Pension Trustee Companies: An Update after *Lehtimäki* [2020] UKSC 33

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This paper discusses the potential implications for pension trustee companies (and their shareholders/members and directors) of the decision of the Supreme Court in 2020 in the charity case *Lehtimäki v Cooper*.[1] This decision appears in the official law reports under the name *Children's Investment Fund Foundation (UK) v Attorney General*.

In Part 1, Robert Ham outlines the factual background to *Lehtimäki* and discusses some of the legal issues raised. In Part 2, David Pollard considers the potential implications of the decision in *Lehtimäki* in relation to non-charity trustee companies (and their directors and shareholders).

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

Facts of *Lehtimäki v Cooper*

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 (TCI) set up at the same time and intended to be managed by Chris.

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 per cent down to 2018 and in 2019 it was 41 per cent. Bloomberg says its return in 2020 was 14 per cent. In round figures, US$1 billion flowed from TCI to CIFF, and was then invested with TCI, which turned the initial US$1 billion into over US$5 billion.

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.

CIFF had a typical two-tier management structure: (1) members and (2) directors, or trustees as they were called. Both Chris and Jamie were trustees (ie directors) as well as members

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1 *Lehtimäki v Cooper* [2020] UKSC 33, [2022] AC 155, [2021] 1 All ER 809. Also known as *Children's Investment Fund Foundation (UK) v Attorney General*.

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 US$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.

At the time of the 2015 agreement, it was not appreciated that, under the extended definitions in the Companies Act 2006 (CA 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 CA 2006, s 217. Because Chris and Jamie were both considered conflicted – though it is not clear why that disenfranchised them from voting 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 s 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.

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.

Company member as a fiduciary

Starting with the question of 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: a fiduciary owes a duty of single-minded loyalty to the beneficiary, meaning that a fiduciary cannot exercise any power so as to benefit him- or herself. 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)*: [2]

> … 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

2 (2012) 287 ALR 22 at [177].

appropriate in every case, but that it was, with that qualification, consistent with the duty of single-minded loyalty.

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 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 s 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.

It is worth noting that:

(a) Lady Arden rejected arguments on behalf of CIFF (referred to in more detail 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 (CIO).

Pausing at that point, one sometimes comes across corporate trustees of pension schemes incorporated as companies limited by guarantee, although, as pointed out in Part 2 below, 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?

Thus far, there was no divergence between the five members of the Supreme Court. But although 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?

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 s 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.

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.

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

Lady Arden accepted the non-intervention principle as stated by Lord Walker in *Pitt v Holt*:[3]

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

Or as Lady Arden 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.

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 Marko was unable to do that, the grant could not 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.

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.

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*,[4] 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, it is suggested, 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.

3 [2013] 2 AC 108 at [73].
4 [1884] UKPC 1.

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

In Part 2 below 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*[5]) 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 analysis of Lord Briggs. 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

The decision of the Supreme Court in *Lehtimäki*[6] is a rare decision by the higher courts looking at the fundamental position of a member of a company acting as a trustee. Robert Ham has outlined the facts in Part 1 of this article. 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 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,[7] 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 s 217 of the Companies Act 2006 (CA 2006) does not change the court's power.

Lehtimäki

Lehtimäki[8] involved a direction by the court to a member of a CIFF. This was in circumstances where the directors of the company had surrendered to the court their

5 [2001] WTLR 901.
6 *Lehtimäki v Cooper* [2020] UKSC 33, [2022] AC 155, [2021] 1 All ER 809. Also known as: *Children's Investment Fund Foundation (UK) v Attorney General.*
7 At first instance, Vos C had, on his own motion, joined Dr Lehtimäki as a party to the proceedings.
8 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

discretion[9] as to whether or not to approve a transaction. The transaction involved the loss of office of one of the directors of the company, so requiring the approval of the members of the company.

The company is a charitable corporation. The charity is not a trust, but instead the company holds its assets for charitable purposes.[10] Under CA 2006, s 217 the transaction also required the approval of the members of the company.[11] 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.[12] The third member, Dr Lehtimäki, was the only member prepared to vote.

At first instance,[13] 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.

Dr Lehtimäki appealed. The Court of Appeal[14] 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[15]).

The company appealed.[16] 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.

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:

(a) Was Dr Lehtimäki in his capacity as a member of the company a fiduciary?
(b) If he is a fiduciary, should the court direct him how to vote or does the 'non-intervention principle' apply?
(c) Does the requirement for shareholder approval under CA 2006, s 217 mean that the court should not give directions?

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decision of Vos C at first instance: *Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371.

9 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.

10 CA, [2018] EWCA Civ 1605 at [6] and [36].

11 The CA commented, [2018] EWCA Civ 1605 at [3], that if the charity had been a trust, CA 2006, 217 would not apply. This seems to be assuming a situation where there was not a corporate trustee, but instead individual trustees.

