silentnight case). Potentially this puts directors in a "damned if you do and damned if you don't" situation and creates an obvious potential conflict with the insolvency regime which requires directors to put a company into an insolvency process where that is best placed to protect the interests of all creditors, not just the pension scheme. This gives rise to what we refer to as the Goldilocks Zone, where insolvency proceedings must be issued not too early or too late, but just at the right time.

    b. Secondly TPR has been granted new powers in the Pension Schemes Act 2021 that extend the scope of its CN powers against connected/associated parties and further allow it to seek civil and criminal sanctions against any person who causes harm to a pension scheme and as consequence, the likelihood of its members receiving their full benefits. The breadth of the new CN tests will allow TPR to investigate almost any significant transaction.

4. Because of the novelty of the criminal sanctions and their overlap with the new CN powers, this paper will focus on CN and criminal sanctions rather than on FSD considerations.

Pensions Act 2021: TPR's new powers

5. The Pensions Act 2021 has given TPR two new powers to issue CNs and created two new criminal offences which it can prosecute. The new CNs have been added as s.38C and s.38E of the 2004 Act. In broad summary:

    a. S. 38 C - applies to any act which would materially reduce the <u>recoveries</u> if a section 75 debt had (hypothetically) fallen due immediately at the time of the act.

    b. S. 38E applies if an act or failure materially reduces the value of the <u>resources</u> of the employer which are available to meet the same hypothetical section 75 debt.

6. While on the face of it, these CNs appear to overlap, it seems from the DWP's Consultation Paper that, to avoid this overlap, s.38C is aimed at any events that adversely affect the employer's balance sheet and by using the term "resources" s. 38E is intended to focus on events that affect the employer's future profitability. This seems fine, until one realises that many commercial transactions represent an exchange between capital and profitability. So many transactions will adversely affect one or the other. By way of example: buying a business will adversely affect capital in the hope of boosting future profitability whilst investing in a new IT system to help sales, (or buying new stock in trade) may reduce capital in the hope of improving sales and profit margins; conversely, selling an associated business (and its future profits) - or in similar vein, selling and leasing back assets – will increase capital but reduce future profitability.

7. It follows that the way the new CNs have been drafted means that, where the pension scheme is in deficit, simply entering into many ordinary commercial transactions will give TPR jurisdiction to seek a CN under one or other of s.38C and s.38E.

8. Furthermore, the way in which the main statutory defence to the new CNs have been drafted will make the defence extremely difficult to make out. This can be illustrated by reference to s.38C but exactly the same issues arise under s.38E. The key problem is that the main so-called defence to a s.38C CN, imposes a requirement that it was reasonable for the target to believe that the act complained of would <u>not</u> materially reduce the recoveries from the hypothetical s.75 debt. However that s.75 debt is hypothesised to fall due <u>immediately after the act in question</u>.

9. Many, perhaps most, transactions that involve the expenditure of capital (for example the acquisition of a new computer system or stock in trade), will have the <u>immediate</u> effect of materially reducing the sums available for a s.75 debt. This is because the day after the stock in trade or the IT system is purchased, it will not be possible to resell it for the amount paid. In <u>commercial</u> terms this is not a problem, because the commercial motivation for entering into the transaction will be to generate future profits and improve resources in the longer term. However, that fact is not, on the face of it, relevant to the question of whether the statutory defence is made out.

10. It will be noted that the same problem does not arise with the existing material detriment test under s.38B. S.38B allows the target to rely on the fact that it was reasonable for it to conclude that the act or failure would not detrimentally affect in a material way the likelihood of accrued scheme benefits being received, (condition C) without any temporal limitation on when the target had to assume the benefits will become payable. This allows the target to conclude that the transaction in question was in the long-term interests of all creditors including the scheme and its members, even if it caused temporary drop in resources.

11. The mood music emanating from TPR is that the new CNs are not intended to catch ordinary commercial transactions, and TPR has emphasised the fact that it will only seek a contribution notice where it has come to the conclusion that it is reasonable to do so. However, TPR is only likely to be investigating the question of reasonableness when a transaction has already gone wrong, so there is an obvious risk that TPR will take a less rosy view of the merits of the transaction than the directors did at the time they entered into it.

12. The danger therefore is that the threat of these new CNs will make directors of companies less willing to try and trade out of financial difficulties by taking ordinary commercial risks and thus propel them further down the road towards an insolvency process, where further problems will arise.

New criminal offences

13. There are also two new criminal offences which are based on similar facts to the 2 new CNs:

    a. S.58A– acts intended to prevent/reduce recovery of a s.75 debt which would otherwise become due.

    b. S.58B- acts which target knew or ought to have known would materially affect the likelihood of scheme benefits being paid

    However, the criminal offences are narrower than the civil CNs. For example, the criminal offence in section 58A only applies if there is an intention to affect the section 75 debt. Further, it only applies in relation to a section 75 debt which would otherwise become due, there is no hypothetical section 75 debt deemed to fall due immediately after the act in question.

14. There is also a wider defence to the criminal offences under s. 58A(2)(b) and (c) and 58(2) (b) and (c) if the target is judged to have a "reasonable excuse". The reasonable excuse could theoretically include a belief that transactions even if risky short-term might have substantial benefits for the scheme in the longer term.

15. However, the most significant difference between the new CNs and the criminal offences is that targets of the criminal offences do not have to be associates of the employer. They therefore include anyone who deals with the employer (such as suppliers, funders, advisers and even trade unions). This begs the question to what extent in a pre-insolvency period, applying economic pressure (or bowing to economic pressure) to secure repayment of a

lawfully due debt[1] (or seeking any other financial advantage) from an employer might potentially be criminalised, because such action may damage the pension scheme as a competing creditor.

16. TPR have tried to reassure directors and creditors of employers by providing guidance as to what they will consider criminal conduct. For example TPR have suggested that if a creditor of the employer seeks to improve its position (by agreeing to roll over lending only on the basis of new security being offered) that conduct will not be considered criminal if lending by the creditor is the only viable alternative to what TPR might term an inevitable insolvency. In contrast, if a supplier uses its position as creditor to take ownership of the business shorn of the management and pension scheme, this may well be considered criminal conduct, if it results in the company being made insolvent at a point when TPR would <u>not</u> regard insolvency as otherwise inevitable.

17. TPR's guidance, while welcome, still leaves many difficult issues for suppliers and bankers/funders to wrestle with:

    a. As regards bankers/funders, it may be difficult to assess whether an offer to continue lending is the only alternative to an inevitable insolvency, so as to justify them improving their position versus the pension scheme by seeking security. The directors might have a commercial interest in not sharing alternative offers of finance to maintain a negotiating position.

    b. As regards suppliers, there may be good reasons why the supplier would be unwilling to further support an employer without restructuring and a change of management. Otherwise it simply risks throwing good money after bad. Yet an attempt to safeguard unsecured lending by either taking over the business, or trading on with [new?] security for existing debts is now potentially criminal conduct, if TPR is not satisfied that insolvency was otherwise inevitable, or that alternative options less damaging to the pension scheme's position were appropriately explored and reasonably rejected.

18. As set out below, a further problem for the directors of the employer is that TPR's concepts of "inevitable insolvency" and (its apparent corollary) "unnecessary insolvency", do not necessarily fit very well with director's separate duties as a matter of insolvency law.

Directors' duties as a matter of insolvency law

19. Quite apart from the risks of action by the pensions regulator in the pre-insolvency period, directors also have to be mindful of the fact that:

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[1] Eg under Part 26A of the Corporate Insolvency and Governance Act 2020

a. Trading while insolvent can expose directors personally for wrongful trading and misfeasance (IA 1986 s214, s212) and disqualification (CDDA 1986);

b. Trading while insolvent can also lead to the company entering into voidable transactions (e.g. transactions at an undervalue, IA s238, preferences, IA s239, floating charges, IA s245);

c. There are also common law duties to have regard to creditors' interests which can be triggered when a company's circumstances fall short of actual insolvency.

20. In the recent case of *BTI v **Sequana*** **(now on appeal to the SC)** [2019] EWCA Civ 112 the CA decided that directors duties to protect the interests of creditors generally arise at the point at which it is likely, on a balance of probability basis, that the company will become insolvent.

21. The assessment of whether the company has become insolvent will be under s.123 of the IA 1986. The test involves a consideration of both "cash flow" and "balance sheet" insolvency.

22. Neither the cash flow nor balance sheet test is a simple snapshot test, especially when long term liabilities (like pension scheme liabilities) have to be taken into account. As the case of ***Casa Estates (UK) Ltd (In Liquidation)**, Re* [2014] EWCA Civ 383 made clear, an ability to keep paying debts as they fall due for some time into the future, does not necessarily mean that a company is solvent, which is why a balance sheet test is also needed. This is relevant because some small employers with large pension schemes may be operationally profitable (and thus cash flow solvent) but have little or no chance of paying off the pension deficit, and so could be balance sheet insolvent. *Casa Estates* requires the directors of such companies to ask how debts are being paid as they fell due, and whether the effect of paying debts is simply to send the company deeper into balance sheet insolvency.

23. On the other hand, *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28, [2013] 1 W.L.R. 1408, [2013] 5 WLUK 231, demonstrates that pure balance sheet insolvency at a point in time may not of itself demonstrate that a company is insolvent if it can pay its liabilities as they fall due and if the future liabilities on the balance sheet are very long term in nature and may fluctuate in value before falling due (as pension scheme liabilities may fluctuate).

24. It should also be noted that the CA in *Sequana* expressly rejected the proposition that directors could only be criticised for not safeguarding creditors only if the company had passed the so called "point of no return", where insolvency was inevitable, in favour of a test that simply asked if insolvency was likely. This approach does not seem to fit neatly with TPR's deployment of the concept of "inevitable insolvency" when assessing the lawfulness of actions that injure the scheme and whether TPR is willing to engage in restructuring arrangements affecting pension scheme liabilities.

25. There is also a danger that the focus on inevitable insolvency, when trying legitimately to protect the pension scheme will place too much emphasis on cash flow insolvency. Not

declaring insolvency until the employer physically runs out of cash may suit the pension scheme, because it gives the pension fund the best chance of retaining the employer covenant, however waiting for actual cash flow insolvency may not be in the interests of creditors generally.

Practical applications of TPRs powers and their interaction with insolvency law

26. In considering how TPR’s powers might be applied in practice and the interaction of those powers with insolvency law, it is helpful to break down the analysis into three distinct time periods:

    a. Pre-insolvency, where the business is financially stressed and looking to effect a turnaround.

    b. The ‘zone of insolvency’, where the business is (or expects to become) balance sheet or cash flow insolvent and director’s duties have shifted to considering the interests of creditors – this is where restructuring discussions with TPR and the PPF are most likely to occur.

    c. Post-insolvency, where TPR powers of investigation and enforcement could clash with those of the insolvency office holder.

Financial stress/distress - pre-insolvency

27. The first period is where financial distress and cash flow insolvency are becoming increasingly likely, but could possibly be averted with new investment and an effective turnaround plan, allowing them to continue trading.

28. Turnarounds require funding – from investment, from asset sales and/or from new lending. Such funding is needed to fund losses, pay professional advisers and meet other restructuring costs. However, turnarounds are not without risk and any new investor or funder will be keen to protect their investment in the event of failure and make an appropriate return in the event of success.

29. Where there is a material pension scheme, balancing stakeholder interests will become more challenging for directors. This is because most funders will require priority over the pension scheme for any returns in the event of business failure; consequently, if a turnaround is unsuccessful, the pension scheme is likely to receive a reduced return in the event of insolvency – i.e. a failed restructuring could be detrimental to members’ pensions and/or the PPF. Even a partially successful restructuring - one that saves the company but subordinates the pension scheme behind significant debt - could be considered detrimental on balance, or trigger one of the other CN tests.

30. This presents certain risks that are likely to make stakeholders more cautious:

    a. Directors are ultimately responsible for the actions of the company and could find themselves a target of proceedings from the insolvency office holder and/or TPR if they cannot justify that the actions they took were reasonable. Even if the business survives, any measures that subordinate the pension scheme and reduces its potential recovery in the event of a subsequent insolvency could result in CN proceedings.

    b. Owners with substantial influence or control are connected parties and likely to be a key target for TPR action if they have financial resources, particularly if they have historically benefited financially from ownership – e.g. through dividends.

    c. Lenders are less likely to be targets as the result of 'arms-length' lending on commercial terms, even if it could be said to prejudice the scheme. However, lenders would seem more likely to become targets if they are connected parties with influence (e.g. internal group lending) or if they are adjudged to have acted deliberately to prejudice the pension scheme to profit financially e.g. by creating a burning platform as part of a loan-to-own strategy.

31. Advisers could potentially become targets of criminal proceedings if they recommend an approach contrary to the interests of the pension scheme (possibly even if it is in the interests of the general body of creditors).

PPF and TPR conditions for engagement

32. For the purposes of restructuring negotiations, TPR (in the case of RAAs) and the PPF (in the case of RAAs and CVAs), will only engage if the company would otherwise inevitably experience an insolvency event within the next year (per published guidance: Multi-employer pension schemes, employer departure, The Pensions Regulator; Regulated apportionment arrangements and employer insolvency statement (thepensionsregulator.gov.uk)), i.e. is, or will shortly become, cash flow insolvent. However company directors may feel that, well before this point is reached, they have reached the point where the company is likely to end up in an insolvency process, because notwithstanding that it may have the cash flow to keep trading, it is getting increasingly balance sheet insolvent because of mounting losses and/or it cannot afford meaningful DRCs to manage the pension deficit, yet be unable to engage with TPR and the PPF.

33. So, TPR may be unwilling to engage at a point in time where the company directors feel they have no option but to commence insolvency proceedings, because the directors cannot prove that insolvency is inevitable within the next year, despite it being, in their view, likely in the longer term.

