

THE EXTENT OF PENSION TRUSTEES' OBLIGATIONS IN SOUTH AFRICA

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1. Preliminaries

A more exact title would be "The Extent of the Obligations of Board Members of a Pension Fund Organisation: An English Perspective " because in South Africa once such Pension Fund is registered it becomes a body corporate¹ and because I am qualified as an English lawyer, not as a South African lawyer. In England, of course, a trust is not a legal person, so it is the trustees who have title to the trust property for the benefit of their beneficiaries and who alone can sue third parties or be sued by third parties. The internal trustee-beneficiary relationship is governed by centuries-old trust law principles as affected by specific legislation² dealing with pension trusts where the trust property is security for the provision of pensions with an express or resulting trust of any surplus.³

In South Africa the pension fund itself is the owner of its assets⁴ and its board members, like directors of a company, must direct and control those assets in the interests of the members of the pension fund organisation⁵. However, just as in England directors of a charitable corporation are treated substantially as if they were the trustees of a charitable trust⁶, so in South Africa board members of a pension fund are treated substantially as if they were trustees of a pension trust⁷. After all, even though they do not have title to the pension assets they do have the direction and control of those assets for the benefit of the fund members who are entitled to expect that the board members will act in the best interests of the fund members⁸ and not in the private interests of the board members⁹.

2. Established Obligations of South African Pension Trustees

¹ Pension Funds Act 1956 "PFA") s. 5

² E.g. Pensions Act 1995, Pension Schemes Act 1993 (for Pensions Ombudsman)

³ *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399; *Wrightson Ltd v Fletcher Challenge Nominees Ltd* [2001] UKPC 23, [2001] Pens LR 207

⁴ PFA s. 5(1) (c) and (2)

⁵ PFA s. 7C

⁶ Charities Act 1999 ss 96(1) and 97(1) defining "charity" and "charity trustees" as earlier recognised in case law, but directors of charitable corporations do not have the extensive personal liability of trustees to third parties.

⁷ *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA). Company directors, in any event, are fiduciaries who must exercise their powers for their proper purposes in what they consider to be the best interests of the company: *Howard Smith Ltd v Ampol Ltd* [1974] AC 403. Like trustees, they are strictly liable if doing what they are not authorised to do, as opposed to doing badly what they are authorised to do: *Re Duckwari plc* [1999] Ch 253

⁸ *Ibid* and *Tek Corporation Provident Fund v Lorentz* 1999 (4) SA 884 (SCA)

⁹ PFA s. 7 C (2) (c)

The basic duties of "pension trustees" (as board members of a pension fund shall hereafter be called) are to ensure proper records are kept, proper control systems are in place, and adequate and appropriate information is communicated to members; to take all reasonable steps to ensure contributions are paid promptly to the fund; to obtain expert advice where sufficient expertise is lacking; and to ensure that the rules and the operation and administration of the fund comply with the Pensions Fund Act 1956 (as amended), the Financial Institutions (Investment of Funds) Act 2001 and all other applicable laws¹⁰. It is noteworthy that, to safeguard its assets, no fund may carry on any business other than the business of a pension fund¹¹.

Not only must the fund or a trustee not act in excess of its, his or her powers, but each must not exercise the fund's powers improperly nor cause a fund member to sustain actual or possible prejudice in consequence of the maladministration of the fund¹².

In directing, controlling and overseeing the operations of the fund the trustees must (a) take all reasonable steps to ensure that the interests of the members in terms of the rules of the fund and the provisions of the 1956 Act (as amended) are protected at all times; (b) act with due care, diligence and good faith; (c) avoid conflicts of interest¹³; and (d) act impartially in respect of all members and beneficiaries¹⁴.

This last statutory requirement reflects what the Supreme Court of Appeal recently held to apply in respect of events pre-dating such requirement, the court stating¹⁵ that a duty of impartiality is "an obligation not to discriminate between members unfairly. It seems to be inherent in the proper exercise of any discretion that it should be done with impartiality." Thus, as in England, it appears the trustees can, in disinterested fashion, fairly discriminate in particular circumstances in favour, for example, of current employees over retired pensioners¹⁶.

Of more general significance, however, than the right of a member to have his trustees act impartially or disinterestedly, is that there is the all-pervasive right to have the trustees act with due care and diligence, not just in their investment management role but also in their distributive role when exercising their discretionary powers to benefit members as individuals or as a class. In England, the duty of care as such is restricted to the investment management role where fund losses enable a case to be made that they were caused by a negligent management decision and the court focuses upon whether or not the decision was a negligent one and whether the relevant losses would not have occurred but for such decision¹⁷. In complaining of the exercise of discretionary distributive powers a member-beneficiary is complaining that he has not received a benefit that he hoped or expected to receive under an exercise of the

¹⁰ PFA s. 7D

¹¹ PFA s. 10

¹² PFA s. 1 definition of "complaint"