12 *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, s 217 for conflicted directors not to vote as members.

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

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

15 See Lady Arden at [33].

16 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).

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].

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

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[17] of a trust.[18]

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 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).

There seems to be a trend towards the increasing use of professional trustees.[19] These can either be the sole trustee or a member of the board of a trustee company.

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).[20] 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, and less need to change ownership of assets.[21]

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 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.

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?[22]

17 *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].

18 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).

19 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* (Oxford University Press, 2013) at 4.7 to 4.13.

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

21 See, eg *Lehtimäki* per Lady Arden at [62].

22 Charities can also choose to incorporate through a CIO or under the Charities Act 2011, s 251 (see *Lehtimäki* per Lady Arden at [62]).

(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)?
(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.[23]

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.

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*'[24].

Charitable company or trust?

It seems that a 'charitable company' can take two forms:

(1) 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, for example, Slade J in *Liverpool and District,*[25] cited in *Lehtimäki* by Lady Arden at [59].
(2) 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.

The first case (1) 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'[26]: see *Lehtimäki* per Lady Arden at [58].

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, s 177.

23 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, s 155(1). A change to this position in the UK (but subject to exceptions) is envisaged. The Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) will (when s 87 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, s 156A, as to be inserted by SBEEA 2015, s 87). 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.
24 David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) at 4.32, the section headed 'Who should own the trustee company'.
25 [1981] Ch 193 (Slade J).
26 Charites Act 2011, s 353(1) defines the term 'company' as meaning 'a company registered under the Companies Act 2006 in England and Wales or Scotland'.

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.[27]

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 the case in (2) 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).

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. It may well not be that the memorandum and articles of association of the company limit its ability to pay dividends or the act solely for charitable purposes.

Such a charity may also have members[28] who may be different to the members or shareholder in the company.

Deciding that Dr Lehtimäki was a fiduciary

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 Ham discusses in Part 1 above, this was mainly based (at [47]) on the judgment of Finn J in *Grimaldi*[29] and 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.

Lady Arden considered that such a reasonable expectation did arise for a member or a charitable company, citing a Charity Commission publication[30] and considering that this had more weight than the leading textbooks or charities (or an old voting case: *Bolton v Madden*[31]): [48] to [50].

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 CA 2006, s 172, given the specific provision in s 172(2) dealing with companies whose purposes include purposes other than the benefit of its members.[32]

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

28 Charity Commission note RS7 'Membership Charities' comments at p 32: '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.'

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

30 RS7–Membership Charities. March 2004 version online at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284722/rs7text.pdf

31 (1873) LR 9 QB 55.

32 CA 2006, s 172(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 s 172(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 s 172(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 s 172(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 David Pollard, *Pensions, Contracts and Trusts: Legal Issues on Decision Making: Applying Braganza* (Bloomsbury Professional, 2020) at 13.10.

This finding that a duty was owed to the charitable objects does seem inconsistent with the earlier provision in CA 2006, s 170(1) which provides that the general duties of directors (including those in s 172) are owed to the company.

Lady Arden did not refer to the old family trust case of *Skeats*[33] 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[34] and in more detail by the Court of Appeal,[35] but does not seem to have been cited in argument before the Supreme Court. It is the view of this author that *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*[36]).

Impact of *Lehtimäki* on pension trustee companies

As Robert Ham explains in Part 1 above, *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.

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

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

It is perhaps a surprising result that, at all levels, it seems that all the judges involved[37] held that Dr Lehtimäki was, as a member of CIFF, the charitable company, a fiduciary and so owed

33 *Re Skeats' Settlement* (1889) 42 ChD 522 (Kay J).
34 At [71].
35 At [40].
36 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*, (Oxford University Press, 2013), 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.
37 Save perhaps Lord Reed who gave a very short concurring judgment in the SC but indicating his doubts.

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].

As Robert Ham comments in Part 1 above, 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.[38]

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 statutory scheme of arrangement.[39] In *Lehtimäki* Lady Arden at [88] cited Briggs J (as he then was) in *Assenagon*.[40] 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:

> 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.[41]

Lady Arden commented in *Lehtimäki* 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.[42]

Lady Arden held that Dr Lehtimäki is a fiduciary in relation to his membership of the charitable company. Hence he owed fiduciary duties (which much 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].[43]

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

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38 *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* (Bloomsbury Professional, 2020) at 9.25 to 9.28 and Ryan Turner, *Rights Powers & Remedies in Commercial Law'* (Sweet & Maxwell, 2021).

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

40 *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].

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

42 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.

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

Lady Arden at [105] and Lord Briggs at [215] 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).[44] 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?[45]).

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.

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

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 issues could arise:

(a) 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.[46]

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

45 This is outside the scope of this paper.

46 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 David Pollard, *Law of Pension Trusts* (Oxford University Press, 2013), Ch 12.