34. Even if TPR decides to engage, there is also a range of other non-statutory conditions that TPR/PPF require to agree a consensual restructuring that may be unacceptable to other stakeholders, e.g., a 10% or 33% (depending on connectedness) equity stake in the

restructured company. While these policies are TPR/PPF's prerogative, based on their statutory terms of reference, they can put directors in a difficult position, as they may be presiding over a company that is on the balance of probabilities insolvent, yet is either not inevitably insolvent within one year or cannot otherwise meet the terms required by TPR, and is therefore unable to restructure consensually.

35. Where TPR declines to engage, directors will be left with the dilemma as to whether to:

    a. Continue trading in an attempt to restructure operations sufficiently to avoid cash flow insolvency

    b. Proceed with a consensual restructuring proposal in the face of resistance from the pensions stakeholders, knowing it is likely to fail unless the PPF can be outvoted by other creditors, or

    c. Initiate non-consensual insolvency proceedings such as administration or liquidation.

Turnaround plans

36. Successful operational and/or financial restructuring requires a credible, funded turnaround plan i.e. a plan clearly demonstrating the steps that will be taken to return a business to profitability, the availability of finance to meet those steps and the impact they are expected to have on the business. Expectations of success must be 'rational'. In order to gain support from other stakeholders, this plan should also be compared with other options, such as a sale of business or a liquidation.

37. Absent such a plan and stakeholder buy-in, if directors proceed regardless and the company fails anyway, they risk exposing themselves to wrongful trading claims or claims for misfeasance. This may occur if creditor recoveries are negatively impacted by losses eroding cash sourced from secured borrowing or distressed asset disposals.

38. Where there is a DB scheme, considerations include the viability of the scheme. It is often possible to maintain cash flow solvency over extended periods by negotiating down DRCs. However, the viability of the scheme itself needs to be assessed under such arrangements, which can be achieved via asset/liability modelling. If, on the balance of probabilities, the recovery plan is probably unviable, then logically so is the employer.

39. It is almost inevitable that efforts to restructure businesses have the potential to cause harm to pension scheme recoveries, for example, if secured funding is provided for a turnaround plan that subsequently fails, or if the scheme is compromised in a pre-pack administration.

40. As a consequence, the 'reasonable excuse' defence to the criminal offences becomes critical. Whilst a common theme of responses to TPR's consultation is greater clarity, TPR does highlight key factors in determining a reasonable excuse, as follows:

a. Whether the detriment to the scheme was incidental, rather than a fundamentally necessary step – e.g. a decision to withdraw credit

b. Whether 'adequate' mitigation has been provided to the scheme

c. Whether there were viable alternatives that could have been pursued that would have a less damaging effect on the scheme.

41. TPR also sets out some examples of behaviour where it would expect to investigate on a criminal basis, which include mismanagement of the business, value extraction and asset stripping and a new transgression – 'unnecessary insolvency'. All of these could also constitute misfeasance.

Liability compromises

42. Should a turnaround not be considered feasible absent a compromise of liabilities, informal options such as debt-for-equity swaps, or formal consensual processes such as CVAs or Schemes of Arrangement, may be possible without TPR/PPF approval if they can be outvoted by other creditors, or the scheme is not compromised. However, creditors often object to being subordinated behind the pension scheme, so running the scheme through a restructuring that compromises financial or other creditors, but not the scheme is rarely an option [where the scheme is a material creditor].

43. Initiating non-consensual insolvency proceedings is also not without its risks. As already noted, TPR has coined the phrase 'unnecessary insolvency' in both the Silentnight CN case and its draft guidance on criminal proceedings, which unlike CN and misfeasance claims can extend to non-associated parties. This refers to cases where it is alleged that, notwithstanding balance sheet insolvency, the company could have continued to trade and pay contributions to the pension scheme and a purpose of crystallising an insolvency event was to abandon the scheme. This could also expose directors (including shadow directors) to claims for misfeasance.

44. If TPR is not persuaded that insolvency is inevitable but the directors believe that insolvency under section 123 of the IA 1986 is likely, directors may be caught between a rock and a hard place.

45. The safest course for directors may still be for the directors to go into a non-consensual insolvency process if there is a genuine concern about wrongful trading. TPR is likely to find it hard to argue that either the directors or non-scheme creditors, could be liable for a contribution notice or commit a criminal offence simply by initiating or voting for a court approved insolvency process, even if the effect of that court approved process is to reduce the obligations to the scheme. Further, as TPR acknowledged in its s.89 report on Silentnight, it would not ordinarily expect lenders to bring about unnecessary insolvencies, and so (one assumes) TPR would not usually anticipate targeting them for doing so. However this would not stop TPR arguing (as in Silentnight) that events that occurred pre-insolvency created the conditions for what they regard as an "unnecessary insolvency", and attacking directors and

creditors, not for the initiation of the insolvency process itself, but for creating conditions where the insolvency process was necessary.

46. Where the insolvency is regarded as unnecessary by TPR, initiating a non-consensual insolvency process will have the additional downside of crystalising, but not limiting the losses which TPR might claim. In other words it could create a situation, like in the Silentnight case, where TPR still argues that but for the insolvency process, the employer would have been able to trade on and meet the scheme deficit in full in due course.

Practical pointers for how to restructure post PSA

47. So what are the practical steps that can be taken to minimise risk?

    a. Restructuring situations can be fast moving and complex and when decisions are reviewed with the benefit of hindsight it will be necessary to show that expectations of success were rational and that there was reasonable excuse for any detriment to the pension scheme. So be prepared to justify any decision to continue trading by reference to credible plans and options analysis.

    b. It should be recognised that consensual restructuring is likely to need TPR/PPF approval which may not be forthcoming, or the attached conditions may be too expensive or risky for funders.

    c. If there is only a 'smoldering' platform, attempts to create a burning platform to crystallise engagement are high risk. Non-consensual restructuring could be deemed 'unnecessary' if it cannot be demonstrated that all options were properly explored, and the scheme has not suffered unfairly.

    d. In short, consider all options, document them and the resulting decisions, take advice every step of the way and understand the legal position and duties throughout. Consider seeking clearance to establish a 'reasonable excuse'.

48. Given the competing pressures and duties on directors and funders in the pre-insolvency period, the most instructive case on how to deal with those pressures continues to be *Johnston Press* (even though it predated the PA 2021 and TPRs latest guidance). In *Johnston Press*, the bondholders <u>did</u> manage to acquire the business shorn of the pension scheme and without reaching a prior agreement with TPR. What the bondholders did well in that case was:

    a. they avoided interfering directly in the management of the employer so as to ensure they did not become shadow directors

    b. they did nothing to accelerate the point at which the debt had to be repaid

    c. they allowed the directors a reasonable shot at selling the business, which process also helped demonstrate that there was likely to be nothing for unsecured creditors like the pension scheme, in the event of a sale

d. they only stepped in with an offer for the business (based on the offers already made and at the 'top end' of an independent valuation of the business and assets) after a Court had ordered the appointment of an administrator on the basis it was insolvent.

49. Another interesting feature about *Johnston Press* is that the Court ordered the appointment on the basis that the company was balance sheet insolvent (not cash flow insolvent) yet TPR seemed happy that the involvement of the Court demonstrated that the insolvency was inevitable.

50. In contrast, if insolvency does <u>not</u> result from a court approved process - for example the appointment of an administrator under a qualifying floating charge (as in Silentnight) - TPR may be less willing to accept that insolvency was inevitable.

Post-Insolvency – Competing Claims

51. Officeholder obligations regarding investigations and pursuit of insolvency claims are set out in Statement of Insolvency Practice 2 (SIP2), '*investigations by office holders in administrations and insolvent liquidations and the submission of conduct reports by office holders*', issued by the insolvency regulatory bodies.

52. Insolvency practitioners have a range of potential tools at their disposal to make recoveries for the insolvent estate's creditors generally, including transactions at an undervalue (IA s238), preferences (IA s239), avoidance of floating charges (IA s245) wrongful trading (IA s214), and misfeasance (IA s212). Directors may also be exposed to disqualification (CDDA). Misfeasance is also likely to catch the attention of TPR. S212 applies to company officeholders (including shadow directors) who have 'misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company'.

53. Given its new civil CN powers, TPR will also have the ability post-insolvency to seek contributions from directors and associates in respect of a very wide range of pre-insolvency transactions that with the benefit of hindsight may not have worked to the advantage of the scheme.

54. There is scope for overlap and conflict between the powers of TPR and Insolvency Practitioners. In its recent draft policy document 'our approach to the investigation and prosecution of the new criminal offences', TPR provides four examples of circumstances that might give rise to prosecution, of which three might also constitute misfeasance:

a. 'The purchase of an employer with no further investment into its business, subsequent mismanagement of the company, and extraction of value before the company went into administration.

b. The stripping of assets from an employer, which resulted in substantial weakening of the support for the scheme.

c. Taking steps to bring about the unnecessary insolvency of the scheme employer with the intention of buying the employer's business without the scheme.'

This is important because recoveries by insolvency office holders benefit the company's estate and its general body of creditors (including the pension scheme), whereas successful claims by TPR benefit only the scheme. Further, which of TPR and the insolvency office holder brings proceedings first is capable of making a significant difference to creditors. There is the possibility that the first claim (misfeasance or CN) will bankrupt the director or shadow director or exhaust their insurance cover, leaving nothing left for the second claim. This could leave either the scheme or the general creditors of the employer out of pocket.

55. There is no clue in either the insolvency legislation or the pensions acts as to how such conflicts might be managed. Nor has any draft guidance been produced by either TPR or the insolvency regulatory bodies.

56. Looking at the same problem from the point of view of a director or shadow director, they are potentially subject to double jeopardy in respect of the same act of misfeasance. There is also nothing expressly in the legislation that prevents double recovery against the director or shadow director in this situation; instead the director will be left to argue from first principles that the nature of the CN and misfeasance regimes is such that double recovery should not be allowed. For example:

a. if a director has already compensated the general body of creditors for an act of misfeasance, the director would have to argue that it would not be reasonable for TPR to seek a contribution notice in respect of the same acts, or at least that the CN should deduct sums which have already found their way to the scheme as a result of the misfeasance claim.

b. Similarly if a director has already compensated the scheme under a contribution notice, they would have to argue that the scheme should not be further compensated via a misfeasance claim, on the basis it is a compensatory regime.

c. The potential for double recovery also needs to be borne in mind by directors seeking to settle CN and misfeasance claims. The target will want to consider whether an overall settlement of both liabilities is possible.

57. Another potential overlap of claims in an insolvency situation that deserves mention is the overlap between a contribution notice in favour of the scheme and the section 75 debt owed by the insolvent company to the scheme.

58. The key provision here is s.50 of the PA 04 which governs the relationship between a contribution notice and a 75 employer debt. The general policy intent behind section 50 seems to be that if the regulator has decided in its wisdom to issue a contribution notice against a person, prima facie that person is a more appropriate funder of the pension scheme than the employer via its section 75 debt. Section 50(6) thus provides that any sums paid to the scheme or the PPF pursuant to a contribution notice are to be treated as reducing the amount of the

debt due from the company /liquidator under section 75 of the 1995 Act. Under s.50(4) TPR also has a discretion to direct the trustees not to pursue a s.75 debt against the employer pending recovery of the CN.

59. It follows that, in some situations, TPR seeking a CN may operate indirectly for the benefit of the wider body of creditors of the employer because lowering the s.75 debt v the employer will increase the assets available for the employer's other creditors.

60. In contrast, if sums have already been paid by the employer under a section 75 debt, the target may apply to TPR for a reduction in a CN, but any such reduction is stated to be a matter of discretion for TPR.

61. There appears to be no provision in s.50 or other legal principle to suggest that paying a CN would give the Target any right of subrogation or indemnity against the employer for having reduced its s.75 debt.

62. Finally, it is not clear how s.50 would work in relation to a settlement. On the face of it a voluntary settlement of proceedings for a contribution notice will not fall within section 50(6). So that issue also needs to be addressed if a target which is also a creditor of the employer is considering settling CN proceedings. This could even necessitate the actual issuance of a CN by agreement in a particular amount, to ensure that s.50(6) is engaged.

63. There is not only a potential for overlap between the insolvency and pensions jurisdictions. There is also a potential for overlap between TPRs criminal and civil powers.

64. One of the questions that had been raised prior to the policy is whether clearance would be available for criminal sanctions, much like it is for the equivalent CN tests. This has to some extent been addressed by TPR in their draft policy document on the investigation and prosecution of criminal offences, which says:

> *'Our practice, when granting clearance, is to issue a statement to the effect that, in our opinion, in the circumstances described in the application it would not be reasonable to impose liability on the applicant under a CN.*
>
> *Section 42 does not apply to the offences under sections 58A and 58B, and there is no equivalent provision applicable to those offences.'*

So, clearance for criminal proceedings is not available and a further question arising is the extent to which a settlement of a civil or CN case would be factored into a potential criminal prosecution. This is partially addressed in TPR's 25 March 2021 'settlement policy', where it states:

> *'Where we are considering using or are pursuing use of more than one power, we may choose to reach a settlement in respect of some but not all of these powers. In this instance, the steps set out in 'Consequences of settlement' (above) will apply only to the*

powers subject to the agreed settlement - the enforcement action in relation to the other powers will continue.'

The implication of the above is that a settlement of a civil claim or CN would not of itself result in the cessation of criminal proceedings.

65. Since there is a public interest in settling <u>civil</u> CNs, one would not like the possibility of criminal proceedings to make civil CNs "unsettlable", however no target in their right mind will be willing to settle civil proceedings while an unresolved threat of criminal proceedings is hanging over them. Settlement would look like an admission of guilt.

66. That said, linking the settlement of civil CNs and criminal proceedings is likely to turn the threat of criminal sanctions into a bargaining chip in settlement negotiations, which leads to some very uncomfortable outcomes as a matter of public policy:

    a. TPR might be tempted to throw in the threat of criminal proceedings as a way of forcing more money from a target who was otherwise unwilling to settle a civil claim on its merits;

    b. it is also a troubling notion that a person with deep pockets should be able to buy their way out of a criminal liability where Parliament has judged their actions to be deserving of a criminal sanction.