¹³ A board member who is also a fund member to represent fund members' interests should not be regarded as "conflicted-out" of a decision happening to benefit him as a class member of the fund: see English *Re Drexel Burnham Pension Plan* [1995] 1 WLR 32 and *Edge v Pensions Ombudsman* [1998] Ch 512, [2000] Ch 602, CA

¹⁴ PFA s. 7C

¹⁵ *Meyer v Iscor Pension Fund* 2003 (2) SA 715, para 22

¹⁶ *Edge v Pensions Ombudsman* [2000] Ch 602, CA

¹⁷ *Nestle v National Westminster Bank* [1993] 1WLR 1260, CA; in Australia: *Australian Securities Commission v AS Nominees Ltd* (1995) ALR 1

discretion that led to a decision which, at face value, appears to be one that would be within the broad leeway afforded to the exercise of discretions. Thus, the court does not focus upon the decision and whether it might have exercised the discretion differently; instead, it focuses upon the minds of the trustees to see whether they exercised their discretion in good faith, upon real and genuine consideration of the right issues, and in accordance with the purposes for which the discretion was conferred¹⁸. However, in South Africa it would seem that one ground for a fund member having the right to have the exercise of a discretionary power adverse to his interests set aside is that he proves that the trustees negligently failed to exercise due care and diligence in coming to a decision that reasonable trustees would not have reached or, perhaps, *might* not have reached, so that there should be a fully informed reconsideration of the issues¹⁹.

In South Africa, an interested person may make a complaint relating to the administration or investments of the fund or the interpretation and application of its rules, alleging that decisions were in excess of powers or an improper exercise of powers or that the complainant sustained or may sustain prejudice in consequence of the maladministration of the fund or that a dispute of fact or law has arisen²⁰. If the pension trustees do not satisfy the complainant he can then lodge the complaint with the Adjudicator²¹, who may make "the order which any court of law may make",²² his determination being deemed to be a civil judgment of any court of law had the matter been heard by such court²³.

The Adjudicator must provide a statement of reasons for his determination²⁴ and any party aggrieved by the determination may appeal to a division of the Supreme Court²⁵ which has power to re-hear the complaint²⁶, taking evidence where appropriate, and "to make any order it deems fit" on the merits of the complaint in question²⁷.

3. The Position of English Pension Trustees

In similar fashion to that in South Africa if the English pension trustees do not satisfactorily resolve matters with a complainant²⁸, he may complain to the Pensions Ombudsman that he has sustained injustice as a result of maladministration or that there is a dispute of fact or law²⁹. The Ombudsman may then direct the trustees to

¹⁸ *Edge v Pensions Ombudsman* [2000] Ch 602, CA. Exceptionally, if the decision itself was so unreasonable that no rational body of trustees could have reached it, this will be proof that the trustees' decision-making process was irredeemably flawed

¹⁹ See text to footnote 60 below

²⁰ PFA s.1

²¹ PFA s. 30A (3)

²² PFA s.30E(a)

²³ PFA s. 30O(1)

²⁴ PFA s. 30M

²⁵ PFA s. 30P(1)

²⁶ *Meyer v Iscor Pension Fund* 2003 (2) SA 715, para 8

²⁷ PFA s.30 P (2). Cp Trust Property Control Act 1988 s. 23 for an appeal from the Master. It would appear that "any order" does not confer a general jurisdiction to substitute the court's (or the Tribunal's) discretion for that of the trustees, which would surely require specific statutory provision as in Australia for its Superannuation Complaints Tribunal; Superannuation (Resolution of Complaints) Act 1993 s. 37, *Att-Gen of The Commonwealth v Breckler* (1999) ALR 576; note 38 below

²⁸ Pensions Act 1995 s. 50; cp PFA s. 30A

²⁹ Pension Schemes Act 1993 s. 146 (1) and (2)

take or refrain from taking such steps as he may specify³⁰. However, unlike South Africa, an appeal to the Courts can only be made on a point of law³¹, whether relating to reasons given by the Ombudsman or to the Ombudsman not complying with the rules of natural justice that apply so as to ensure he deals fairly with the parties³².

Otherwise, the obligations of English pension trustees are similar to the obligations of South African trustees, though statutory duties arise under the English Pensions Act 1995. The trustees must not act beyond their authorised powers and must always act in good faith with the motive of acting in what they consider to be the best interests of the beneficiaries, so as to avoid any conflicts of interest (that are not authorised) and any partiality (that is not authorised) and so as to fulfil the purposes for which their powers were conferred upon them³³. In the exercise of their investment functions they (and their delegates) must exercise due care and skill, being judged in the light of the results of their investing³⁴, but, unlike the position in South Africa, there is no specific duty to use due care and diligence in non-investment related functions; instead, a similar duty arises under the *Hastings-Bass* principle which will shortly be discussed.

For trustees to be acting in the best interests of the beneficiaries when exercising their discretionary powers, they need to be sufficiently informed (by taking account of key factors and ignoring irrelevant factors) to be able to give effect to the purposes for which those powers were conferred upon them³⁵.

