

JOHN RAISIN FINANCIAL SERVICES LIMITED

Haringey Pension Fund

LGPS Update

A paper by the Independent Advisor
June 2020

Introduction

The purpose of this paper is to update the Pensions Committee and Board on developments relating to two important issues. Firstly, developments relating to the Good Governance in the LGPS project. Secondly, to report on the outcome of a legal case relating to the LGPS in respect of which the Supreme Court delivered its judgement on 29 April 2020.

1. Good Governance in the LGPS project

As reported in detail in previous papers to the Pensions Committee and Board (21 January 2019, 11 July 2019, 19 September 2019 and 20 January 2020) the Scheme Advisory Board for England and Wales (SAB) has been developing proposals to significantly enhance governance within the LGPS. This paper briefly reviews the Good Governance in the LGPS project and in particular provides an update on developments since the end of January 2020.

This project – The Good Governance in the LGPS project - is the most important development presently underway in the LGPS as it seeks to fundamentally enhance and strengthen the governance of the individual LGPS Funds across England and Wales (now 85 in total). Completion of the project and its effective implementation across the LGPS in England and Wales is surely the most effective means of maintaining the existing and longstanding local management of the LGPS.

As previously reported a Phase I report was produced by Hymans Robertson in July 2019 and a Phase II report by Hymans Robertson and two stakeholder Working Groups was considered by the SAB and issued in November 2019. [The Independent Advisor was a member of both the Working Groups]. This Phase II report included a broad range of proposals to enhance the governance of the LGPS across England and Wales.

At the meeting of the Scheme Advisory Board held on 3 February 2020 it was agreed that the two working groups who prepared the Phase II report be combined to form an Implementation Group [of which the Independent Advisor is a member]. It was further agreed that this group prepare a detailed paper for consideration by the Board at its meeting in May 2020 to include proposals for necessary changes to the LGPS Regulations and new Statutory Guidance, the establishment of Key Performance Indicators, and the process for the independent assessment of the governance of the individual LGPS Funds.

The Implementation Group began its work in February 2020. In March an initial draft of the new Statutory Guidance on Governance in the LGPS and draft paper on the role of the LGPS Senior Officer were issued and circulated for comments. The social distancing restrictions introduced by the government in March prevented the group meeting in person. Telephone conferencing discussions were held but attendance was limited due to the fact that local government Officers on the group were engaged in responding to Coronavirus.

Therefore, on 6 April 2020 at a virtual meeting involving the SAB Chair, Vice Chair and Chairs of the Investment and Cost Management Committees it was agreed to stand down the Implementation Group until further notice but that the project team at Hymans Robertson be asked to continue to work on papers for consideration by the Implementation Group once meetings again become viable. This action was approved at the Board meeting of SAB held on 5 May 2020. Consequently, the timetable for the completion of the Good Governance in the LGPS project is on hold pending the resolution of the Coronavirus epidemic.

The Ministry for Housing Communities and Local Government (MHCLG) were represented on the Phase II Working Groups and are represented on the (Phase III) Implementation Group. Therefore, the proposals of the Good Governance in the LGPS project are likely to be adopted, eventually, by the MHCLG and compliance required of all LGPS Funds in England and Wales through the issuing, in due course, of new Statutory Guidance on Governance in the LGPS.

Given the delays to the work of the Implementation Group caused by Coronavirus, the need for the SAB to consider and as necessary consult upon the proposals of the Implementation Group and then the need for the MHCLG to formally propose, consult upon and enact changes to the LGPS Governance requirements it will be mid 2021 at the very earliest and potentially considerably later before this new and much enhanced framework becomes a requirement upon all LGPS Funds across England and Wales.