67. TPR's current guidance gives little comfort on either of these points; on the contrary TPR expressly contemplates it might seek a criminal sanction where the target has no funds to meet a civil CN. On its face that suggests that poor people are more likely to be criminalised than rich ones.

68. One possible way out of these difficult public policy issues is for TPR to effectively take a decision on bringing, or not bringing, criminal proceedings before it seeks any civil CN so that the decision as to whether to launch criminal action is not influenced by the assets of the target or their willingness to settle the civil claim.

Topical issues in public sector pensions

Paul Newman QC[1]

Introduction

When I started working in pensions some 30 years ago, pension scheme litigation was in its infancy. In my first year of practice in 1991, a total of 26 cases had been published in the Pension Law Reports; today, that number stands at over 750.

For most of that time, claims involving pension schemes had both immediate and long-lasting consequences for members and employers, as they would affect the accretion of future benefits as well as already-accrued liabilities. Today, for reasons which will be known to all, claims relating to private sector DB pension schemes largely involve legacy issues. Whilst still important, the steps taken by employers to close DB schemes, in order to deal with the high costs and volatility associated with DB pension liabilities, means that, going forward, scheme funding has been put on a more stable basis and both the complexity and effect of the legal issues relating to future service benefits have been reduced.

The same cannot, however, be said for public sector occupational pension schemes. As active participation in private sector occupational schemes began to decrease during the 1990s, contributing members of public sector schemes increased: by 2011, there were 5.3 million active members of public sector schemes, compared with 2.9 million active members of private sector schemes.[2] Since the introduction of auto-enrolment in 2012, the number of active members of private sector schemes has risen dramatically, but of course those members are accruing benefits on a DC basis: as at 2019, public sector employees accounted for 87% of all those actively contributing to a DB scheme – 6.3 million out of 7.6 million.[3]

Issues relating to public sector pensions therefore tend to have a greater impact on younger and still-employed members of participating bodies; moreover, many of those bodies are heavily unionised, which means that pensions issues, when they arise, are more likely to lead to disputes and to litigation.

One development which significantly contributed to such disputes was the wholesale reform of public sector pension schemes introduced by the Public Service Pensions Act 2013 (***"the 2013 Act"***). Designed to reduce the cost of meeting public sector pensions, the reforms replaced final salary benefit provision with CARE benefits, and increased the normal pension ages for members of schemes other than those of the uniformed services. Whilst these changes have had a significant

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[1] I am very grateful to David Pollard for reading and commenting on an earlier draft of this paper. Any remaining errors are my sole responsibility.

[2] Office for National Statistics, *Occupational Pensions Survey, UK: 2011*, section 5.

[3] *Public Service Pensions: Facts and Figures,* House of Commons Briefing Paper no.8478, 11 May 2021, section 2.

effect on the funding of those schemes,[4] their implementation - and in particular the transitional arrangements - have caused significant legal problems.

This paper will consider a number of topical legal issues affecting public sector pension schemes, all of which are linked to the key issue of the nature of the duties owed by the administrators of public sector schemes when exercising their powers. The general state of the law on that issue will be considered, together with the particular question of how administrators' decision-making powers are affected by ministerial guidance. There then follows an analysis of the exercise of those powers in the investment of scheme assets, in the specific situation of whether (and, if so, to what extent) administrators may take account of non-financial factors. The paper concludes by looking at the exercise of powers by administrators in the context of two other topics of current interest: the provision of exit credits in the Local Government Pension Scheme (***"LGPS"***); and the removal of the discriminatory elements of the reformed public sector schemes' transitional arrangements, following the *McCloud* and *Sargeant* litigation.

Nature of the duties owed by scheme administrators

In a typical private sector pension scheme established under trust, the sources of the duties of those charged with administering the scheme are clear: as trustees, they owe fiduciary duties to members and beneficiaries, duties of reasonable skill and care both at common law and under the Trustee Act 2000, and duties imposed by pensions legislation.

Public sector pension schemes, by contrast, are created by delegated legislation: these schemes are not trusts,[5] and the administrators of these schemes are not trustees. Whilst the regulations establishing these schemes impose specific duties and confer specific powers on administrators, they do not define the way in which the administrators should go about exercising those powers, in terms of identifying the factors which they should take into account or whose interests they should consider.[6]

Given that this issue underpins the entire decision-making process of the administrators of public sector pension schemes, it is perhaps surprising that there is no caselaw which deals directly with the scope of their duties.

The starting point is generally taken to be a statement in a House of Lords decision from 1925, *Roberts v Hopwood*.[7] The case involved a challenge to the decision of a local authority to pay a

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[4] The average value of future service benefits provided to members of the four main public sector schemes - NHS, civil service, teachers and local government - was predicted to reduce by more than a third: from 23% of a member's salary to 14%: Pensions Policy Institute, *The implications of the Coalition Government's reforms for members of the public service pension schemes*, October 2012.

[5] For an example of a statutory pension scheme which was expressed to be treated as established under a trust, see s.67(2) of the Pensions Act 2008 (providing for the creation of the National Employment Savings Trust).

[6] Save for some specific provisions requiring administrators to follow guidance issued by the Secretary of State: see the discussion of the *Palestine Solidarity* case below.

[7] [1925] AC 578.

particular wage to its lowest paid employees, which the district auditor regarded as being excessive due to a substantial fall in the cost of living for the year in question. The House of Lords upheld the challenge, and in the course of his speech Lord Atkinson described the nature of the local authority's duty in these terms:[8]

> *A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly business-like manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others.*

This principle, which came to be known as the "fiduciary principle", has been applied in a number of cases involving the application of public funds by local authorities without regard to the interest of the ratepayers. It has been used to strike down: the introduction of a scheme of free travel for the elderly;[9] a failure to pass on to council house tenants the costs incurred by an authority to landlords of derequisitioned premises;[10] and an increase in local rates to pay for reductions to public transport fares.[11]

The application of this principle to the powers of the administrators of public sector pension schemes was first suggested in a Circular issued by the Secretary of State for the Environment in 1983,[12] which stated that the administering authorities of the constituent funds of the LGPS should pay due regard to the principle as stated by Lord Atkinson.[13] Since then, the only caselaw which has touched on the question of the status of public sector scheme administrators has also related to LGPS administrators.

Martin v City of Edinburgh District Council[14] involved a challenge to the investment policy of a local authority in relation to the assets held by it, including funds held as administrator of an LGPS fund. The Court of Session treated the authority as the trustee of a trust fund, and the issue was determined on the basis of general principles of trust law. However, the status of the authority as trustee was common ground from the outset, and there was no argument, still less a decision, on

[8] *Ibid* at 595.

[9] *Prescott v Birmingham Corporation* [1955] Ch 210.

[10] *Taylor v Munrow* [1960] 1 WLR 151.

[11] *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.

[12] Circular no.24, cited in para 2.19 of the Department for Communities and Local Government consultation paper, *Local Government Pension Scheme: Revoking and replacing the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009* (November 2015).

[13] In an Opinion dated 25 March 2014, commissioned by the Local Government Association in connection with the changes to LGPS corporate governance responsibilities brought about by the 2013 Act, Nigel Giffin QC advised that the administering authority owed fiduciary duties to both employers and members. The Opinion can be found at:

https://lgpsboard.org/images/PDF/Publications/QCOpinionApril2014.pdf

[14] 1988 SLT 329.

that issue; and there was no separate discussion about the authority's status as the administrator of the pension fund, as the case related to all the public and charitable assets held by the authority.

That case can be contrasted with the approach of the Court of Session in *Bain, Petitioner*,[15] which concerned whether an LGPS fund constituted a "trust scheme" for the purposes of the obligations imposed on such schemes by the Pensions Act 1995. The Court noted that the pensions legislation made a distinction between a *trust scheme*, which was defined as an occupational pension scheme established under a trust, and a *public service pension scheme*, which was established under legislation, being a scheme all the particulars of which are set out in an instrument made under legislation. Because the scheme in question was governed by the LGPS regulations, with all its provisions being contained in legislation, it was held not to be a trust scheme.

The most recent authority is *R (oao Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government*,[16] in which a majority of the Supreme Court struck down guidance issued by the Secretary of State to administrators of LGPS funds regarding non-financial considerations in relation to their investment strategy. During the course of the judgments, the Court had something to say about the status of the administrators. When the case was before the Court of Appeal, it supported its decision to uphold the guidance on the ground that local government authorities were themselves part of the machinery of state. This description was rejected in the Supreme Court by Lord Wilson JSC in the following terms:[17]

> *… administrators of local government schemes have duties which, at a practical level, are similar to those of trustees and they consider themselves to be quasi-trustees who should act in the best interests of their members. The view, superficial at best, that the administrators are part of the machinery of the state, and are discharging conventional local government functions, fails to recognise that crucial dimension of their role.*[18]

However, none of these cases really assist in determining the scope of the administrators' duties. The *Martin* case simply assumed that the administrator was a trustee. The *Bain* case was only concerned with the definitions in pensions legislation, and did not consider whether the scheme could be regarded as a trust for the purposes of the general law. The *Palestine Solidarity* case did not explore what the 'quasi-trustee' status of the administrators actually entailed, as that was not relevant to the decision.

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[15] 2002 SLT 1112.

[16] [2020] 1 WLR 1774.

[17] *Ibid,* at [31].

[18] Lord Wilson JSC (at [12]) and Lord Carnwath JSC (at [42]) also referred to a 2014 Law Commission report (discussed further below) which stated that, although the LGPS was not technically a trust, at a practical level the duties of those managing its assets were similar to those of trustees, and the administering authorities considered themselves to be quasi-trustees, acting in the best interests of their members: *Fiduciary Duties of Investment Intermediaries* (2014) (Law Com No 350), paras 4.3(3) and 4.79. The dissentient members of the Supreme Court agreed with the Court of Appeal's description of the administrators as part of the machinery of state: per Lady Arden and Lord Sales JJSC at [87].

A bald statement that administrators owe fiduciary duties, or that they are to be treated as 'quasi-trustees', is not particularly helpful in determining the nature of those duties, for several reasons.

First, fiduciary duties cannot be considered in isolation from the other statutory or common law duties which the administrator may owe in relevant circumstances. For example, the investment duties of the administrator stem from a number of sources, such as common law principles, fiduciary duties, the regulations establishing the scheme and national and EU legislation concerning pensions investments; and there are also the public law obligations of the local authorities who act was administrators of the LGPS. There may be a good deal of overlap between these duties and they need to be considered together.

Secondly, the scope of the duties owed by a fiduciary are heavily dependent upon the particular facts and circumstances surrounding the fiduciary relationship:[19] not all fiduciaries owe the same fiduciary duties,[20] and some relationships may give rise to more onerous duties than others. The identification of the fiduciary is therefore only the beginning of the analysis.[21]

Finally, the simple application of the fiduciary principle to the administration of public sector schemes is complicated by the presence of different stakeholders in those schemes. Lord Atkinson's statement in *Roberts v Hopwood* rested on the fact that the funds in question derived from a source external to the authority: the duty identified in that statement was said to be owed to those contributors who are not members of the authority (such as local ratepayers). In the general run of cases, where the funds derive from a single source, such as local ratepayers, there is no difficulty in identifying the persons to whom the duty is owed. However, in the case of public sector schemes, the assets making up the fund derive from a number of sources with potentially conflicting interests, such as: the contributions of members; the payments made by tax and rate payers, in relation to contributions made by the public sector bodies who employ the scheme members; and the payments made by private sector bodies, where they are permitted to participate in public sector schemes such as the LGPS.

Thus, whilst it can now be said with some confidence that the administrators of public sector pension schemes owe fiduciary duties, how those duties are to be exercised will vary depending on the circumstances in issue, and the question can only be sensibly answered by reference to the facts of the particular case under consideration. Perhaps the safest general guide is to begin to approach the matter from the point of view of trustees of private sector schemes,[22] and to adapt that approach by reference to any circumstances which depart from the typical private sector scheme situation.

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[19] See *Re Coomber* [1911] 1 Ch 723 at 729 per Fletcher Moulton LJ: *There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.*

[20] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206 per Lord Browne-Wilkinson.

[21] *Children's Investment Fund Foundation (UK) v Attorney General* [2020] 3 WLR 461 at [35] per Lady Arden JSC.

[22] See S.H.Bailey, *Cross on Local Government Law*, para 8B-08.

The effect of statutory guidance on the exercise of administrators' powers

Another aspect of the decision-making powers of the administrator is the need to take account of any guidance issued by the Secretary of State in respect of their functions. The 2013 Act enables the regulations governing a public sector scheme to include guidance, issued to the administrator by the government department responsible for the scheme, as to the administration and management of the scheme.[23] To what extent can administrators choose to depart from the guidance, if they consider it to conflict with their fiduciary duties?

R v London Borough of Islington ex p. Rixon[24] concerned guidance issued under s.7(1) of the Local Authority Social Services Act 1970, which required local authorities, in the exercise of their social services functions, to act under the general guidance of the Secretary of State. This was considered in that case by Sedley J, who said as follows:[25]

> *Clearly guidance is less than direction … In my judgment Parliament… did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. … in my view Parliament by section 7(1) has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.*

In *R (oao Forest Care Home Ltd) v Pembrokeshire CC*,[26] Hickinbottom J suggested that, since the local authority is the ultimate decision-maker, it must as a matter of principle be able to depart from guidance even substantially if it had sufficiently compelling grounds for so doing: however, the more substantial the proposed deviation from guidance, the more compelling must be the grounds for departing from it.[27]

The guidance-issuing powers in the 2013 Act are, if anything, even more restrictive than the provision in issue in the *Rixon* case, as the guidance in the former is not stated to be general, and so can be more specific and therefore more prescriptive. In practice, although it does not take the form of a ministerial direction,[28] specific guidance in mandatory terms must be treated as such by the administrator unless it has a good justifiable reason to depart from it, and any departure should be kept to a minimum in the absence of cogent, logical and convincing reasons for going further.