Where the trustees have serious doubts over the construction of their powers or the extent of their duties³⁶ or whether it would be proper to exercise their powers in a particular fashion (e.g. to compromise a claim against the employer owing money to the fund³⁷) they may obtain protective rulings from the court. The beneficiaries may not only sue in the courts for breach of trust but may obtain declarations as to the true extent of the trustees' obligations.

However, the courts can never exercise the trustees' discretionary functions³⁸ unless, in a very rare case the trustees expressly surrender their discretion to the court and the court is ready to accept this as appropriate in all the circumstances³⁹ - or the case is the exceptionally exceptional one where the trustees are dead or have been removed for breach of trust and a simple distribution of the trust property by the Court to

³⁰ Ibid, s. 151 (2); he does not have unfettered discretion to impose remedies not open to the court: *Wakelin v Read* [2000] EWCA Civ 82, [2000] Pens LR 319, CA

³¹ Ibid, s. 151 (4)

³² *Edge v Pensions Ombudsman* [2000] Ch 602, CA

³³ Ibid, *Cowan v Scargill* [1985] Ch 270, Underhill and Hayton, *Law relating to Trusts and Trustees*, 16th ed 2003, Article 61 (hereafter "U & H")

³⁴ *Nestle v National Westminster Bank* [1993] 1 WLR 1260, CA; Pensions Act 1995 ss 33-36; Trustee Act 2000 s.1

³⁵ *R v Charity Commissioners ex parte Baldwin* [2001] WTLR 137 at 148-149, U & H Article 61

³⁶ *Cowan v Scargill* [1985] Ch 270

³⁷ *Bradstock Pension Scheme Trustees Ltd v Bradstock Group plc* [2002] Pensions LR 327

³⁸ *Edge v Pensions Ombudsman* [1998] Ch 512 at 534, *Breadner v Granville-Grossman* [2001] Ch 523 at 543

³⁹ *Thrells v Lomas* [1993] 1 WLR 456, *Public Trustee v Cooper* [2001] WTLR 901 at 923

particular beneficiaries is the obvious course to take, rather than the trust continuing under replacement trustees left to exercise their discretions as they think fit⁴⁰.

4. Upsetting the Exercise of Pension Trustees' Discretions

There have been two significant recent developments in England concerning upsetting the exercise of pension trustees' discretions: developments in the application of the *Re Hastings - Bass*⁴¹ principle and developments concerning the possible application of grounds for administrative judicial review⁴². These developments seem to be much influenced by the fact that beneficiaries under pension trusts have earned their rights in the pension fund (so as to be settlors⁴³ as well as beneficiaries) and by the state's interest in its citizens providing satisfactorily for their own retirement which seems to require pension trusts to be professionally run other than as a purely private entity. Indeed, it is notable that in pension trusts (as opposed to private family trusts) the trustees have significant quasi-judicial functions leading to statute requiring internal dispute resolution procedures⁴⁴ e.g. relating to whether a beneficiary is sufficiently incapacitated to qualify for early retirement benefits or whether a person was a deceased beneficiary's cohabitee or what is the appropriate amount of assets to be hived off to cover the pensions of persons who have become employed by a company purchasing part of the business run by their former employer.

(a) *The Hastings - Bass principle*

Re Hastings-Bass was a Court of Appeal decision concerned with a Revenue claim that the trustees' transferring capital from a 1947 settlement to a trust for B for life, with a remainder benefiting B's descendants that later was discovered to be void for perpetuity, was wholly void, so that the advanced capital remained in the settlement and was subject to estate duty of 75%. The Court stated⁴⁵:

"Where a trustee is given a discretion as to some matter under which he acts in good faith the court should not interfere with his action notwithstanding that it does not have the full effect intended, unless

- (1) what he has achieved is unauthorised by the power conferred on him, or
- (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."

The Court held that it would not interfere to make the advancement void. Such was authorised because it was "for the benefit of" B as intended to save estate duty and

⁴⁰ *McPhail v Doulton* [1971] AC 424 at 457, HL *Mettoy Pensions Trustees Ltd v Evans* [1990] 1 WLR 587 at 1617 at 1618

⁴¹ [1975] Ch 25

⁴² For South African developments see *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA)

⁴³ Under their contract they must make contributions to the fund, while having a right to have their employer make contributions to the fund so that there is sufficient therein to be security for payment of sums due thereout to them in due course

⁴⁴ PFA s. 30A and Pensions Act 1995 s 50. The Pensions Ombudsman has held that injustice in consequence of maladministration arises unless the trustees provide a reasoned decision: *Allen v TKM Group Pension Trust Ltd* (PO Decision Loo 370, 25 April 2002)

⁴⁵ [1975] Ch 25 at 41

effective to save such duty, even if taking effect only as an advancement of capital to trustees on trust for B for life. Indeed, the failure of the trusts in remainder left B with a contingent interest in capital under the 1947 settlement, so that he had a greater prospect of obtaining ownership of that capital than would have been the case had the trusts in remainder in favour of his descendants taken effect.

