IN FOCUS

PUBLIC SECTOR PENSION SCHEMES: TRUSTEES, FIDUCIARIES, OR JUST PUBLIC SERVANTS?

By James McCreath

The following two propositions should not be capable of much dispute: the vast majority of pensions litigation to date, and the bulk of the experience of most pensions lawyers, has been in private sector schemes; and anyone now accruing a defined benefit pension is more likely to be working in the public sector than the private sector. The inherent tension between these two propositions tends to suggest that public sector pensions work will form an ever larger part of pensions lawyers' diets in the future.

This article considers an issue that has been acknowledged in certain authorities (most recently in *Croydon v Oasis Community Learning* [2023] EWHC 2 (Ch)) but as yet is unresolved: the nature of the duties which those granted powers under the scheme owe to its members. That problem arises generally, but is particularly acute in funded public sector schemes. The most prominent such scheme, the Local Government Pension Scheme (**"LGPS"**),[1] is vast in size, with some 6 million members and over £342bn in assets.[2]

The LGPS was established under the Superannuation Act 1972, and is now governed by the Local Government Pension Scheme Regulations 2013 (SI 2356 of 2013) and the Public Service Pension Schemes Act 2013. Under Regulation 53(1) of those Regulations, each of the "administering authorities" in that Act is required "to maintain a pension fund for the Scheme." Regulation 53(2)

[1] Another funded scheme in the public sector is the Parliamentary Contributory Pension Fund.
[2] https://lgpsboard.org/index.php/schemedata/scheme-annual-report.

makes that administering authority responsible *"for managing and administering the Scheme in relation to any person for which it is the appropriate administering authority under these Regulations."*

With a few exceptions,[3] the administering authorities are all councils, primarily county councils. They are not however the sole employers under the LGPS. The employers listed in Schedule 2 include, just by way of example, fire and rescue authorities, Academies, housing management companies, and the Serious Organised Crime Agency. Employees are required by Regulation 9 to pay contributions while in active service, while Regulations 67 to 71 impose various obligations on employers to pay contributions (which by virtue of Regulation 64 can include deficit contributions on exiting participation). Employees can also purchase additional pensions by making voluntary contributions.

The administering authorities are in turn required to manage and invest the funds, a function now regulated by the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (SI 946 of 2016).

Thus described, the LGPS might be thought to look like a trust. The administering authorities are passed assets by employees and employers according to rules. They are required to maintain those assets as a fund, and manage and invest them. They must then pay those assets to members (the word used in the Regulations) in accordance with the rules. Does this not look very much like a trust, or rather, a series of different trusts, with each administering authority constituted a trustee?

A pair of Scottish cases give contrasting answers.[4] In *Martin v Edinburgh DC* 1988 SLT 329 [1989] Pens LR 9, the Council had disinvested funds from South Africa in opposition to apartheid. While not stated expressly in the report, as an administering authority for the LGPS (Scotland), those

[3] The South Yorkshire Pensions Authority, the Environment Agency, and the London Pensions Fund Authority.

[4] In Scotland the position is governed by regulations applying specifically to Scotland, presently the Local Government Pension Scheme (Scotland) Regulations 2018 (SI 141 of 2018). However, nothing turns on that for the present point of principle.

presumably included LGPS funds. Lord Murray sitting in the Outer House had no difficulty in treating the funds as trusts, and holding that the disinvestment for political purposes rather than in the best interest of the beneficiaries constituted a breach of trust. However, while consistent with the instinctive reaction above, the point was not in fact argued in that case: the Council tried to raise the argument that they were not trustees late, but were refused permission to do so on the grounds of time (see para [27]).

Re Bain 2002 SLT 1112 is perhaps more helpful. That did not concern the LGPS, but another fund set up under the Superannuation Act 1972, with effectively the same structure. The Inner House directly confronted the correct legal characterisation of that arrangement, and concluded (in part as a result of the distinction drawn in the Pensions Act 1995 and the Pension Schemes Act 1993 between a "trust scheme" and "a public service pension scheme", the latter embracing arrangements set up under legislation) that the scheme should be regarded as established under statute, not as a trust.