Of course, another way to overcome statutory guidance is to challenge it on the grounds that it exceeded the statutory powers of the Secretary of State. This is what occurred in the *Palestinian*

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[23] s.3(2)(a), sch.3, para 12(a) of the 2013 Act.

[24] [1997] ELR 66.

[25] *Ibid,* at 71.

[26] [2010] EWHC 3514 (Admin).

[27] *Ibid,* at [29].

[28] Although sch.3, para 12(a) of the 2013 Act enables such directions to be given in addition to guidance.

Solidarity case,[29] where a majority of the Supreme Court held that investment strategy guidance[30] issued to administrators of LGPS funds not to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries was struck down. This was on the basis that the enabling legislation[31] only permitted guidance to be provided about how administrators should take ethical considerations into account when determining their investment strategy, and did not extend to attempts to enforce the government's foreign and defence policy. Accordingly, the majority held that it was not open to the Secretary of State to require administrators to give effect to the government's policies in these matters in preference to those which they thought it right to adopt in the fulfilment of their fiduciary duties.

Taking account of non-financial factors in investment decisions

Before leaving the *Palestine Solidarity* case, it is worth considering what the Supreme Court had to say about the general question of taking non-financial factors into account when exercising investment powers.

The guidance in question was made under legislation which required the investment strategy to include, amongst other things, the administrator's policy on how social, environmental and corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments.[32] One aspect of the guidance which was not challenged dealt with the extent to which administrators could take such non-financial considerations into account when making investment decisions, in the following terms:

> *Although schemes should make the pursuit of a financial return their predominant concern, they may also take purely non-financial considerations into account provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.*

The two conditions identified in the guidance broadly (but not exactly) replicated the conditions for taking into account non-financial factors which were laid down by the Law Commission in its 2014 report on the fiduciary duties of investment intermediaries.[33]

No-one in the Supreme Court took issue with that aspect of the guidance, and Lord Carnwath JSC went so far as to endorse the Law Commission's view that non-financial factors can be taken into account, provided that the two conditions were satisfied: [34]

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[29] *Supra.*

[30] Ministry of Housing, Communities & Local Government*, Local Government Pension Scheme: Guidance on Preparing and Maintaining an Investment Strategy Statement*, 15 September 2016.

[31] Reg 7(1) of The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016.

[32] *Ibid,* reg.7(2)(e). For the equivalent private sector pension scheme requirement, see reg.2(3)(b)(vii) of The Occupational Pension Schemes (Investment) Regulations 2005.

[33] *Supra,* para 6.34.

[34] *Supra,* at [43].

> *That report in turn may be seen as having settled a long-running debate as to the extent to which pension trustees could take account of non-financial factors dating back to cases such as Cowan v Scargill … There appears now to be general acceptance that the criteria proposed by the Law Commission are lawful and appropriate. I agree.*

However, this *obiter* comment should not be taken as the final word on the ability of either public sector pension scheme administrators, or private sector scheme trustees, to take account of non-financial factors when making investment decisions: the Law Commission's report has no legal force of its own, and the case law shows that this issue is not at all settled.

Indeed, the only directly relevant case, which is over 30 years old, provides no support for the Law Commission's proposition. *Cowan v Scargill* [35] involved a challenge to the trustees of the Mineworker's Pension Scheme investing in overseas businesses and businesses in direct competition with coal. The challenge was rejected on the basis that the trustees were not entitled to take social or political reasons into account when exercising their investment powers, as that would conflict with their duty to act in the best financial interests of members.[36]

What, then, of the Law Commission's conclusion that non-financial factors can be taken into account, provided that that would not involve significant risk of financial detriment to the scheme and that there was good reason to think that scheme members would support the decision?

On closer analysis, neither of those conditions are supported by authority.

The second of these conditions appears to come from the comment of Sir Robert Megarry V-C in *Cowan v Scargill* that non-financial considerations could be taken into account where it was known that all the beneficiaries held strong moral views, so that it would not be for their 'benefit' to know that they were obtaining larger financial returns by means of investments which were contrary to their beliefs.[37] However, it will generally not be possible to apply this principle to pension schemes with a large number of members, and the second condition identified by the Law Commission is subject to the same practical difficulty.

The first condition identified by the Law Commission - that trustees may take account of non-financial factors if that does not involve a risk of significant financial detriment - is taken from a case which did not concern pension schemes at all. *Harries v The Church Commissioners for England,*[38]

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[35] [1985] Ch 270.

[36] As regards the general duties of pension scheme trustees, this decision must now be read in the light of *Merchant Navy Ratings Pension Fund Trustees Limited v Stena Line Limited* [2015] Pens LR 239 and *Keymed (Medical and Industrial Equipment Ltd) v Hillman* [2019] EWHC 485 (Ch).

[37] *Supra,* at 288.

[38] [1992] 1 WLR 1241. Permission has recently been given for charity trustees to seek declaratory relief and directions regarding the nature and scope of their powers of investment, specifically as to whether it is lawful to adopt environmentally-friendly investment policies, on the basis that things have moved on considerably since the *Harries* case: *Butler-Sloss v Charity Commission for England and Wales* [2021] EWHC 1104 (Ch).

involved a claim that trustees of a charitable trust were obliged in investing the charity's assets to have regard to the object of promoting the Christian faith through the established Church of England. Although Sir Donald Nicholls V-C rejected the claim, he did go on to say as follows:[39]

> *Trustees may, if they wish, accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment*.

This principle is perfectly understandable in the context of charities, which have moral and ethical purposes as their objects, but it does not apply with the same force to pension schemes, which provide financial benefits for individuals. The Vice-Chancellor was accordingly careful to distinguish the contrary view expressed in *Cowan v Scargill* on the basis that that case involved a pension scheme.[40]

Moreover, the Law Commission's approach is difficult to apply in the specific case of public sector pension schemes, because of the wide range of interests which the administrators have to take into account when exercising their powers, including tax and rate payers: in such a case, it cannot be sufficient for the administrators to be satisfied that the members of the scheme would support a decision to take non-financial factors into account.

So, for these reasons, the issue of whether public sector pension scheme administrators (and indeed trustees of private sector schemes) can properly be led by non-financial considerations in making investment decisions is still an open legal question, notwithstanding the *Palestine Solidarity* case.[41]

Other topical issues

The final two issues under consideration which affect public sector schemes are currently ongoing, and have given rise to additional operational challenges for administrators.

<u>Exit credits</u>

The first issue relates to the treatment of surplus assets in the LGPS on the cessation of participation of an employer. This principally affects private contractors to whom local authority functions were outsourced and who as a result took on former local authority employees who were members of the LGPS. Those contractors would typically participate in the relevant constituent fund of the LGPS pursuant to an admission agreement with the fund administrator.

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[39] *Supra,* at 1247.

[40] *Ibid,* at 1248.

[41] See further: Philip Bennett, *Must an occupational pension scheme take into account ESG factors, even if there is a risk of financial detriment to the pension fund?* (2019) 32 Trust LI 239; Philip Bennett, *Would it be a breach of a pension fund trustee's investment duties to invest in "green gilts" at a greenium?* (Forthcoming paper to be delivered at the APL Summer Conference 2021).

Prior to 2018, where the employer ceased participation in the fund on the expiry of the outsourcing arrangement, whilst it would be liable to meet the cost of any deficit in the fund referable to its employees, if that part of the fund was in surplus at that time, there was no mechanism for any of that surplus to be paid to it. As a result, contractors were often reluctant to increase their contributions near the end of their participation in the fund, for fear of creating a 'trapped surplus' from which they could not benefit.

As a result, the governing provisions of the LGPS were amended by regulations with effect from 14 May 2018 to introduce an obligation on the part of the administrator to pay to the departing employer any surplus in the funds referable to that employer's members.[42] These were known as exit credits.

Shortly after this, the law of unintended consequences came into play. What few people appeared to have realised when the exit credits were introduced was that many (but not all) private contractors had already catered for pension costs - including the inability to benefit from surpluses on their exit from the fund - by including provisions in the commercial agreement with the local authority which made the authority responsible for some or all of the pension costs which would otherwise fall on the contractor, including any deficit which arose on the contractor's exit from the fund. These were known as 'pass-through arrangements'.

Accordingly, the result of creating a statutory right on the part of the contractor to the payment of an exit credit was that it stood to benefit from a surplus, in circumstances where it may never have been exposed to a risk of having to meet a deficit, or in some cases, it never had to meet the economic cost of contributing to the fund at all.

Following several cases of exit credits arising in this way, in March 2020 the government bowed to substantial lobbying from local authorities by making further regulations to replace the obligation of the administrator to pay an exit credit with a discretion to make such a payment.[43] This change was introduced retrospectively with effect from 14 May 2018, so that any exit credits due under the previous regime were no longer payable, although any exit credits which had already been paid under that regime were not recoverable.[44]

The retrospective element of this change was the subject of a judicial review claim by contractors who were owed exit credits under the old regime, and on 27 May 2021 the High Court rejected that claim.[45] Whilst there is much in that judgment of particular interest to those advising on this matter, for present purposes what is relevant is that part of the judgment which sought to give guidance as

[42] Reg.13 of The Local Government Pension Scheme (Amendment) Regulations 2018, amending reg.64 of the Local Government Pension Scheme Regulations 2013 (***"the LGPS Regulations"***).

[43] Reg.3 of The Local Government Pension Scheme (Amendment) Regulations 2020 (***"the 2020 Regulations"***).

[44] *Ibid,* reg.4.

[45] *R (oao Enterprise Managed Service Limited) v Secretary of State for the Ministry of Housing, Communities and Local Government* [2021] EWHC 1436 (Admin). It is my understanding that permission to appeal will not be sought.

to how administrators should exercise the new power to award exit credits, which had replaced the duty to do so.

The 2020 Regulations require the administrator, when exercising its discretion to determine the amount of any exit credit, to take account of all relevant factors, including: the extent to which there is a surplus; what proportion of surplus has arisen because of the value of the exiting employer's contributions; and any representations made by the exiting employer and prescribed stakeholders.[46] In addition, the administrators of a number of LGPS constituent funds have updated their funding strategy statements[47] to set out their approach to the determination of exit credits; and some of those state that no exit credit will be paid where pass-through arrangements are in place.[48]

This approach was challenged by the claimants in the judicial review proceedings, who asked the Court in effect to declare that the administrators should not treat the existence of pass-through arrangements as determinative but should (for example) take account, where relevant, of the fact that the contractor had given the local authority a discount on the contract price in return for the pass-through arrangements.

By the time of the trial of the judicial review claim, the Secretary of State and the administrators who were defending the claim did not dispute that such matters could be taken into account, given the wide scope of the relevant factors prescribed in the 2020 Regulations. However, Bourne J did take the opportunity to give some guidance as to the parameters of the administrator's discretion, which can be summarised as follows:[49]

(i) the essential obligation of the administrator is to make a rational and fair determination, giving the words of the legislation their clear meaning;

(ii) the discretion is multi-factorial, having regard to all relevant facts of which the decision maker is made aware: no single factor is conclusive;

(iii) regard may always be had to the fact that the legislation had since 2018 provided for the possibility of exit credits and that the current regulations provided for a discretion rather than an absolute entitlement;

(iv) primacy is not to be given to any single factor: the weight given to any relevant factors will therefore always depend on the facts of the individual case.

This is useful guidance which makes it clear that the decision-maker cannot adopt a blanket approach of denying an exit credit simply because there was a pass-through arrangement, and that administrators should avoid setting out too prescriptive a policy on the treatment of exit credits,

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[46] Reg.64(2ZC) of the LGPS Regulations, inserted by reg.3(5) of the 2020 Regulations.

[47] Made pursuant to reg.58 of the LGPS Regulations.

[48] *Enterprise Managed Service Limited, supra,* at [153(iii)].

[49] *ibid,* at [161].

which may preclude them from taking account of particular matters which the policy had not anticipated. Hopefully this guidance, if adopted by administrators, will reduce the scope for disputes where exit credits arise in the future.

McCloud and *Sargeant*

The other topic concerning the exercise of powers is perhaps the most pressing current issue for public sector scheme administrators – dealing with the consequences of the *McCloud* and *Sargeant* litigation.[50]

The transitional arrangements put in place at the time of the reforms of public sector pensions in 2013 were intended to protect those closest to retirement from the effect of the changes: members within ten years of normal pension age on 1 April 2012 were given the option to remain in the relevant legacy scheme; and members within a further four years of pension age on that date could remain in the relevant legacy scheme for a transitional period, the length of which depended on their age.[51] In 2018, the Court of Appeal in the conjoined cases of *McCloud* and *Sargeant*[52] held that those arrangements unlawfully discriminated against younger members of the judicial and firefighters' pension schemes on the grounds of age.

After much consultation, the government has promised to introduce primary legislation to require public sector schemes to remove the discriminatory effect of those arrangements for all members for the period between April 2014 and April 2022.[53] This will involve members being given a choice between remaining in the reformed schemes or being reinstated as members of the old schemes for that period.

The proposed new legislation will be passed *when parliamentary time allows*,[54] which presumably means before April 2022, as retrospective legislation may give rise to fresh legal challenges. The legislation will provide that the changes must be introduced by public sector schemes by 1 October 2023.[55]

The question arises as to what administrators can and should do to provide a remedy to members who have already been affected by the discrimination, or who will be affected before the legislation is passed and implemented. Although the government has said that it will work with schemes to

[50] See the professionalpensions.com article dated 21 May 2021: *PLSA: McCloud is biggest challenge for LGPS admin amid tsunami of regulation*. See also the report of the House of Commons Public Accounts Committee, HC 289 (11 June 2021): *Public Sector Pensions*.

[51] Transitional provisions to this effect have been included in all public sector pension schemes by regulations made pursuant to s.18(5) of the 2013 Act.

[52] *Lord Chancellor v McCloud; Secretary of State for the Home Department v Sargeant* [2019] ICR 1489.