The Court also held⁴⁶ "In the present case (2) above has not, in our judgment, been established." Clearly, the trustees had failed to take into account the voidness of the trusts in remainder, but they had directed their minds to the key issue, the estate-duty-saving aspect, which was satisfied by an advancement of the capital on trust for B for life. Even if they had appreciated that the trusts in remainder were void for perpetuity they would still have conferred the life interests on B, though they would have restricted the trusts in remainder to the perpetuity period. They had managed to exercise their powers to do the right thing of saving estate duty, even if in different fashion from that intended.

The *Hastings-Bass* principle has been taken to make trustees' decisions void⁴⁷ not just if unauthorised but if their mistaken failure to take account of a material consideration was so significant that taking it into account would have led them to make a different decision, so that their power has been exercised wrongfully or improperly as in the case of the fraud on a power doctrine.⁴⁸ It has therefore taken on a special life of its own in both the private trust and the pension trust context. However, in the private trust context courts have overlooked the fact that the principle only applies if the trustees' action "does not have the full effect intended". After all, a document cannot be rectified or set aside for mistake where the document accurately records what the parties agreed and there was no mistake as to the meaning or effect of the document as a document, only a mistake as to its consequences and advantages⁴⁹. Sadly, the English High Court⁵⁰ and the Jersey Royal Court⁵¹ in three first instance decisions have overlooked this so as to hold *void* apparently authorised appointments where there were no mistakes as to the terms and effect of the appointments, only mistakes as to the tax consequences thereof which were disastrous instead of beneficial. Thus, trustees alone of all taxpayers could nullify what they had earlier deliberately done, a situation that must be too good to be true (enabling negligent lawyers and their insurers to escape liability at the expense of the Revenue) so that the *Hastings - Bass* principle should have been held inapplicable.

⁴⁶ *Ibid*

⁴⁷ *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, *Green v Cobham* [2000] WTLR 1101, *Abacus Trust Co v NSPCC* [2001] WTLR 953

⁴⁸ There is a fraud on a power where it is exercised for an ulterior or foreign purpose, as in *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, and the exercise of the power is void, not having the effect of vesting any equitable proprietary interest in the appointees: *Cloutte v Storey* [1911] 1 Ch 18 at 30 and 31 per Farwell LJ. It seems the ignored relevant consideration or the influential irrelevant consideration should be so fundamental that the trustees cannot be said to have exercised their power for the purpose for which it was conferred on them: thus the exercise of the power in *Karger v Paul* [1984] Victoria R 161 was unimpeachable, while any exercise of the power in favour of the adopted son before it expired would have been unimpeachable in *Breadner v Granville-Grossman* [2001] Ch 523 at 532 and 544 - 545, although the exercise of the power in *Abrahams' WT* [1969] 1 Ch 463 was void as not overall of benefit to the advanced beneficiary.

⁴⁹ *Gibbon v Mitchell* [1990] 3 All ER 338 at 343; *AMP(UK) v Barker* [2002] WTLR 1237 at 1260; *Anker-Petersen v Christiansen* [2002] WTLR 313 at 330-331

⁵⁰ *Green v Cobham* [2000] WTLR 1101, *Abacus Trust Co v NSPCC* [2001] WTLR 953

⁵¹ *Re Green GLG Trust* [2003] WTLR 377

However, Lightman J in *Abacus Trust Co v Barr*⁵² has recently undermined these three first instance decisions in another way. He has held that where the trustees had made an apparently authorised appointment but mistakenly appointed 60% instead of 40% of the trust fund on trust for the settlor's sons, the *Hastings-Bass* principle only applied to make such appointment *voidable* and not void where the trustees would have followed the settlor's suggestion of only appointing 40% but for mistakenly thinking he had suggested appointing 60%. Thus the principle was subject to the usual discretion of the court to refuse its assistance on account of delay or acquiescence or the intervention of third party rights. Lightman J also adverted to the fact that in a pension trust case, *Stannard v Fisons Pension Trust Ltd*⁵³ the Court of Appeal, without apparently considering that it was departing from the principle as laid down in *Re Hastings-Bass*, had held a pension trustees' decision ineffective because they *might* (not would) have come to a different decision on the amount of trust assets to be transferred to a new fund in respect of employees being transferred to a new employer if they had considered the higher valuation of the trust assets at the delayed time the transfer actually was made. Since then, in the pensions context judges have accepted that⁵⁴ "a decision of trustees to exercise a discretion will be void if (a) the trustees have failed to take into account a material consideration and (b) that consideration might materially have affected their decision" though finding on the facts that such consideration also would have affected their decision. Lightman J believes⁵⁵ it still to be an open question whether "would" can be supplanted by the weaker "might", but in my view "might" is appropriate in the pensions –as opposed to the family - context.

It is surely time for the English Courts to treat pension trusts differently⁵⁶ from family trusts because they are very different institutions. Settlers of family trusts are patriarchs who intend their trustees to have plenty of leeway over the extensive life of the trust to make as patriarchs the sorts of gifts the settlor would have wanted to make without being bothered by whining, whingeing objects of discretionary powers. Thus, private trustees' apparently authorised exercise of discretions will only be upset if the trustees failed to take account of a material consideration that was so significant that they *would*⁵⁷ have come to a different decision if they had taken account of it; such a consideration is thus a key factor, failure to take account of which would prevent a real and genuine consideration being given to the exercise of the power⁵⁸.