2. Supreme Court Case regarding 2016 LGPS Statutory Guidance

In 2016 the Local Government Pension Scheme (Management and Investment of Funds) Regulations were updated. To accompany the new Regulations the Government issued Statutory Guidance to assist Administering Authorities in the LGPS to formulate, publish and maintain their Investment Strategy Statement as required under the new Regulation 7. This was entitled “Guidance on Preparing and Maintaining an Investment Strategy Statement.”

This Statutory Guidance was 10 pages long and provided much clear and helpful guidance to Administering Authorities. The Statutory Guidance did however include two short paragraphs that became the subject of a case taken by the Palestine Solidarity Campaign and an individual member of the LGPS who claimed that the inclusion of two specific paragraphs in the Guidance were unlawful and that they should be removed.

Before discussing the case initiated by the Palestine Solidarity Campaign and its implications it is essential to stress that the fundamental investment duty of an LGPS Administering Authority is not affected by this case. LGPS Funds, in the words of the 2016 Statutory Guidance, *“should make the pursuit of a financial return their predominant concern...”* Both the case taken by the Palestine Solidarity Campaign and the Judgement of the Supreme Court did not concern, challenge or alter this overriding duty.

The case raised by the Palestine Solidarity Campaign merely concerned the breadth of the ethical investments that Administering Authorities of the LGPS (such as Haringey) are permitted to make. In the Judgement of the Supreme Court of 29 April 2020 Lord Wilson defined (in paragraph 1) an ethical investment as follows *“By an ethical investment, I mean an investment made not, or not entirely, for commercial reasons but in the belief that social, environmental, political or moral considerations make it, or also make it, appropriate.”*

The paragraphs that the claimants believed were unlawful are in italics below:

- *“However, the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.”*
- An Administering Authority *“Should not pursue policies that are contrary to UK foreign policy or UK defence policy”*

The case was originally heard in the High Court in 2017 which declared the two passages in the Guidance under challenge to be unlawful. This decision was reversed by the Court of Appeal in 2018. Leave was granted for the case to be finally determined by the Supreme Court which heard the case in November 2019 and delivered its Judgement on 29 April 2020.

In their Judgement the Supreme Court determined by a majority of 3 to 2 that the two passages in the Guidance under challenge were indeed unlawful as in issuing them the Secretary of State had exceeded his powers. As part of the Judgement (in paragraph 31) Lord Wilson stated *“Power to direct HOW administrators should approach the making of investment decisions by reference to non-financial considerations does not include power to direct (in this case for entirely extraneous reasons) WHAT investments they should not make.”*

On 11 May 2020 the LGPS Scheme Advisory Board for England and Wales posted the following initial statement on its website: *‘The SAB welcomes the clarity brought by the judgement of the Supreme Court in the case of R (on the application of Palestine Solidarity Campaign Ltd and another) Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent). In seeking to restrict the outcome as well as the considerations taken account of by an LGPS administering authority when developing its responsible investment policy, the government has been judged to have overstepped its powers. It is the Board’s view that Responsible Investment policy decisions belong at the local level reflecting: the need to pay pensions both now and in the future; local democratic accountability and the views of scheme members; and that outcomes of policy developments should not be subject to restrictions based on unrelated matters’*

The Judgement issued by the Supreme Court is 35 pages long and statements made by the Judges in this may clearly have implications beyond the issue of the two passages in the Statutory Guidance which were the subject of the case. Therefore, the Scheme Advisory Board (SAB) agreed that its Secretariat, in conjunction with the Board’s legal adviser, draft a statement summarising the Judgement for publication on the Board’s website. This was to include the direct effect of the decision and possible indirect impacts of the decision.

The Scheme Advisory Board issued their (five page) note on the Judgement on 8 June 2020 which *“seeks to clarify the direct legal impact of the Supreme Court’s judgement in relation to investment guidance issued by the Secretary of State. It also includes items of interest from the court’s reasoning in reaching its judgement that may inform the thinking of both scheme stakeholders and government in the future.”* It is surely significant that in three separate places in the note (pages 2,3,4/5) the comment is made that the Judgement does not change the fundamental duties and responsibilities of LGPS Administering Authorities in relation to their investment or other powers and confirms that the Administering Authority remains *“responsible for investment decisions”*.