[53] HM Treasury CP373, *Public service pension schemes: changes to the transitional arrangements to the 2015 schemes: Government response to consultation* (February 2021).

[54] *Ibid,* executive summary, pp.6-7.

[55] *Ibid,* para 2.79.

develop processes to provide immediate remedies in certain circumstances,[56] there are a number of complex issues which need to be resolved, some of which will themselves probably need to be dealt with by primary legislation. One such issue is the tax consequences of the changes to benefits and contributions required to remedy the discrimination, and the government has hinted that special rules will be introduced in order to allow fair tax treatment in such cases.[57]

However, members of public sector schemes, backed by their unions, are not prepared to wait for the legislation. For example, High Court proceedings were issued in March 2021 by the Fire Brigades Union, on behalf of affected members of the firefighters' pension schemes, seeking an immediate remedy for the discrimination; and there have been threats of similar claims by members of other public sector schemes.

Such claims put the administrators in a difficult position: they are faced with claims for immediate redress by members who have unarguably suffered discrimination, but they cannot simply pay out on these claims without doing so for all other affected members, and if they do that, there are potentially serious consequences for the administration of the schemes which the government is simply not yet in a position to rectify.

Perhaps the answer to this dilemma lies in the fiduciary duties owed by administrators to members and other stakeholders: even if there is no defence to the discrimination claims, it may be argued that the administrators still have a discretion as to how and when to provide the remedy, and that their fiduciary duties require them to tread very carefully in light of the numerous difficulties involved in reinstating members to their former schemes, which are currently being discussed with the government. It is accordingly arguable that the administrators' duty to act in the interests of all members and stakeholders justifies the administrators not doing anything until the proposed legislation is introduced.

Conclusion

The issues discussed in this paper illustrate both the importance of the way in which the administrators of public sector pension schemes go about exercising their powers, and the relative lack of analysis of this issue in the caselaw. As the job of administrators becomes more complex and more onerous, and as their powers move further beyond the purely administrative, the issue of the scope of their duties will only gain greater prominence.

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[56] *Ibid,* para 2.100.

[57] *Ibid,* paras 2.91 to 2.98 and 2.102 to 2.105.

From the Tax Tribunals

Emily Campbell

The purpose of this talk is to summarise a number of recent cases, which it is well worth pensions practitioners knowing about. There are a number of cases involving the charging regime under FA04 crossing the desks of the judges of the tax tribunals – that is to say the FTT and the UT. The first two cases I am going to talk about are from the UT, and the last two are from the FTT.

It is relevant to bear in mind what the precedent value of UT decisions is. The UT is a superior court of record: See the Tribunals, Courts and Enforcement Act 2007, section 3(5). This means that its decisions have the same status as regards the rules of precedent as decisions of a High Court Judge. The same cannot be true of FTT decisions, although they are bound to bear some weight as an analysis of the case by an experienced tax judge following argument at an oral hearing (cf e.g. the Pension Ombudsman).

The author has recent experience of an apparent practice of HMRC not to appeal FTT decisions which it loses and thinks are wrong, and simply to ignore them when dealing with other taxpayers. It is seriously questionable whether this is consistent with public law duties and the HMRC Charter (in particular, the requirement to treat taxpayers fairly). Allowing an FTT decision in favour of one taxpayer to stand and then disapplying it to other taxpayers is capricious, because it leads to materially identical taxpayers being treated differently.

SIPPchoice and contributions in specie

The case under discussion here is *HMRC v SIPPchoice Ltd* [2020] UKUT 149 (TCC). The question was whether *in specie* member contributions were eligible to tax relief as "contributions paid" under FA04, section 188(1)/(2).

Four individuals (consistently with HMRC manual guidance, which has now been withdrawn) purported to contract to pay particular sums of money to a SIPP, so that their subsequent transfer of shares was in satisfaction of those money debts. The shares were not eligible shares within section 195, which gives relief on the transfer of shares in specific situations.

The FTT held that "contribution paid" was wide enough to cover a transfer of assets in satisfaction of a debt. The UT allowed HMRC's appeal. "Contributions paid" in section 188 was restricted to contributions of money, whether in cash or other forms, having regard to the provisions of section 195. It would make no sense to extend relief to eligible shares if transfers of shares were already within section 188. The extended meaning of "payment" in section 161 (to include a transfer of assets) was expressed to apply to a different Chapter of Part 4 FA04. A pre-existing contractual obligation to pay could not convert the transfer of shares into a relievable contribution. In any event, there was no binding contractual obligation to pay on the facts of this case.

The taxpayers in *SIPPchoice* did not, however, seemingly put an available argument, namely whether an IOU itself could be a relievable contribution, or at least if it was put, it was not properly understood or dealt with by the UT. It seems likely that the idea that an IOU was equivalent to cash had been the idea behind the original HMRC manual guidance. The subsequent satisfaction of the IOU by the transfer of shares would either be an authorised or unauthorised member payment, depending on (in particular) value.

HMRC is clearly (rightly) concerned about members offloading "junk" assets into their schemes in order to obtain tax advantages. The speaker has, for example, seen some particularly egregious examples involving intellectual property rights. There was no exploration in *SIPPchoice* of what forms of asset other than cash might count as a contribution in money. It must be remembered that schemes never actually receive cash – usually just an IOU from the transferee bank.

The question of whether an IOU is a relievable contribution as a contribution in money is being heard as a preliminary issue later this year in a case in which the speaker is acting for the taxpayer (on the instruction of Burges Salmon). It will be interesting to see the result. Watch this space!

Bella Figura, discovery assessments and waiver of the scheme sanction charge

The case under discussion here is *HMRC v Bella Figura Ltd* [2020] UKUT 0120 (TCC). The case concerned an unauthorised employer payment (a loan). In principle, this gave rise to an unauthorised payment charge, surcharge and scheme sanction charge. All three fell on the employer (in the case of the scheme sanction charge, in its capacity as scheme administrator). The principal question was (1) whether it was too late to assess the unauthorised payment charge and surcharge and (2) whether it was just and equitable to discharge the unauthorised payment surcharge and scheme sanction charge under section 268 FA04.

The UT's decision was delivered by Nugee J. The UT rejected a technical argument that (owing to a drafting anomaly) there was no power to make assessments in respect of the scheme sanction charge. Regulation 4 of the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 provided a standalone power to make assessments.

As time limits, both parties agreed that the applicable time limits for making any permitted assessments were set out in sections 34/36 TMA70. HMRC needed to show "carelessness" in order to evoke the 6-year period for making discovery assessments (rather than the usual 4 years). For some reason, HMRC had raised an assessment for the scheme sanction charge in March 2015 and for the unauthorised payment charges later, in October 2015, the cut-off point for the 4-year period being April 2015. The UT held that the employer had not been careless in relation to its reporting duties (indeed – it looks like HMRC was the one which had been careless!). Even though no express advice had been obtained, it was reasonable for the taxpayer to derive reassurance from the firm of pensions administrators which had prepared the relevant loan documentation and had not suggested it was defective. Accordingly, it was too late to raise a discovery assessment in respect of the unauthorised payment charge and surcharge.

Finally, the UT declined to discharge the scheme sanction charge on the basis that it would be inappropriate for there to be no consequences at all for the loan.

Bella Figura is a useful case in that it shows that an (honest) taxpayer can escape even the basic unauthorised payment charge on the basis of HMRC delay in discovering the issue; and that the taxpayer can contend against carelessness on the basis that he, she or it reasonably relied on another party (usually a professional) in making the error.

The speaker has experience of HMRC practically disregarding *Bella Figura* and also seeking to circumvent it by contending that the acts of an adviser or of the scheme administrator should be attributed to the taxpayer under the principles of agency (see TMA70, section 36(1B) – reference to "*another person acting on behalf of that person*") – an argument which appears to be obviously wrong.

Hymanson and mistaken contributions

The case under discussion here is *Hymanson v HMRC* [2018] UKFTT 667 (TC). The taxpayer had obtained a fixed protection certificate, but had not realised that he needed to stop making contributions. Accordingly, HMRC revoked the certificate on the basis that there had been benefit accrual contrary to the requirements set out in FA11, Schedule 18. The taxpayer argued that he had made a mistake when he paid the additional contributions and that therefore those payments could be set aside and treated as if they had not happened. The taxpayer was successful and HMRC did not appeal.

The FTT in *Hymanson* was of the view that the taxpayer had made a mistake as to the tax consequences of the transaction. If he were to take his case to the High Court, it would issue an order for rescission for mistake (i.e. under the *Pitt v Holt* jurisdiction[1]). The FTT was effectively prepared to treat that as done which ought to be done. It applied the UT case of *Lobler*[2] by analogy. That case concerned rectification, and the decision of the UT was delivered by Proudman J. She stated:

> *Thus although the FTT did not itself have power to order rectification, it could determine that if rectification would be granted by a court who does have jurisdiction to grant it, Mr Lobler's tax position would follow as if such rectification had been granted.*

This is a practical policy decision, designed to ensure that the Courts are not cluttered up with cases referred by the Tax Tribunals. It represents an important alternative route to obtaining the tax consequences of equitable relief. The speaker, however, has experience in two different cases of HMRC simply saying that *Hymanson* is wrong. One of those cases is in the course of being appealed to the FTT, so there may be a further decision on this topic in the next few months. It will be interesting to see whether HMRC's back-door assault on *Hymanson* and *Lobler* is successful.

Gammell v HMRC

The case under discussion here is *Gammell v HMRC* [2021] UKFTT 0049 (TC). The FTT held that a taxpayer who had reasonably relied on the defective advice of his professional advisers had a reasonable excuse for failing to apply for enhanced protection of his pension against a lifetime

[1] See *Pitt v Holt* [2013] UKSC 26.
[2] See [2015] UKUT 152 (TCC).

allowance charge by the due date under FA04. He had acted promptly once he became aware that a late application was possible, and therefore should be entitled to make a late application.

The *Gammell* case, as well as *Bella Figura*, shows that the tax tribunals are sympathetic to taxpayers who have reasonably relied on incorrect professional advice – although seemingly HMRC are not!

Pensions trustee companies: an update after *Lehtimäki* [2020] UKSC 33

Robert Ham QC and David Pollard

Part 1 – Outline of *Lehtimäki v Cooper*: Robert Ham QC

1. David Pollard and I are going to talk about a recent decision of the Supreme Court, in *Lehtimäki v Cooper*, which is going to appear in the official law reports under the name *Children's Investment Fund Foundation (UK) v Attorney General*.

2. The neutral citation is [2020] UKSC 33.

3. Since it is not a pensions case, it may be worth outlining the factual background in Part 1 of our talk.

Facts of *Lehtimäki v Cooper*

4. The case concerned a charitable company limited by guarantee, commonly referred to by the acronym CIFF. The company was incorporated in 2002, with three members – a married couple then known as Christopher and Jamie Cooper-Hohn and their old friend from Harvard Business School, Marko Lehtimäki. Without intending any disrespect to three intelligent and deeply serious individuals, I will call them Chris, Jamie and Marko. CIFF is a grant-making charity whose focus is on helping children in developing countries. It was set up as the intended recipient of the bulk of the profits of a hedge fund called The Children's Investment Fund set up at the same time and intended to be managed by Chris.

5. TCI has been enormously successful. It is one of the top 20 hedge funds of all time. According to Yahoo, the annual return on investment net of fees averaged 18% down to 2018 and in 2019 it was 41%. Bloomberg says its return in 2020 was 14%. In round figures, a billion dollars flowed from TCI to CIFF, and was then invested with TCI, which turned the initial billion into over five billion dollars.

6. Unhappily Chris and Jamie's marriage broke down. One of the issues in the ancillary relief proceedings was how CIFF was to be taken into account, and the judge in the Family Division rightly held that it was not a matrimonial asset and left it out of account. But Jamie continued to press for an interest in CIFF.

7. CIFF had a typical two-tier management structure: members and directors or trustees, as they were called. Both Chris and Jamie were trustees (i.e. directors) as well as members of CIFF and after the divorce their differences proved disruptive to the management of the charity. Eventually, it was agreed in 2015 that Jamie would resign as a member and trustee of CIFF and that it would make a grant of $360 million to a new charity set up by Jamie called Big Win Philanthropy. However, the trustees/directors stipulated that the grant was to be subject to court approval and it was their application for approval that ended up in the Supreme Court. Jamie's resignation was to take effect when the application was determined.

8. At the time of the 2015 agreement, it was not appreciated that under the extended definitions in the Companies Act 2006 the grant might fall to be treated as a payment for loss of office to a person connected with a director which required approval by a resolution of the members of the company under section 217. Because Chris and Jamie were both considered conflicted – though it is not clear why that disenfranchised them as members – that effectively meant Marko. But surprisingly he was not a party to the proceedings, until he was added during the hearing before Sir Geoffrey Vos C – remarkably without allowing him an adjournment.

The Chancellor held that Marko was a fiduciary and, although he expressly found that others might reasonably take a different view, concluded that it was in the best interests of CIFF to make the grant to BWP. He directed Marko to vote in favour of its approval under section 217.

The Court of Appeal allowed an appeal: it agreed that Marko was a fiduciary, but applied the principle of non-intervention, that the Court will not generally interfere with the decisions of trustees and other fiduciaries.

9. The Supreme Court agreed with the lower courts that the member of a charitable guarantee company was a fiduciary. But, notwithstanding the non-intervention principle, it reinstated the Chancellor's order directing Marko to vote in favour of the grant though the Court was divided as to the basis of that direction. I will come back to the opposing judgments, but the important point to note at this stage is that both judgments in the Supreme Court accepted that the court could intervene only if Marko was a fiduciary.