⁵² [2003] Ch 409

⁵³ [1991] Pensions LR 225

⁵⁴ Per Etherton J in *Hearn v Younger* [2002] WTLR 1317 at para 86 following *AMP(UK) plc v Barker* [2001] WTLR 1237

⁵⁵ [2003] Ch 409 para 20

⁵⁶ Despite the unreserved judgment of Rattee J in *Wilson v Law Debenture* [1995] 2 All ER 337 equating the two so as to deny any right to trustees' reasons, but undermined by the criticism of Lord Walker in A J Oakley (ed) *Trends in Contemporary Trust Law*, Oxford, 1996 pp 130-131 and by the Pensions Ombudsman holding denial of reasons to amount to "maladministration" (see note 39 above)

⁵⁷ Such stringent test preferred in *Re Green GLG Trust* [2003] WTLR 377 para 29 and *Scott v National Trust* [1998] 2 All ER 705 at 718. Indeed, in *Nestle v National Westminster Bank* [1994] 1 All ER 118 at 128 Dillon LJ, in the family trust context, accepted that a trustee's investment decision made on wholly wrong grounds which would have been correct if decided upon the right grounds would be unimpeachable: thus, a beneficiary can only impeach a decision if proving the trustee would have come to a different decision but for taking account of wrong grounds

⁵⁸ *Dundee General Hospitals Board v Walker* [1952] 1 All ER 896 at 905; *Karger v Paul* [1984] VR 161 at 164; *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSW 715, para 55

However, pensions trustees' decisions will be upset if they failed to take account of a material consideration and if that consideration *might* materially have affected their decision. After all, for beneficiaries, who are not donees but have fully earned their pension rights in the workplace, to be compelled to prove that the trustees probably *would* have come to a different conclusion if not failing to take account of a key material consideration before the trustees have to reconsider a decision, surely places too high a hurdle in front of the beneficiaries. Do not pension beneficiaries as settlors have a legitimate expectation that their reasonable queries of particular exercises of their trustees' discretions will not be brushed aside on the basis they cannot establish that the trustees probably would have acted differently? Does not the State have such an expectation of the position of beneficiaries in the light of its regulatory role within the superannuation framework? Another perspective is to say that the beneficiary-settlors and the State reasonably expect pension trustees to behave more diligently than family trustees.

In South Africa the beneficiaries can point to their statutory right to lodge a written complaint with their pension trustees, while such complaint must "be properly considered and replied to in writing" within 30 days, with the complainant then having the right if not satisfied with the reply to lodge the complaint with the Adjudicator⁵⁹. Moreover, there is the obligation of the trustees⁶⁰ to "act with due care, diligence and good faith" in all their functions. Such obligation surely requires the trustees when exercising a discretion to act in accordance with the principles in *Re Hastings-Bass*, so as not just to act in authorised fashion within their powers but also diligently to take account of material considerations, while ignoring immaterial considerations, but without the need for such considerations to be of such key significance that ignoring them probably *would* have led to a different exercise of the discretion .

It seems to me that in South Africa as well as in England if a discretionary decision of pension trustees failed to take account of some material consideration and if that consideration *might* materially have affected the trustees' decision, then they ought frankly to admit the validity of the complaint and swiftly go on to consider the matter afresh, taking account of the overlooked consideration.

(b) *Administrative law principles*

While Chancery judges for centuries in the private law context have been developing the grounds on which the court is entitled to scrutinise discretionary decisions of trustees and other persons holding fiduciary powers, Common Law judges in the last forty years have been developing the grounds for scrutinising the discretionary decisions of those performing public or quasi-public functions, focusing upon the legitimate expectations of those affected by the performance of such functions but who have no private law rights in respect of such functions. In dealing with trusts which, in substance, are glorified gifts by settlors for longer periods than their lives, so that those filling the office of trustee have powers vicariously to make the gifts the settlor would have wanted, the Chancery judges⁶¹ have focused on the settlor's legitimate expectations that the trustees will restrict themselves to authorised acts in

⁵⁹ PFA a. 30A(2)

⁶⁰ PFA s. 7C (2) (b)

⁶¹ *Edge v Pensions Ombudsman* [2000] Ch 602, *Cowan v Scargill* [1985] Ch 270; U & H, Article 61

acting in good faith in what they consider to be the beneficiaries' best interests, subject to exercising their powers for the purposes for which he conferred them and not perversely to any expectation he had: the settlor expects his trustees to be adequately informed to be able to give real and genuine consideration to exercising their powers to fulfil his purposes.