That conclusion can fairly now be regarded as having momentum behind it. In *R (Palestine Solidary Campaign Ltd & anr) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 [2020] 1 WLR 1774, the Supreme Court had to consider guidance issued by the Secretary of State to administering authorities that their investments should not be used to pursue boycotts against foreign nations or UK defence industries, and that they should not pursue policies contrary to UK foreign or defence policy. The Supreme Court held that that guidance was unlawful. While the legal characterisation of the LGPS was not directly in issue, Lord Wilson (with whom Lady Hale agreed) at [30] referred to the views of administering authorities that they were *"quasi-trustees who should act in the best interests of their members"*. He approved that, referring to it as a *"crucial dimension of their role."* Lord Carnwath, the third member of the majority, said that the *"primary responsibility of the statutory authorities"* was *"as 'quasi-trustees' of the fund."*

As explained further below, this formulation can be traced back to a 1920s House of Lords decision, *Roberts v Hopwood* [1925] AC 578. While making it clear that administering authorities are not trustees in the ordinary sense, that formulation though immediately raises the question what

"quasi-trustees" means. The reference to a duty to act in the best interests of members is resonant of the core fiduciary obligation of a trustee of loyalty to the proper purposes of the trust.

Does it therefore follow that, despite not being full trustees, administering authorities nevertheless owe fiduciary duties to their members? The point is most likely to arise (as it did in both *Martin* and *Palestine Solidarity*) in the context of investments, and in particular investments pursued for non-financial reasons. The role of ethical, social, and governance factors in determining investment decisions is problematic in pensions more generally, but it can be expected to be particularly acute in schemes where the quasi-trustees are by definition political bodies.

Again, there is a clear prima facie case that administering authorities are fiduciaries. As the Supreme Court said, they should act in the best interests of their members. More generally, they are entrusted with powers of administration over the financial affairs of others, namely their members, in a way which the law generally protects by the imposition of fiduciary duties.[5] In the *Croydon* case, the Court thought (at [33]) that the result of the *Palestine Solidarity* case was that an administering authority *"does intend to assume fiduciary obligations as quasi-trustee in relation to property it administers but does not own beneficially."*

That though is arguably pushing the *Palestine Solidarity* case too far. Whether administering authorities owe fiduciary duties, and if so the content of those duties, remains very much up for grabs. The clear prima facie case has to grapple with two connected difficulties.

The first is that the administering authorities and their role are a creation of statute. They are not a common law/equitable relationship upon which the equitable concept of fiduciary duties can

[5] See in this regard the powerful analysis of Nigel Giffin QC in an opinion dated 25.03.14 published by the LGPS Advisory Board (https://lgpsboard.org/index.php/legal-opinions). It is worth noting though that while Mr Giffin at para 7 considered the position to be clearest in respect of scheme employers, it has been held in the context of a private scheme that scheme trustees do not owe any fiduciary duties to employers: *Keymed (Medical & Industrial Equipment) Limited v Hillman* [2019] EWHC 485 (Ch). But the various impacts the administering authorities' conduct might have on members as described in that paragraph closely mirror the impact which private sector scheme trustees might have on their members.

be automatically imposed. Ultimately, the duties imposed on them must be ones which Parliament can be taken to have intended to impose on setting up the LGPS.[6]

The second is that the administering authorities are public bodies, and so subject to control by public law principles. That raises the questions what room is left for fiduciary duties, and how the content of any such duties might differ from private law duties.

As to the first, public law has in its armoury a tool that, in effect, is very similar if not identical in content to the fiduciary's duty of loyalty: the duty not to exercise powers by reference to improper purposes or irrelevant considerations. In *Roberts v Hopwood, supra*, a council was empowered to employ people for *"such wages as (the Council) may think fit."* It decided to fix a minimum wage of £4 per week, regardless of whether the worker was male or female, and notwithstanding a substantial fall in the cost of living.