Member as a fiduciary

10. Starting with the question whether a member of a charitable guarantee company is a fiduciary, Lady Arden JSC referred to the debate as to how to define a fiduciary but said that it was generally accepted that the key principle was that a fiduciary acts for, and only for, another: he owes a duty of single-minded loyalty to the beneficiary, meaning that he cannot exercise any power so as to benefit himself. The Court of Appeal had adopted the test set out by Finn J, sitting in the Federal Court of Australia, in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 ALR 22, [177]:

> … a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest …

Lady Arden commented that this formulation introduced the additional concept of reasonable expectation of abnegation of self-interest and said that reasonable expectation might not be appropriate in every case, but that it was, with that qualification, consistent with the duty of single-minded loyalty.

11. Normally, members of companies are not fiduciaries in relation to any of their powers; and Lady Arden said that the principle was no different in relation to companies which do not have a share capital. But where the company is also a charity a member might be a fiduciary in relation to the rights attached to membership, including the right to vote. In Lady Arden's judgment, a member of CIFF owed a duty, not to the company as the Court of Appeal had thought, but to the charitable purposes and that duty was one of single-minded loyalty. In the CIFF case, that involved considering only the best interests of the objects of the charity – because the section 217 resolution related to the disposition of assets otherwise available for application by CIFF towards those objects. It was, she held, of the essence of a fiduciary obligation that it should be capable of effective enforcement by the court.

12. It is worth noting that:

(a) Lady Arden rejected arguments on behalf of CIFF (referred to in more detail by David in Part 2 below), that it was unnecessary for a member of a charitable company to be a fiduciary and

(b) she also rejected the view taken by the Court of Appeal that the duties of such a member were the same as those of the member of a charitable incorporated organisation.

13. Pausing at that point, one sometimes comes across corporate trustees of pension schemes incorporated as companies limited by guarantee, though as pointed out in Part 2 of this talk corporate pension trustees are mostly companies limited by shares with the shares held by the sponsoring employer.

But if the members of a charitable guarantee company owe fiduciary duties to the purposes of the charity, why should the members of the pension scheme trustee company not owe duties to the members of the scheme? And how does that fit in with the well-established proposition that in the case of the other tier of governance of the company, the directors, duties are owed to the company alone?

14. Thus far, there was no divergence between the five members of the Supreme Court. But though four of the five agreed (Lord Reed PSC found the judgment of the Court of Appeal more persuasive than the other members of the Court, but did not push his doubts to the point of dissent) that the Chancellor was right to direct Marko how to vote, they arrived at that conclusion by different routes.

Simple although unusual route?

15. Lord Briggs JSC (with whom Lords Kitchin and Wilson agreed) took the view that because the trustees/directors had surrendered their discretion the court's decision that the purposes of the charity would best be furthered by making the grant to BWP finally resolved that question, even though it was a difficult one about which reasonable minds might well differ. It was binding on all interested parties, including Marko even though he

had not surrendered his discretion. It would therefore be a breach of Marko's fiduciary duty not to vote in favour of the section 217 resolution necessary to enable the grant to be made. Lord Briggs described this as a "simple although unusual" reason why the Chancellor was right to direct Marko how to vote, while also agreeing with Lady Arden's reasons.

16. Lady Arden herself followed a different route, finding that the exceptional circumstances of the case brought it within an exception to the non-intervention principle, under which the court would not substitute its judgment for that of a fiduciary unless he was acting, or threatening to act, in breach of duty.

17. To my mind, Lady Arden's response to Lord Briggs's judgment is wholly convincing. The duty of fiduciaries is subjective, to do what they in good faith consider to be in the best interests of the beneficiaries or (in this case) the charitable objects.

The importance of a subjective duty is that it is the fiduciary, and not the court, which decides which option to take: the question is not what is in the best interests of CIFF and its charitable objects but does the fiduciary in good faith consider that the transaction is in the best interests of CIFF and its charitable objects? If this encroachment on the subjective nature of the fiduciary's duty is developed it is potentially very important.

Exceptional circumstances exception

18. Lady Arden accepted the non-intervention principle as stated by Lord Walker in *Pitt v Holt* [2013] 2 AC 108 at [73]:

> Apart from exceptional circumstances (such as impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention.

Or as she herself put it:

> a breach of duty was necessary before the court could intervene with respect to matters that fell to trustees to do or decide.

19. Her reasons for not applying the general non-intervention principle depended on two things:

(a) the wider jurisdiction of the court over charities as opposed to other trusts and

(b) the threatened impasse in the administration of the charity if Marko were unable to reach the same conclusion as the Chancellor:

If he is unable to do that, the Grant cannot be made even though the arrangements which have led to the proposal for the Grant provided the means for settling an existential threat to the operation of the charity caused by deeply felt dissension between its two founders.

20. That is true – but on the facts the agreement that had been reached removed the existential threat to the charity because Jamie had agreed to resign as a member and trustee of CIFF, whether the court approved or refused to approve the grant to BWP. The existential threat had already been removed whatever the outcome.

21. Leaving aside the special position of charities, the case confirms the established rule that in general the Court will intervene only in cases of breach (or threatened breach) of fiduciary duty and that the decision of what is in the interests of the beneficiaries is a subjective one for the fiduciary. But there is a residual category of cases. In the 19th century case of *Letterstedt v Broers* [1884] UKPC 1, Lord Blackburn delivering the advice of the Privy Council described the jurisdiction of a court of equity to remove trustees as merely "ancillary to its principal duty, to see that the trusts are properly executed". That is, I suggest, the criterion to be applied in deciding whether intervention is justifiable in the absence of a breach of fiduciary duty: is it necessary or desirable to secure the proper execution of the trusts.

22. But following on from that one may ask why there is a threshold requirement that there should be a fiduciary obligation. Why should the court be unable to intervene if a non-fiduciary power-holder, e.g. in the case of a pension scheme a sponsoring employer, prevents the trusts being properly carried out?

23. In Part 2 of this talk David Pollard considers in some depth the impact on pension trustees, but I want to make one litigation-related point. Even non-litigators are likely to be familiar with the four-fold categorisation of applications for directions by trustees made by Robert Walker J in the unreported case of *Re Egerton Trust Retirement Benefit Scheme* (made famous by Hart J in *Public Trustee v Cooper* [2001] WTLR 901) and the distinction between categories (2) – blessing momentous decisions – and (3) – surrender of discretion. In practice, it is often unclear into which category a particular application falls. So it was in the CIFF case, but eventually it was decided that the trustees/directors were surrendering their discretion, a point of crucial significance to the Briggs analysis. Trustees really need to be clear about this, so that they have an immediate answer to the question, are you surrendering your discretion?

Part 2 – Implications for Pension Trusts: David Pollard

Introduction to Part 2

24. The decision of the Supreme Court in *Lehtimäki*[1] is a rare decision by the higher courts looking at the fundamental position of a member of a company which is acting as a trustee. Robert Ham outlines the facts in Part 1 of this paper.

25. Broadly, the decision of the Supreme Court was that:

    (a) The members of a charitable company limited by guarantee are fiduciaries in relation to the objects of the charity;

    (b) Where the trustees/directors have surrendered their discretion on a matter to the court, any decision by the court is binding on a member who is a fiduciary and a party to the relevant proceedings.

        (i) Lady Arden reached this result by considering it to be a rare exception from the usual "non-intervention principle".

        (ii) The majority seem to agree with Lady Arden's conclusion but reached the same result by a "short cut". This was that the member was, as a party to the proceedings[2], under an obligation to follow the court decision (even where he had not surrendered his discretion to the court). Accordingly he would be acting in breach of fiduciary duty if he did not obey the court's direction. This would be a breach of duty entitling the court to give him directions. Lady Arden disagreed with this route.

    (c) The statutory requirement for member approval under s217 of the Companies Act 2006 (***CA 2006***) does not change the court's power.

Lehtimäki

26. Robert has discussed the facts of the case and the decisions made. At the risk of repetition, I give a brief outline below.

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1 *Lehtimäki v Cooper* [2020] UKSC 33, [2020] 3 WLR 461, [2021] 1 All ER 809.
Also known as: *Children's Investment Fund Foundation (UK) v Attorney General*.
The Supreme Court overturned a unanimous decision of the Court of Appeal: *Lehtimäki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605, [2019] Ch 139.
The Court of Appeal had allowed an appeal from the decision of Vos C at first instance*: Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371.

2 At first instance, Vos C had, on his own motion, joined Dr Lehtimäki as a party to the proceedings.

27. *Lehtimäki*[3] involved a direction by the court to a member of a charitable company (CIFF) limited by guarantee. This was in circumstances where the directors of the company had surrendered to the court their discretion[4] as to whether or not to approve a transaction. The transaction involved a payment connected with the loss of office of one of the directors of the company, so requiring the approval of the members of the company.

28. The company is a charitable corporation. The charity is not a trust, but instead the company holds its assets for charitable purposes[5]. Under the Companies Act 2006, s217 the transaction also required the approval of the members of the company[6]. There were only three members of the company and two of them were not prepared to vote on the approval of the proposal, considering themselves to be conflicted[7]. The third member, Dr Lehtimäki, was the only member prepared to vote.

29. At first instance[8], Vos C approved the transaction as being in the best interests of the charity. Dr Lehtimäki reserved his position as to whether he would cast his vote to approve the transaction. Vos C of his own motion joined Dr Lehtimäki to the proceedings and held that he held his member rights as a fiduciary. On this basis Vos C held that the court could give him directions as to how to vote (even though Dr Lehtimäki had not surrendered his discretion to the court). Accordingly, Vos C directed Dr Lehtimäki to vote in favour of the proposed disposal.

30. Dr Lehtimäki appealed. The Court of Appeal[9] unanimously overturned Vos C. The Court of Appeal held that although the members of a charitable company are fiduciaries, the Court did not have any jurisdiction to give them directions about how to vote, absent either a breach of duty or a surrender of discretion to the court (which had not occurred here in relation to Dr Lehtimäki[10]).

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3 The Supreme Court overturned a unanimous decision of the Court of Appeal: *Lehtimäki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605, [2019] Ch 139.
The Court of Appeal had allowed an appeal from the decision of Vos C at first instance*: Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371.

4 Company directors (unlike trustees) cannot usually surrender their discretion to the court. In *Lehtimäki* this is best seen as an example of the wider court role for charitable companies.

5 CA at [6] and [36].

6 The CA commented, [2018] EWCA Civ 1605 at [3], that if the charity had been a trust, s217, CA 2006 would not apply. This seems to be assuming a situation where there was not a corporate trustee, but instead individual trustees.

7 *Lehtimäki v Cooper* [2020] UKSC 33 per Lady Arden at [15]. It is one of the oddities of the case that a court order approving the transaction was not enough to persuade the other two members of the charitable company to agree that they could vote – see Vos C at [106] and [107]. There is no requirement under CA 2006, s217 for conflicted directors not to vote as members.

8 *Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371 (Vos C).

9 *Lehtimäki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605, [2019] Ch 139.

10 See Lady Arden at [33].

31. The company appealed[11]. The Supreme Court unanimously overturned the Court of Appeal and directed Dr Lehtimäki to vote in favour of the transaction. But the Justices of the Supreme Court were split on the reasons for this.

32. Lady Arden gave the main judgment. She noted that there was no challenge to the decision of Vos C that the Grant was in the best interests of the charity. She considered that there were three main issues to be decided by the Supreme Court:

    (i) Was Dr Lehtimäki in his capacity as a member of the company a fiduciary?

    (ii) If he is a fiduciary, should the court direct him how to vote or does the "non-intervention principle" apply?

    (iii) Does the requirement for shareholder approval under CA 2006, s217 mean that the court should not give directions?

33. Lord Briggs, Lord Kitchen and Lord Wilson agreed with most of Lady Arden's judgement but ultimately held that once the court had decided that the proposed disposal was in the best interests of the charity, Dr Lehtimäki became under an obligation to follow that decision. This obligation was part of his fiduciary duty "to further the purposes of the charity" - see [226].

34. Lord Reed gave a very short judgment stating that he was more inclined to follow the Court of Appeal, but, given that the rest of the Court was in favour of allowing the appeal, concurred in the order proposed.

Pension Trustee companies

35. It is usual now for private sector occupational pension schemes to have a sole trustee which is a company incorporated under the companies legislation (now the Companies Act 2006). Companies can be sole trustees[12] of a trust[13].

36. There is no legal requirement for a company to be the trustee of a pension scheme. Smaller schemes may still use individual trustees and some schemes may still have the employer as

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11 There does not seem to be any discussion about the principle that a trustee (and presumably any other fiduciary too) is at risk as to costs if he or she appeals a court decision on an internal trust matter where directions have been given by the court. But this is not a universal principle: *Airways Pension Scheme Trustee Ltd v Fielder* [2019] EWHC 29 (Ch), [2019] 4 WLR 9 (Arnold J).

12 *Attorney-General v Landerfield* (1744) 9 Mod. 286 and *Attorney-General v St John's Hospital Bedford* (1865) 2 DJ&S 621, 635 cited in *In re Thompson's Settlement Trusts* [1905] 1 Ch 229 (Swinfen Eady J). There was an issue with companies being trustees before 1899. This was because it was impossible for a company to be a joint tenant with a natural person as the company could not die – *Law Guarantee and Trust Society Ltd v Bank of England* (1890) 24 QBD 406 (Mathew J) at 411. This issue was cured by the Bodies Corporate (Joint Tenancy) Act 1899 - *In re Thompson's Settlement Trusts* [1905] 1 Ch 229 (Swinfen Eady J) at 232. Discussed in *Jasmine Trustees Ltd v Wells & Hind* [2007] EWHC 38 (Ch), [2008] Ch 194 (Mann J) at [12].

13 A corporate body can be appointed a trustee of a registered body under the Friendly Societies Act 1896: *Re Pilkington Bros Ltd Workmen's Pension Fund* [1953] 1 All ER 816 (Danckwerts J).

sole trustee (this used to be more common in the past, but the blurring of the relevant duties has led to it being much less usual now, save perhaps for an insured death benefit trust).

37. There seems to be a trend towards the increasing use of professional trustees[14]. These can either be the sole trustee or a member of the board of a trustee company.