Comments in the note on ***“The Decision and its Direct Impact”*** include:

- *The outcome of the decision is that the Secretary of State went beyond his powers by including the contested passages in the guidance. The reissued guidance from July 2017 (with the relevant passages removed) remains valid.*
- *The judgement does not change the fundamental duties and responsibilities of LGPS administering authorities in relation to their investment or other powers. The administering authorities remain responsible for investment decisions.*

In the section ***“Are LGPS Funds Public Money?”*** the SAB note very helpfully addresses issues considered in paragraphs 28 to 30 of the Judgement issued by the Supreme Court in April 2020. One of the arguments that was raised by the Barrister (Julian Milford) representing the Secretary of State at the hearing before the Supreme Court in November 2019 was the concept that LGPS Funds are *“public money.”* The SAB note contains the following statement on this issue which, I think, it is helpful to quote below in full. I have however highlighted in bold the two paragraphs that perhaps merit particular attention.

“In pursuing an argument that administering authorities were part of the machinery of state, MHCLG also argued that LGPS funds are “public money”. What MHCLG appear to have argued is that because LGPS funds are ultimately funded by the taxpayer, they are effectively the government’s money and therefore the government has the power to direct how those funds should be used via guidance.

Lord Wilson rejected this argument, quoting Sir Nicolas Browne-Wilkinson VC from the Imperial Tobacco case², making the point that contributions are paid by both employees and employers and that employer contributions are made in consideration of the work done by their employees and so represent another element of the employees’ overall remuneration.

Lord Wilson came to the conclusion that LGPS funds should rather be viewed as representing employees’ money rather than public money.

This comment may be at risk of being taken out of context and should not be interpreted as meaning that LGPS funds are owned or controlled by the members. It is clear elsewhere in the judgement that the LGPS is a statutory pension scheme and that the primary responsibility for delivering the functions of the LGPS rests with its administering authority.

There is no suggestion that the assets of an LGPS fund legally vest in anybody but the administering authority. We do not believe that Lord Wilson was making such a suggestion. In fact, Lord Carnwath specifically states that, “responsibility for investment decisions thus rests with the administering authorities”

The full text of the SAB note on the Supreme Court Judgement can be found at the link https://www.lgpsboard.org/images/Guidance/SAB_SCSN062020.pdf This SAB note on the Supreme Court Judgement provides Administering Authorities with helpful information as to the overall consequences of the Judgement.

In conclusion the Judgement issued by the Supreme Court on 29 April 2020 determined that the Secretary of State exceeded his powers by including in the Statutory *“Guidance on Preparing and Maintaining an Investment Strategy Statement”* of 2016 the (few) lines contested in the case relating to not pursuing policies that are contrary to UK foreign policy or UK defence policy. The contested lines (but nothing else) were removed from a revised version of the Statutory Guidance issued in July 2017 (following the original High Court ruling) and this remains valid in its entirety.

The Judgement does not in any way suggest that Administering Authorities, such as the London Borough of Haringey, are not completely responsible for investment decisions relating to their LGPS Fund. Indeed in paragraph 42 of the Supreme Court Judgement Lord Carnwath explicitly stated *“...Responsibility for investment decisions thus rests with the administering authorities.”*

Finally it is worth restating that it can be said with certainty that the Judgement does not undermine the overriding duty of the Administering Authority, in the words of the 2016 Statutory Guidance on Preparing and Maintaining an Investment Strategy Statement, that *“...schemes should make the pursuit of a financial return their predominant concern...”* This element of the Statutory Guidance was not disputed in this case.

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Note: The full Supreme Court Judgement referred to above can be accessed at <https://www.supremecourt.uk/cases/docs/uksc-2018-0133-judgment.pdf>

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