Pensions: **Corporate Agenda**

SUMMER | 2019

Do trustees of occupational pensions schemes owe duties to the sponsoring employer?

Key points:

- Trustees of an occupational pension scheme do not owe fiduciary or equitable duties to the sponsoring employer, but may have regard to the interest of sponsoring employers.
- Trustees must not subordinate their primary duty to the beneficiaries to any other interests.

In *KeyMed (Medical & Industrial Equipment) Ltd v Hillman and Woodford*, the High Court rejected a claim that two former directors had conspired to maximise the value of their pensions at the expense of their employer.

The main allegation against the directors was that they had breached various duties owed to their employer by establishing an executive pension scheme, independent of the main occupational pension scheme, to improve the security of their benefits. In doing so, it was alleged that they had breached fiduciary duties owed to the sponsoring employer of the occupational pension schemes and their directors' duties under the Companies Act 2006.

It was also alleged that the defendants had disapplied certain Inland Revenue limits and removed a young spouse reduction provision to improve their own benefits, and that they had adopted an unnecessarily conservative funding strategy to increase the security of their benefits and produce larger transfer values for their pensions.

Following a four-week trial, the Court dismissed all of the employer's claims and said that trustees of occupational pension schemes do not owe a "fiduciary or equitable duty" to the sponsoring employer. They owed such duties only to the members and other beneficiaries.

The Court gave an example from the scheme rules to illustrate the risk of dividing the trustees' loyalties. The trustees were required to set the level of the employer's contributions, and in doing so they had to consider whether to seek high contributions and risk the employer's insolvency, or seek low contributions and risk creating a deficit that would not be filled. The Court decided that the trustees could "only serve one master" and should seek to serve the interests of the beneficiaries in such a context. The Court would not create conflicts of interest for trustees without good reason.

However, the judge did acknowledge that it is not improper for trustees to have regard to the interests of the employer. Such interests may be considered even if the beneficiaries of the scheme are indifferent to those interests. The trustees must not, however, subordinate their primary duty to the beneficiaries to any other interests.

The employer's claims that the defendants had breached their directors' duties also failed. The decisions to establish the executive pension scheme and remove the relevant Inland Revenue limits had been honestly and properly made, and the directors had properly declared their interests at the relevant meetings.

The Court did not agree that the defendants had adopted an unduly conservative investment strategy. The approach had minimised the risk of a shortfall, had been advantageous to scheme members, was applied to both the executive and main staff pension schemes and was continued by subsequent trustees – the "mere fact that a conservative investment and funding strategy is being followed in no way justified an inference of impropriety or breach of duty towards the scheme".

This decision provides guidance on the duties of trustees, although in the context of quite unusual factual circumstances. The comments about the trustees' "discretion" to consider the employer's interests have a different emphasis from the first instance decision in British Airways v Airways Pension Scheme Trustee. In that case, the Court decided that the trustees had a "duty" to take account of all relevant factors, including the interests of the employer. It therefore seems likely that the relationship between trustees and the sponsoring employers of occupational pension schemes more broadly will be considered by the courts again in the future.

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