38. In practice, for a pension scheme of any size, there are many advantages in having a trustee company (rather than a trustee board with individuals)[15]. The main advantage is that unlike a trustee body with individual trustees, there is no automatic personal liability of the directors on contracts entered into by the trustee company. This is increasingly a major issue, given the trend for pension schemes to have more long term contracts (eg buy-in contracts with insurers, longevity swaps etc). A corporate trustee is also easier administratively – for example less paperwork on change of director, less need to change ownership of assets[16].

39. The position on potential liability of individuals on the trustee board to beneficiaries (or new trustees) for a breach of trust (or statutory duty) is a bit less clear, but in practice there is usually little actual difference for the individuals, given the existence of exoneration provisions in the pension scheme that commonly exclude liability save for dishonesty or fraud (although such an exoneration will not be effective in relation to investment matters - see 80 below).

40. Unlike where there is a group of individuals (or individuals and companies) acting at the trustee board, where a company is the sole trustee, this raises various issues:

    (a) Is the trustee company to be a company limited by shares or one limited by guarantee?[17]

    (b) Members: Who are to be the members of the trustee company? What responsibilities does each member owe to the trustee company or the beneficiaries of the trust (ie the pension scheme)?

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14 These may or may not be 'trust corporations" with special status under the Trustee Act 1925 and the Law of Property Act 1925. See David Pollard '*Law of Pension Trusts'* at 4.7 to 4.13.

15 David Pollard '*The Law of Pension Trusts*' (2013, Oxford University Press) at ch 4 'Corporate Trustees'.

16 see eg *Lehtimäki* per Lady Arden at [62].

17 Charities can also choose to incorporate through a CIO or under the Charities Act 2011, s251 (see *Lehtimäki* per Lady Arden at [62]).

(c) Directors: Who are to be the directors of the trustee company? What responsibilities does each director owe to the trustee company or the beneficiaries of the trust (ie the pension scheme)? Directors are usually individuals[18].

41. The first issue, whether to have a company limited by shares or one by guarantee is a matter of individual choice. A company limited by guarantee (with the directors, while they hold office, as members) is quite a convenient structure if the structural preference is for the trustee company to be "owned" by its directors (rather than the employer). Compared to a company limited by shares, it avoids any need to keep transferring shares at the same time as the directors change.

42. I suspect that in practice, most trustee companies have been established as companies limited by shares and with all their shares owned by the employer. There is a discussion of the consequences of the ownership issue in '*The Law of Pension Trusts*'[19].

Charitable company or trust?

43. It seems that a "charitable company" can take two forms:

(a) First where it is a company with solely charitable objects. This seems to be the type of company involved in the *Lehtimäki* case. It does not hold its assets on trust, but instead is beneficial owner (so needs to draw up audited accounts under the companies legislation etc). The courts still have charitable jurisdiction over the company. See eg Slade J in *Liverpool and District*[20], cited in *Lehtimäki* by Lady Arden at [59].

(b) Second where the company is an express trustee, holding its assets on the terms of the (charitable) trust, in the same way as individual trustees. This is, of course, the most common structure for occupational pension schemes.

44. The first case (a) above clearly is a "charitable company" under the charities legislation. Section 193 of the Charities Act 2011 refers to a charitable company as meaning "a charity which is a company[21]" – see *Lehtimäki* per Lady Arden at [58].

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18 Some jurisdictions (eg Australia and Singapore) provide that only natural persons (ie individuals) may be directors. Currently in the UK the statutory requirement is that at least one director must be a natural person – Companies Act 2006, s155(1).
A change to this position in the UK (but subject to exceptions) is envisaged. The Small Business, Enterprise and Employment Act 2015 will (when s87 comes into force) amend the Companies Act 2006 to provide that a person may not (subject to exceptions) be appointed a director of a company unless the person is a natural person (CA 2006, s156A, as to be inserted by SBEEA 2015, s87). But these amendments are not, at the time of writing, yet in force. A further government consultation "*Corporate Transparency and Register Reform: Consultation on implementing the ban on corporate directors*" was released in December 2020.

19 David Pollard '*The Law of Pension Trusts*' at 4.32, the section headed "Who should own the trustee company".

20 *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193 (Slade J).

21 Charities Act 2011, s353(1) defines the term "company" as meaning "a company registered under the Companies Act 2006 in England and Wales or Scotland".

45. The charities legislation goes on in effect to refer to a trustee of a charity as including a person managing the company, so will include a director of a charitable company – see Charities Act 2011, s177.

46. Members of a charitable incorporated organisation (CIO) incorporated under the Charities Act 2011 owe duties under the legislation. Section 220 provides that:

> "Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO."[22].

47. Conversely a charity which is established as an express trust may have a company as one of its trustees, or the company may be the sole trustee. This is case (b) above. In this case it is clear that the company does not own the charity's assets beneficially (instead they are held on the terms of the express trust).

48. The court's jurisdiction over the trustee company (in its capacity as trustee of a charity) may be limited to its role as a trustee. In a case(b) situation, it may well be that the memorandum and articles of association of the company do not (i) limit its ability to pay dividends or (ii) require that it acts solely for charitable purposes.

49. Such a charity may also have members[23] who may be different to the members (or shareholders) in the company.

Deciding that Dr Lehtimäki was a fiduciary

50. Lady Arden's reasoning in deciding that Dr Lehtimäki was a fiduciary is set out in paras [42] to [51] and [75] to [107]. As Robert discusses in Part 1, this was mainly based (at [47]) on the judgment of Finn J in *Grimaldi*[24]. That is based on either an undertaking to perform a fiduciary function or an assumption of such a responsibility as would reasonably entitle the beneficiary of the fiduciary duty to expect that he or she (or it) will act in the other's interest to the exclusion of his or her own or a third party's interest.

51. Lady Arden considered that such a reasonable expectation did arise for a member or a charitable company, citing a Charity Commission publication[25] and considering that this had

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22 Cited in *Lehtimäki* by Lady Arden at [29] and by the Court of Appeal at [48].

23 Charity Commission note RS7 '*Membership Charities*' comments at p32:

> "Whilst it is uncommon for charities whose governing instrument is a trust deed to have a membership as we define it here, there is no legal reason why they cannot."

24 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296, (2012) 287 ALR 22 at [177].

25 RS7–Membership Charities. March 2004 version on the web at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284722/rs7text.pdf

more weight than the leading textbooks or charities (or an old 1873 voting case: *Bolton v Madden*[26]) – [48] to [50].

52. Lady Arden considered that any fiduciary duty is owed not to the company but to the objects of the charity: [35] and [50]. She considered that this was consistent with the duty on directors to promote the purposes of the company under the Companies Act 2006, s172, given the specific provision in s172(2) dealing with companies whose purposes include purposes other than the benefit of its members[27].

53. This finding that a duty was owed to the charitable objects does seem inconsistent with the earlier provision in CA 2006, s170(1) which provides that the general duties of directors (including those in s172) are owed to the company.

54. Lady Arden did not refer to the old family trust case of *Skeats*[28] as to whether or not a person was a fiduciary or whether a power was fiduciary. This case was cited in the lower courts briefly by Vos C[29] and in more detail by the Court of Appeal[30], but does not seem to have been cited in argument before the Supreme Court. In my view, *Skeats* is a difficult case on fiduciary powers and is best ignored at the present day (it was doubted by Paul Finn in his book "*Fiduciary Obligations*"[31]).

Impact of *Lehtimäki* on Pension Trustee companies

55. As Robert Ham has explained in Part 1, *Lehtimäki* was a case concerning a charity and a charitable company. It could be argued that it does not then apply to cases involving other trusts. There is much discussion in the judgments about how charities are treated in a special way by the courts.

56. But there is also much discussion in the judgments in *Lehtimäki* about the fundamental concepts of when someone is a fiduciary, the nature of the relevant duties owed as a result, and the powers of the courts to give directions. These are all issues that can arise in relation to

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26 (1873) LR 9 QB 55.

27 CA 2006, s172(1) is the general duty on directors to "act in the way that he considers, in good faith, would be most likely to promote the success of the company". This is modified by s172(2) where "the purposes of the company consist of or include purposes other than the benefit of its members". In such a case the duty on directors under s172(1) applies so that the reference to "promoting the success of the company for the benefit of its members" was instead a reference to "achieving those purposes". The s172(2) modification seems very likely to apply to a charitable company with no express separate trust (eg case (a) discussed above). It may well also apply to any company acting as a trustee, including a pension trustee company – see Pollard '*Pensions, Contracts and Trusts: Legal Issues on Decision Making: Applying Braganza*' (2020, Bloomsbury Professional) at 13.10.

28 *Re Skeats' Settlement* (1889) 42 ChD 522 (Kay J).

29 At [71].

30 At [40].

31 Paul Finn "*Fiduciary Obligations*" (Law Book Co, 1977) at [273]. See also David Pollard and Dawn Heath *The power of employers to appoint or remove trustees of occupational pension schemes: is it fiduciary?* (2011) 25 TLI 184 and Pollard *Law of Pension Trusts*, ch 12. Also Ryan James Turner '*Is the power to appoint a trustee a fiduciary power in the hands of a non-fiduciary*' (2018) 32 TLI 163.

a pension scheme as well, particularly one with a corporate trustee.

57. *Lehtimäki* is likely to be much cited in future when these issues are discussed in relation to non-charitable trusts, including pension trusts. Examples of the fiduciary issues are:

    (a) Are the shareholders (or members) of a pension trustee company fiduciaries in relation to the trustee company or the underlying pension trust (and its beneficiaries)?

    (b) Are the directors of the pension trustee company direct fiduciaries in relation to the pension trust (and its beneficiaries)?

    (c) Is the employer (or principal employer) a direct fiduciary in relation to the pension trust (and its beneficiaries)?

    (d) Can the courts give directions to the pension trustee company that bind the other parties to the pension trust?

These issues are discussed below in relation to what emerges from the (rather convoluted) judgments of the Supreme Court in *Lehtimäki.*

Members and shareholders of a pension trustee company

58. It is perhaps a surprising result that, at all levels, it seems that all of the judges involved[32] held that Dr Lehtimäki was, as a member of CIFF, the charitable company, a fiduciary and so owed fiduciary duties. But these were not (apparently) owed to the company, but instead to "the objects of the charity" – *Lehtimäki* per Lady Arden at [35].

59. As Robert comments in Part 1, and as Lady Arden noted in *Lehtimäki* at [88], usually members of a company (in particular shareholders) are not fiduciaries (at least in relation to the company). Shares are held as property rights and can be voted as the holder wishes (or the holder can bind themselves to vote in a particular way, for example under a contract). Shareholders generally do not owe duties to each other or the company as to how they exercise their voting and other rights[33].

60. This categorisation of shares is however subject to some qualifications. These include:

    (a) existing caselaw does make it clear that shareholders do owe some duties in relation to some exercises of votes. This arises as part of the principles imposed where a majority can bind a minority, for example in relation to amending the constitution or voting in a

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32 Save perhaps Lord Reed who gave a very short concurring judgment in the SC, but indicating his doubts.

33 *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 per Lord Sumption at [40]. See Pollard '*Pensions, Contracts and Trusts: Legal Issues on Decision Making: Applying Braganza*' (2020, Bloomsbury Professional) at 9.25 to 9.28 and Ryan Turner '*Rights Powers & Remedies in Commercial Law*' (2021, Sweet & Maxwell).

statutory scheme or arrangement[34]. In *Lehtimäki* Lady Arden at [88] cited Briggs J (as he then was) in *Assenagon*[35]. These are commonly called duties to act in "good faith", for example for a proper purpose and for the benefit of the company as a whole.

(b) Shareholders in a company can, of course, also owe fiduciary duties if they hold the relevant shares on trust. But in such a case the shareholder's fiduciary duties are owed to that trust and not the company.

(c) Members of a charitable incorporated organisation (CIO) incorporated under the Charities Act 2011 owe duties under the legislation. Section 220 provides that:

    (i) "Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO."[36].

Lady Arden commented at [95] that s220 is not an exhaustive statement of the duties of a member of a CIO and it does not make it clear if this is a fiduciary duty or not.[37]

61. Lady Arden held that Dr Lehtimäki is a fiduciary in relation to his membership of the charitable company. Hence he owed fiduciary duties (which must be framed by the relevant context – see [51]). Being a fiduciary was also a precondition for him being the subject of direction by the court – Lady Arden at [42][38].

62. Lady Arden held that this fiduciary status applies to all members of charitable guarantee companies which in general prevent members from receiving profits from the company – Lady Arden at [78].

63. Lady Arden and Lord Briggs[39] both refused to deal with the position of a "mass membership" charitable company where the member may pay a subscription and also gain a benefit (eg in the case of the National Trust, free access to the relevant properties)[40]. There are presumably arguments that this would be inconsistent with the member's fiduciary status (although presumably, from a trust and company law perspective, it could be expressly authorised by the governing documents of the charity and the charitable company. But it may be that such an authorisation could impact on the company's charitable or tax status?[41]).

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34 See *Arbuthnott v Boneyman* [2015] EWCA Civ 536, [2015] 2 BCLC 627.

35 *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd)* [2012] EWHC 2090 (Ch), [2013] 1 All ER 495, [2013] Bus LR 266 (Briggs J) at [44].

36 Cited in *Lehtimäki* by Lady Arden at [29] and by the Court of Appeal at [48].

37 Lady Arden contrasted the position under CA 2006, s178(2) in relation to directors. Although that section deals with fiduciary duties rather obliquely. It states that the relevant duties under sections 171 to 177 (other than the duty to exercise reasonable care, skill and diligence in s174) are "enforceable in the same way as any other fiduciary duty owed to the company by its directors". Note the comment by Julius Grower in the casenote on *Lehtimäki* [2021] CLJ 21 at 23/24.