Two pillars of administrative law are the principles of natural justice and the principles preventing abuse of discretionary powers⁶². The former principles, involving the need to give a fair hearing (or opportunity to make representations) to all affected parties and the need for an independent impartial tribunal, are no part of general trusts law. Often the trustees are beneficiaries or related or otherwise closely associated with the beneficiaries, although when they come to exercise their powers they must exercise them as disinterestedly as they can unless otherwise authorised by the settlor expressly or by necessary implication to cover particular circumstances⁶³. There is no need⁶⁴ to give any opportunity to make representations to any beneficiary who might be adversely affected by exercise of a power in favour of other objects thereof. As stated by the High Court,⁶⁵ "The difference between the public law and the trust approach is that the former focuses on the individual's opportunity to be heard before a decision, whereas the trust concept focuses on the information available to the person making the decision," although a trust instrument or legislation may, exceptionally, impose a greater obligation on trustees before making a decision e.g. one based upon a request from a beneficiary.

However, the public or administrative law principles preventing abuse of discretionary powers have been developing on similar lines to trust law principles governing the exercise of discretionary powers, although the former focus on the legitimate expectations of persons to be affected by exercise of the discretionary powers while the latter focus on the legitimate expectation of the settlor who conferred the discretionary powers so as to help carry out *his* purposes.⁶⁶ However, if the settlor has a particular expectation and the beneficiaries are aware of this, then they have the same expectation⁶⁷, albeit a derivative expectation, while in the pensions context it is crucial that the beneficiaries are also settlors who, in such working context, will have higher expectations than there are in the context of family and friendship.

In the pensions context in England and South Africa, it seems to me that beneficiaries can have a legitimate expectation that in exercising their discretionary powers the

⁶² Generally see PP Craig, *Administrative Law*, 5th ed, 2003

⁶³ *Edge v Pensions Ombudsman* [2000] Ch 602; in the pensions context the trustees will include beneficiaries within their number, while some trustees will be senior officials of the corporate employer of the beneficiaries.

⁶⁴ *Karger v Paul* [1984] VR 161 at 166 endorsed by *R v Charity Commissioners ex p Baldwin* [2001] WTLR 37 at 148; *Scott v National Trust* [1998] 2 All ER 705 at 717; *Re B* [1987] 2 All ER 475 at 478

⁶⁵ *R v Charity Commissioners ex p Baldwin* [2001] WTLR 137 at 148-149

⁶⁶ *McPhail v Doulton* [1971] AC 424 at 449, 457, HL; *Re Hay's ST* [1982] 1 WLR 202 at 209; *Hayim v Citibank* [1987] AC 730 at 746, PC

⁶⁷ Thus a settlor would expect trustees of his discretionary trust not suddenly to stop quarterly payments of £4,000 made to help maintain a poor beneficiary since his retirement six years previously without a very good reason and, normally, by reducing the support gradually over a period if such reduction was appropriate: such beneficiary would have the same expectation: *Scott v National Trust* [1998] 2 All ER 705 at 717

trustees⁶⁸ will, in good faith, disinterestedly exercise those powers only for the purposes for which they were conferred, diligently acting upon material considerations and not immaterial considerations and properly dealing with any complaints⁶⁹ in fully informed fashion. While this trust law position may be said to reflect the administrative law position⁷⁰, it does seem to confer (as one might expect) greater protection than the key administrative law principle known in England as the "*Wednesbury* principle", which is that⁷¹ "if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere" : such irrational decision can only have been made on the basis of acting upon immaterial considerations. Indeed, the other face of this rationality test⁷² is represented according to Lord Woolf⁷³ by "a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an irrelevant factor)."

In trust and administrative law cases courts "interfere" with decisions made in breach of the above principles using the terms "void" and "voidable". Where there appears to be a presumptively valid decision affecting the complainant, so that he needs to complain that the decision was outside the real scope of the decision-makers power, then the decision will often be said be void, so that it ought to be retrospectively null, unlike a voidable decision which is valid until set aside. In English administrative law it appears, however, that "void" and "nullity" have no absolute sense⁷⁴. The court may require the decision to have no effect at all from the outset or where a person has later justifiably acted on the assumption that the decision was valid may consider his position on the basis that the decision was then valid or the court may in its discretion refuse relief to the applicant because of delay, waiver or some other reason. Rather than focus on manipulating the concepts of "void" and "voidable" it would seem better for the court to exercise its jurisdiction⁷⁵ through exercising discretion at the remedial level, "interfering" as it thinks appropriate without reference to such concepts.

Indeed, it may well be significant that the English Court of Appeal in referring to the *Hastings-Bass* principle stated⁷⁶, "There is no doubt that the trustees' decision can be

⁶⁸ *Edge v Pensions Ombudsman* [2000] Ch 602, CA

⁶⁹ See PFA s. 30A and Pensions Act 1995 s. 50

⁷⁰ See *Edge v Pensions Ombudsman* [2003] Ch 602 at 628, CA; *Equitable Life Assurance Society v Hyman* [2002] 1 AC408 at 417 para 19 per Lord Woolf

⁷¹ *Associated Provincial Pictures Ltd v Wednesbury Corporation* [1948] 1KB 223 at 230, CA

⁷² Its stringency is being weakened so as to be applied with less intensity in some contexts by asking whether the decision was one that was within the leeway afforded to a reasonable authority, while in matters covered by the Human Rights Act 1998 or by European Community law the relevant weight accorded to relevant factors must be considered in applying a test of proportionality: was the decision necessary and suitable to achieve the desired objective without imposing excessive burdens, though this is difficult to apply in cases not involving human rights or penalties : see PP Craig, *Administrative Law* 5th ed 2003 pp 618 - 632.