(b) 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 CA 2006, s 1159 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.

A pension trustee company not being a subsidiary may be helpful in some areas.[47] 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.[48] 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[49] without infringing the employer-related investment limits under s 40 of the Pensions Act 1995.

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: see [103].

Directors of a pension trustee company

For a company which is a trustee (whether of a pension scheme or a private family trust), it had generally previously been accepted[50] that 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.

Being a director of a trustee company did not (save for a trustee of a charity[51]) automatically impose duties (fiduciary or otherwise) direct to the beneficiaries of the relevant trust.

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;[52] or

47 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).

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

49 See *Freshfields on Corporate Pensions Law 2015* (Bloomsbury Professional) at Ch 2.9.

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

51 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 s 177.

> '**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.'

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

(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*[53] and *Gregson v HAE*.[54]

As to the level of duty owed by a director to the trustee company, see *Bishopsgate Investment Management*[55] and *ASIC v Cassimatis*.[56]

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.

There was some mention in *Lehtimäki* (see, eg Lady Arden at [98]) of the decision of Danckwerts J in *Re French Protestant Hospital*[57] where 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 charity case of *Abbey and Malvern Wells*[58] considered the earlier Court of Appeal authorities in *Wilson v Lord Bury*[59] and *Bath v Standard Land*.[60] *In HR v JAPT,*[61] Lindsay J considered that he should not follow *Re French Protestant Hospital*.

It seems that another reason for distinguishing these two decisions of Danckwerts J, in *French Protestant Hospital* and *Abbey and Malvern Wells*, is that they both involved charitable companies, unlike all the other decisions mentioned above. And not one with a separate trust instrument.

Reasonable expectation?

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.

But often directors of a pension trustee company will refer to themselves as trustees (rather than directors). 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). 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.

It may be arguable that such an exoneration cannot extend to investment matters, as s 31 of the Pensions Act 1995 prohibits such exonerations in favour of a trustee.[62] But to invalidate such an exoneration in favour of a director of a pension trustee company would be an extension of the wording in s 31. The Pensions Act 1995 generally was drafted with the difference between a trustee company and its directors well in mind.

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53 *HR v JAPT* [1997] OPLR 123 (Lindsay J).
54 *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch), [2008] 2 BCLC 542 (Robert Miles QC). Discussed in David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) at Ch 5.
55 *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261, CA.
56 *Cassimatis v ASIC (No 8)* [2016] FCA 1023, 336 ALR 209 (Edelman J). Upheld on appeal [2020] FCAFC 52.
57 [1951] Ch 567 (Danckwerts J).
58 *Abbey and Malvern Wells Ltd v Ministry of Local Government* [1951] Ch 728 (Danckwerts J).
59 (1880) 5 QBD 518, CA.
60 [1911] 1 Ch 681, CA.
61 *HR v JAPT* [1997] OPLR 123 (Lindsay J).
62 For a discussion of s 31, see Fenner Moeran *Trustee Exoneration & Exemption Clauses and Pension Schemes* Nugee Lecture (June 2018).

Employer as a fiduciary?

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.

Generally, employer powers in relation to a pension scheme have been considered not to be fiduciary,[63] save in some special cases.[64] 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).

This does not seem to be affected by the decision in *Lehtimäki*. Lady Arden commented at [184] that:

> '[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.'

The courts 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. Lord Briggs maintained throughout his judgment a clear requirement that the issue related only to control of a fiduciary.

Lord Briggs 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 trust cases

Lehtimäki was a decision about a charity. It could perhaps be argued in a future case that there is a public interest in pension trusts as well. But in practice the jurisdiction of the Court in this

63 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 Ch 11, 'Employer Powers – Non-Fiduciary', in David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013).

64 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).

case was limited to fiduciaries and then to those who were joined to the relevant proceedings (Lord Briggs at [208]).

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 the order gives jurisdiction. This is the point made by Lady Arden at [179] to [183].

Impact on pension trusts

From a pension trust perspective, it is clearly possible to argue that *Lehtimäki* is not strictly a binding authority in that

- it is an unusual case on the facts; and
- it only relates to charities.

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

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 that:

- shareholders (or members) of a pension trustee company can, depending on the facts, be fiduciaries to the purposes of the trust;
- 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;
- an exception to the non-intervention principle could apply so that decisions of a fiduciary are reviewable without a breach of duty;
- the court can give directions to fiduciaries who are before the court, even where they have not surrendered their discretion to the court; and
- fiduciary duties are objective (prudent and reasonable) rather than just subjective (what the fiduciary considers is proper).

The implications of any of these arguments succeeding in relation to a pension trust could in some circumstances be significant. This author's inclination, at this stage, is that these arguments are unlikely at the end of the day to succeed. Extending *Lehtimäki* to pension trusts feels to be a step too far. But watch this space.