38 Lord Briggs also seems to have treated this as a precondition – see [215].

39 At [105] (Lady Arden) and [215] (Lord Briggs).

40 Similarly the Court of Appeal at [46], referring specifically to the National Trust as an example.

41 This is outside the scope of this paper.

64. Lady Arden reached this conclusion despite counsel for the company pointing out some of the difficulties that could follow. These are listed below (split up for ease of reading):

> 75. While Lord Pannick seeks to uphold the decisions of the Court of Appeal and the Chancellor that Dr Lehtimäki is a fiduciary, Mr William Henderson, for CIFF, impressed on us the difficulties which CIFF sees in members of charitable companies being fiduciaries. The practical difficulties he mentioned included:
>
> (i) Whether there ought to be declarations of interest before meetings of members;
>
> (ii) Whether a member with a conflict of interest can vote (which was particularly emphasised by Dr Lehtimäki on the grounds of the difficulties that this would cause where a member was a member of more than one charity in the same field);
>
> (iii) Whether a member has a duty to attend and vote at meetings;
>
> (iv) Whether a member can appoint a general proxy as permitted by section 324(1) of the 2006 Act;
>
> (v) Whether a member can receive a benefit from the company;
>
> (vi) Whether a member can fetter his discretion by making a voting agreement;
>
> (vii) Whether a member would have to investigate a matter before he could vote on it;
>
> (viii) What information a member could require from the company;
>
> (ix) Whether a member is entitled to be indemnified for the cost of attending a meeting of the company or for the cost of taking legal advice;
>
> (x) Whether a member would be liable to compensate the company if he exercised his right to vote in breach of duty.
>
> 76. Mr Henderson also raises several objections of principle to members being fiduciaries which I will address in the course of expressing my reasons for concluding that the Court of Appeal and the Chancellor were correct on this issue."

65. This is an impressive list. Lady Arden deals with some (but not all) of these issues later in her judgment.

66. For pension trustee companies the issue is whether the shareholder in the company is a fiduciary or not. If he, she or it is a fiduciary then various issues could arise, including:

    (a) as to how votes are cast; and

    (b) whether the pension trustee company is a subsidiary of the employer.

67. As to how votes are cast, this is likely potentially to be an issue on changes to the company's articles of association or on appointment or removal of directors of the company[42].

68. The status of a pension trustee company as a subsidiary (or not) of the shareholding employer can be relevant in some circumstances. If the relevant shares, although held by the employer, are held in a fiduciary capacity, it may well mean that the trustee company is not a subsidiary of the employer. This is because the statutory definition of "subsidiary" in the Companies Act 2006, s1159 and Sch 6, includes provision that "Rights held by a person in a fiduciary capacity shall be treated as not held by him." – Sch 6, para 5.

69. For a pension trustee company, not being a subsidiary of the employer may be helpful in some areas[43]. But some exemptions have been used by pension schemes based on the trustee company being a subsidiary of the employer. An example is the exemption used by some pension schemes to invest assets in a common fund. Ordinarily such a common investment fund would require the operator to be an authorised person under the Financial Services and Markets Act 2000. But there is an exemption where all the participants are in the same group of companies[44]. This exemption has been used by pension trustee companies in some cases to pool assets with other pension schemes of the same employer or to invest in asset backed funding structures[45] without infringing the employer-related investment limits under section 40 of the Pensions Act 1995.

70. Lady Arden also commented that a member who is a fiduciary is not able to vote for their own appointment as a director or trustee – [103].

Directors of a pension trustee company

71. For a company which is a trustee (whether for a pension scheme or a private family trust), it had generally previously been accepted[46] that generally the directors owe their relevant duties to the trustee company, and not direct to the beneficiaries of the trust of which the company is trustee[47].

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42 Appointment and removal of a company director by a shareholder has not previously been considered to be a fiduciary power. In contrast claims are sometimes made that the power to appoint or remove a trustee is fiduciary. In practice this claim seems misguided in relation to employers acting under pension schemes – see David Pollard and Dawn Heath *The power of employers to appoint or remove trustees of occupational pension schemes: is it fiduciary?* (2011) 25 TLI 184 and Pollard *Law of Pension Trusts*, ch 12.

43 For example liability for the obligations under the UK carbon reduction commitment used to apply to all members of a Companies Act group – CRC Energy Efficiency Scheme Order 2013 (SI 2013/1119, as amended).

44 Sch 1, para 10 of the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062).

45 See *Freshfields on Corporate Pensions Law 2015* (Bloomsbury Professional) at ch 2.9.

46 David Pollard '*Liability of Directors of Corporate Trustees',* ch 5 in *The Law of Pension Trusts* (2013, OUP) and Henry Legge, '*Pension Schemes*', ch 29 in *Company Directors: Duties Liabilities and Remedies* (Simon Mortimore ed, 3rd edn, 2017, OUP) at 29.56. See also Nuncio D'Angelo '*Transacting with Trusts and Trustees*' (2020, LexisNexis Australia) at 4.30 to 4.58.

47 See also in Jersey, *Alhamrani v Alhamrani* [2007] JLR 44 and recently in Australia *Baba v Sheehan* [2021] NSWCA 58.

72. Being a director of a trustee company did not (save for a trustee of a charity[48]) automatically impose duties (fiduciary or otherwise) direct to the beneficiaries of the relevant trust.
73. However, it remains clear that a director of a trustee company can be liable:

(a) to beneficiaries of the trust, if the director dishonestly assists in a breach of trust by the trustee company[49]; or

(b) to the trustee company, if there is a breach of duty by the director to the company – eg a claim by a liquidator (or perhaps by a new trustee) - *HR v JAPT*[50] and *Gregson v HAE*[51].

As to the level of duty owed by a director to the trustee company, see *Bishopsgate Investment Management*[52] and *ASIC v Cassimatis*[53].

74. These two further potential liabilities do not seem to be affected by the decision in *Lehtimäki*. That case concerned members, not directors. It also related to charities, where a different perspective seems to apply.

75. There was some mention in *Lehtimäki*[54] of the 1951 decision of Danckwerts J in *Re French Protestant Hospital*[55]. He held that the directors of a company owed fiduciary duties to the trust. But that was a charity case. Neither it (nor the later decision of Danckwerts J in the charity case *Abbey and Malvern Wells*[56]) considered the earlier (non-charity) Court of Appeal authorities in *Wilson v Lord Bury*[57] and *Bath v Standard Land*[58]. In the pensions case, *HR v JAPT*[59], Lindsay J considered that he should not follow *Re French Protestant Hospital*.

76. In relation to pension trustee companies, it seems that another reason for distinguishing these two decisions of Danckwerts J is that they both involved charitable companies, unlike all the other decisions mentioned above. And not one with a separate trust instrument.

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48 The charities legislation defines a charity trustee for the purposes of the Charities Act 2011 as (in effect) including a director of a charitable company – see s177.

> Section 177 Meaning of "charity trustees"
> "In this Act, except in so far as the context otherwise requires, "charity trustees" means the persons having the general control and management of the administration of a charity."

49 *Barnes v Addy* (1874) LR 9 Ch App 244, HL, *Royal Brunei Airlines v Tan* [1995] 2 AC 378, PC and *Twinsectra v Yardley* [2002] 2 AC 164, HL.

50 *HR v JAPT* [1997] OPLR 123 (Lindsay J).

51 *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch), [2008] 2 BCLC 542 (Robert Miles QC). Discussed in Pollard '*The Law of Pension Trusts'* (2013, OUP) at ch 5.

52 *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261, CA.

53 *Cassimatis v ASIC (No 8)* [2016] FCA 1023, 336 ALR 209 (Edelman J). Upheld on appeal [2020] FCAFC 52.

54 Eg Lady Arden at [98].

55 [1951] Ch 567 (Danckwerts J).

56 *Abbey and Malvern Wells Ltd v Ministry of Local Government* [1951] Ch 728 (Danckwerts J).

57 (1880) 5 QBD 518, CA

58 [1911] 1 Ch 681, CA

59 *HR v JAPT* [1997] OPLR 123 (Lindsay J).

Reasonable expectation

77. Unlike the charities position, I am not aware of any Pensions Regulator publication that considers that directors of a pension trustee company owe direct fiduciary duties to the beneficiaries of the pension trust.

78. But sometimes directors of a pension trustee company will refer to themselves as trustees (rather than directors). Following *Lehtimäki*, this could conceivably be argued to be grounds for raising a "reasonable expectation" by members of the pension scheme (and other beneficiaries) that the directors were accepting direct fiduciary duties to the members (and beneficiaries).

79. Depending on the facts, this argument seems unlikely to succeed. In practice a direct duty may not often be relevant, given the existence of wide exoneration provisions in pension scheme trust deeds. These often expressly extend to cover directors of a trustee company as well as the trustee company itself.

80. It may be arguable that such an exoneration cannot extend to investment matters, as section 31 of the Pensions Act 1995 prohibits such exonerations in favour of a trustee[60]. But to invalidate such an exoneration in favour of a director of a pension trustee company would be an extension of the wording in s31. The Pensions Act 1995 generally was drafted with the difference between a trustee company and its directors well in mind.

Employer as a fiduciary?

81. The decision of the Supreme Court in *Lehtimäki* is an indication that the courts may be more prepared to find a fiduciary duty than previously.

82. Generally employer powers in relation to a pension scheme have been considered not to be fiduciary[61], save in some special cases[62]. Instead the employer's powers are subject to express and implied contractual duties (eg the implied duty of mutual trust and confidence), and to limits on powers (proper purpose and the *Braganza* duties[63]).

83. This does not seem to be affected by the decision in *Lehtimäki*. Lady Arden commented that:

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60 For a discussion of s31, see Fenner Moeran *Trustee Exoneration & Exemption Clauses and Pension Schemes* Nugee Lecture (June 2018).

61 See eg *Imperial Tobacco* [1991] 2 All ER 597 (Browne-Wilkinson V-C) at 604, *National Grid* [2001] UKHL 20, [2001] 2 All ER 417 per Lord Hoffmann at [11], *British Coal* [1995] 1 All ER 912 (Vinelott J) at 926, *Hillsdown Holdings* [1997] 1 All ER 862 (Knox J) at 890 and *Prudential* [2011] EWHC 960 (Ch) (Newey J) at [140] and [146]. Discussed in '*Employer Powers – Non-Fiduciary*', ch 11 in Pollard '*The Law of Pension Trusts*'.

62 Eg if the employer was also a trustee of the scheme or where there has been a change in powers which otherwise would be invalidated: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Warner J).

63 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639. See Pollard '*Pensions, Contracts and Trusts: Legal Issues on Decision Making: Applying Braganza*' (2020, Bloomsbury Professional).

> [184] The exceptions to the non-intervention principle only enable the court to make orders against fiduciaries. It does not enable the court to bind any non-fiduciary such as a donor, benefactor or founder of a charity who has reserved the right to give consent to any transaction, save to the extent that they are themselves fiduciaries. If their consent is required, but is withheld, the effect is likely to be that the transaction which the court approved on the trustees' application cannot be implemented.

84. The Courts (at all levels) in *Lehtimäki* also refused to give directions to the Charity Commission in relation to the requirement for its consent – see Lady Arden at [185]. Lord Briggs commented on this at [230] that he did not agree with Lady Arden at [184], but this was on her point of drawing an analogy between the Charity Commission and Dr Lehtimäki.

85. Lord Briggs maintained throughout his judgment a clear requirement that the issue related only to control of a fiduciary. He held at [230]:

> [230] I am unable to agree with Lady Arden's next point (at paras [184]–[186]), which is that if (as the Chancellor recognised) the Charity Commission retained its power to approve or disapprove the transaction under s 201 of the 2011 Act, then there could be no valid distinction with Dr Lehtimäki's power as a member under s 217. First, the Charity Commission is not a fiduciary subject to the court's general jurisdiction in relation to breach of duty. It is a separate public body with its own statutory jurisdiction. Secondly the Charity Commission was not joined as a party to the proceedings, or heard on the merits of the Grant. The relationship between the court and the Charity Commission is quite different from that between the court and a fiduciary who is also a party to the proceedings, and its detail is beyond the scope of the issues in this appeal.

Court Directions in Pensions and other Trust cases

86. *Lehtimäki* was a decision about a charity, where there is a clear public interest. It could perhaps be argued in a future case that there is a public interest in pension trusts as well.

87. But in practice the jurisdiction of the Court in *Lehtimäki* was limited to fiduciaries and then to those who were joined to the relevant proceedings (Lord Briggs at [208]).

88. There is the concern that this jurisdiction is to put the cart before the horse. The Court gives a direction and then a fiduciary (who is party to the proceedings) is bound. So making the order gives jurisdiction. This is the point made by Lady Arden at [179] to [183].

Impact on Pension Trusts

89. For a pensions perspective, it is clearly possible to argue that *Lehtimäki* is not strictly a binding authority in that:

    (a) it is an unusual case on the facts; and

    (b) it only relates to charities.

90. But in my view such an approach would be to underestimate the likely future importance of the judgments in *Lehtimäki* for both fiduciaries generally and for pension trusts.

91. The judgments in the Supreme Court addressed the position by reference to the general law for fiduciaries. At the very least it is likely to be cited in support of the arguments in relation to pension trusts that:

    (a) Shareholders (or members) of a pension trustee company can, depending on the facts, be fiduciaries to the purposes of the trust; and

    (b) Directors of a pension trustee company could, depending on the facts and the generation of "reasonable expectations" be direct fiduciaries to the beneficiaries of the trust; and

    (c) An exception to the non-intervention principle could apply so that decisions of a fiduciary are reviewable without a breach of duty; and

    (d) The Court can give directions to fiduciaries who are before the court, even where they have not surrendered their discretion to the court; and

    (e) Fiduciary duties can be objective (prudent and reasonable) rather than just subjective (what the fiduciary considers is proper).

92. The implications of any of these arguments succeeding in relation to a pension trust could in some circumstances be significant. My inclination, at this stage is that none of these arguments[64] is likely at the end of the day to succeed in relation to pension trusts. Extending *Lehtimäki* to pension trusts feels to me to be a step too far. But watch this space.

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64 Save perhaps for (e) - see Robert Ham's comment at 17 above - , but the issue depends on what is a "fiduciary duty" for this purpose.

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