⁷³ *R v North and East Devon H.A.* [2001] QB 213 at 244, para 65 CA

⁷⁴ *Abacus Trust Co v Barr* [2003] Ch 409 at 420, para 29 per Lightman J. Transfers of legal title resulting from an appointment of trustees that was a fraud on a power are voidable: *Re Newen* [1894] 2 Ch 297, *Re Osiris Trustees* [2000] WTLR 933

⁷⁵ See the reliance on flexible discretion in monitoring and intervening in trust matters in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 PC and the unease of Lord Walter with *Cloutte v Storey* (note 45 above) in (2002) 13 KCLJ173 at 177 "The Limits of the Principle in *Re Hastings-Bass*."

⁷⁶ [2003] Ch 602 at 633

set aside if it can be shown that they failed to consider matters which were relevant or took into account matters which were irrelevant." No indication was given as to whether such setting aside should be prospective or retrospective.

Something is absolutely clear. Failure to comply with the legitimate reasonable expectations of the settlor-beneficiaries as discussed above only leads to the court interfering to set aside the decision and not to the court substituting its judgment for that of the trustees⁷⁷.

What, however, if the expectation of a particular beneficiary, B, was a specific substantive benefit as where the trustees erroneously told him that under the rules if he decided to take early retirement due to his particular circumstances, he would receive on his target retirement date three months ahead a pension of £x per year and a lump sum of £x because they would exercise their discretion under the early retirement rules to the full. On this basis he gave notice to his employer and spent half of £x on his only daughter's wedding. On the first day of his retirement he received a letter from the trustees that they had misread the rules about the circumstances under which it would be possible to pay him the amounts indicated to him, so they were only able to pay him half those amounts with a cheque enclosed therefor. His employer has refused to re-employ him. He has discovered that the rules confer a residual power upon the trustees to make grants not exceeding in aggregate £10x per calendar year of up to £x in any such calendar year to any one or more of their retired pensioners as they consider particularly deserving or needy.

However, the trustees have refused to pay him any more than the lump sum of £½x and the annual pension of £½x as anything more would be *ultra vires*⁷⁸. In the absence of any residual power, it would seem that the trustees would be personally liable to compensate him for his loss, having positively misled him to act to his detriment, although, in any event, in South Africa it seems that the trustees' promised payments of the extra amounts would be enforceable against them personally despite the absence of valuable consideration⁷⁹. This means that the trustees are too self-interested to be in any position to be seen fairly to exercise their fiduciary residual power in unimpeachable fashion, while if the trustees do forthwith fully compensate B by paying over the balance of the lump sum and executing a covenant to pay the extra pension (or purchasing such a covenant from a well-established bank), then B will no longer be a needy pensioner within the terms of the residual power vested in the successor trustees taking over from the trustees. It would seem unfortunate that the more recalcitrant the trustees are in not compensating B, the more likely they are to be relieved from liability by successor trustees exercising their residual power to benefit needy pensioners

In South Africa, perhaps by analogy with flexible administrative law remedies, would it be possible for the trustees' undertaking out of the fund to pay £x per year and a lump sum of £x to be indirectly enforced as to the missing half £x against the successor trustees to the extent that the residual power is available to prevent the trustees being forced to act beyond their powers so long as other pensioners are not

⁷⁷ See note 38 above

⁷⁸ *Tek Corporation Provident Fund v Lorentz* 1999(4) SA 884 (SCA)

⁷⁹ *Meyer v Iscor Pension Fund* 2003 (2) SA 715 at 733, citing *McCullough v Fernwood Estate Ltd* [1920] AD 204 at 206

considered more deserving or needy than B, with the old trustees being personally liable themselves to pay any necessary amounts to B to make up their promised payments?

In England B would rely upon very flexible proprietary estoppel principles⁸⁰ against the trustees in their capacities as trustees (able to resort to the fund) and as individuals (personally liable for their conduct), B having acted to his detriment in the reasonable belief or legitimate expectation that he would receive out of the fund a lump sum of £x and an annual pension of £x. The court in its equitable discretion will make an order that is the minimum required to do justice and which cannot exceed whatever was promised. It seems likely that it would order the successor trustees to make the remaining £½x lump sum payment as soon as practicable out of the £10x available in the fund in the current (or next if need be) calendar year if considering that pensioners other than B were not more deserving of an exercise of the residual power, while in each year up to £½x per year should be payable out of the fund to B to the extent that the trustees considered other pensioners were not more needy or deserving, but any shortfall would need to be made good by the old trustees personally.