This was a proposal which caused the 1920s House of Lords to reach for the smelling salts. Lord Atkinson at 594 expressed the relevant principle as follows:

The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.

Leaving aside the politics, the legal point Lord Atkinson was making was that the power to fix wages had to be guided by its purpose, namely to fix a just and reasonable remuneration, and should not be guided by extraneous purposes, such as the Council's broader views about what was

[6] And one might add that Parliament has shown itself able to say expressly when it intends pensions arrangements to be governed by trust: see for example s.67(2) of the Pensions Act 2008 requiring the establishment of the National Employment Savings Trust Corporation.

politically correct in the labour market. The analogy to the LGPS and its investment powers is obvious: the purpose of those powers is to invest the funds in the best interests of the members, and therefore it would be a breach of the public law duty to have regard to extraneous political factors.

If that was the end of the story, one might say that the content of the public law duty appears effectively identical to the content of the supposed fiduciary duty. The difference between the two is consequences: a claim for breach of fiduciary duty can sound in damages/equitable compensation, unlike a public law claim, and benefits from longer limitation periods. Thus, if this was the end of the story, the question could be powerfully posed: did Parliament intend that administering authorities should be subject to claims for damages from disgruntled beneficiaries, as well as the ordinary control of their decisions allowed by public law?

However, that is not the end of the story. Lord Atkinson went on in *Roberts* as follows (at 595 – 596):

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 businesslike 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.

It is true that the question of whether a common law claim for compensation lay was not in issue in *Roberts*, and also that Lord Atkinson here spoke of a duty owed to the body of ratepayers as such. But the administering authorities are a body charged with the administration for definite purposes (those of the LGPS) of funds contributed by members of the LGPS (either directly or by their employers as consideration for their employment). As Lord Wilson put it in *Palestine Solidarity* at [30]:

And it is equally misleading to claim that pension contributions to the scheme are ultimately funded by the taxpayer. … The contributions of the employees into the scheme are deducted from their income. The contributions of the employers are made in consideration of the work done by their employees and so represent another element of their overall remuneration. The fund represents their money. With respect to Mr Milford, it is not public money.

Thus this passage from *Roberts* can be read as setting out a principle capable of imposing on administering authorities a duty owed to members of a fiduciary-like character.

That is indeed how it appears to have been read subsequently. As long ago as 1983, the Department of the Environment issued a circular expressing the view that administering authorities should pay due regard to this principle.[7] Thus a clear line can be drawn from this statement of principle to the practice of administering authorities, described and effectively endorsed in the *Palestine Solidarity* case, to regard themselves as quasi-trustees.

As to the second issue, the content of any fiduciary duties, this is something which the cases are yet to address in any detail. From *Roberts* and *Palestine Solidarity*, one can say with some certainty that investments pursued for political reasons will be a breach of the duty,[8] involving as it does an extraneous consideration. Beyond that, however, the content of duties owed by administering authorities will have to be determined against a more complex background than that in the traditional private sector trust. In particular, any fiduciary duties imposed will have to be consistent with and respect the public law duties which the administering authorities owe, and the corresponding interest of rate payers (and also private sector employers where they have been allowed to participate) in the performance of the LGPS.

[7] See Circular No 24, cited at para 2.19 of the DCLG's November 2015 Consultation Paper *"Local Government Pension Scheme: Revoking and replacing the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009*.

[8] Save where the decision does not involve significant risk of financial detriment and the administering authority has good reason to think that scheme members would support the decision.

What these duties involve is something that will have to be considered in future cases. But the mere fact that the content of the fiduciary duties may differ from those seen in the private sector context is no reason to reject the existence of such duties at all. There is nothing heterodox in asserting that a different set of factual circumstances may give rise to different duties, and it is a trite proposition (if an often overlooked one) that the mere fact that someone owes a fiduciary duty does not mean that all the duties they owe are fiduciary.

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Published February 2023