If the trustees had retired as soon as they had realised their difficulties and the successor trustees had refused to exercise their residual powers, so that B and the old trustees took the successor trustees to court, an alternative approach would be for the court, taking account of B's proved needy circumstances, to quash the trustees' decision because it might well have been arrived at without due care and diligence in ignorance of material factors which might have led to a different decision if duly considered⁸¹, or the court might stigmatise the successor trustees' refusal to exercise their residual powers in favour of B as an irrational decision that no rational body of trustees could make, so as to strike down that refusal.⁸² If the trustees then refused again, the court could replace them with reasonable disinterested trustees who could be relied upon to exercise their powers more sensibly.

Indeed, in very exceptional circumstances, where all ways of exercising the trustees' discretionary powers except for one would amount to the trustees acting perversely to any sensible expectation of the settlor - the private family trust law equivalent of acting irrationally in a fashion not open to any rational body of trustees - then the court can direct the trustees to act in the only way open to them to act, even where there is no detrimental behaviour by the beneficiary to justify a proprietary estoppel claim.⁸³

English and Canadian administrative law has now caught up with this approach. Where frustration of a substantive (as opposed to a procedural) legitimate expectation of a claimant amounts to the abuse of discretionary power by a public body, that body can either be directed to exercise its discretion afresh so as to give effect to the legitimate expectation unless there is some exceptional factor that requires the body bona fide in fulfilling its statutory public duties not to give full effect to such

⁸⁰ *Gillett v Holt* [2001] Ch 210, CA, *Otley v Grundy* [2003] WTLR 1253, CA

⁸¹ See note 54 above

⁸² *Harris v Lord Shuttleworth* [1995] OPLR 79 at 86, CA applying the *Wednesbury* irrationality test to pension trustees

⁸³ *Klug v Klug* [1918] 2 Ch 67; *Dunstone v Irving* [2000] Victoria SC 488

expectation⁸⁴ or, if in all the circumstances there can be no question of the discretion being exercised other than to give effect to the expectation⁸⁵, then the body can be directed to give effect to that expectation, even if there was no detrimental behaviour induced by the expectation⁸⁶.

5. Conclusion

Pension trustees have more extensive obligations than private trustees, the beneficiaries having earned their rights in a working environment and being settlors as well as beneficiaries, so having higher expectations of their pensions trustees than gratuitous beneficiaries have of the trustees of their family trust whose function it is to exercise their powers to fulfil the legitimate expectations of the patriarchal settlor in a family environment. Such a settlor expects his trustees to be sufficiently informed to exercise their discretionary powers in authorised fashion to fulfil his purposes. How they become adequately informed is left up to them rather than the settlor requiring them to be seen to adopt a fair procedural process. They must ask themselves the right question concerning what the settlor's purposes require to be done, but they need not be fully informed of all relevant considerations and may, indeed, be misinformed and negligent, so long as their beneficiaries cannot prove that if fully informed they probably would have come to a different decision.

In administrative law, however, procedural fairness in accordance with the principles of natural justice is crucial, so that breach of it requires a decision to be quashed and the process to start afresh. It is no defence that if procedural fairness had been present the same decision would have been reached. Procedural fairness is regarded as so integral to the decision-making that one cannot be heard to say that a decision produced in its absence would have been the same as a decision produced with the benefit of a fair procedural process.

In the case of pension trusts it seems trustees should diligently use procedures to make themselves sufficiently informed of relevant considerations so that a member-beneficiary cannot show that their negligence – their lack of due care and diligence – led them to make a discretionary decision that might have been different if they had been sufficiently informed⁸⁷. If he can, then the decision should be quashed and the trustees should consider the matter afresh. However, consideration should be given to having rules that complaints must be made to the trustees within a relatively short period of time, if not quite as short as the time limits for administrative judicial review.

⁸⁴ *R (on the application of Bibi) v Newham LBC (No1)* [2002] 1 WLR 237, CA

⁸⁵ Consider the jurisdiction to quash an authority's discretionary decision to close a special facility for a severely disabled applicant promised a home for life there, so infringing her human rights (now Human Rights Act 1998), so the only course is to give effect to the legitimate expectation and permit her to continue living there (*R v North and East Devon HA* [2001] QB 213, CA); and Canadian Supreme Court view of Lachlan CJ and Binnie J in *Mount Sinai Hospital v Quebec* [2001] 2 SCR 281 paras 67-68 that Minister had to issue permit for 1991-93 (without prejudice to his powers thereafter) as the only option available that was not patently unreasonable.

⁸⁶ See *Mount Sinai* (above) paras 30 and 42

⁸⁷ To enable him to do this he needs to know the trustees' reasons, thereby giving meaningful substance to his right to check that they have acted with due care, diligence and good faith – and have not been guilty of maladministration (see note 44 above)

Leaving principles of natural justice to one side, pension trust law and administrative law can learn from each other in dealing with the exercise of discretionary powers to further the legitimate reasonable expectations⁸⁸ of those affected by the exercise of such powers.

⁸⁸ An “accordion” expression dependent on detailed examination of particular circumstances : cp *Tek Corporation Provident Fund v Lorentz* 1999 (4) SA 884, para 47 per Marais JA