ADMINISTERING AUTHORITIES UNDER THE LOCAL GOVERNMENT PENSION SCHEME AND REGULATION BY THE FINANCIAL CONDUCT AUTHORITY

OPINION

1. I am instructed to advise the Local Government Association ("the LGA"). The issue concerns the extent to which a local authority or other body which is the administering authority of a fund established for the purposes of the Local Government Pension Scheme ("LGPS") might in that connection be subject to regulation by the Financial Conduct Authority ("FCA") pursuant to the Financial Services and Markets Act 2000 ("FSMA"). This Opinion is by way of confirmation of advice previously given in consultation. I understand that the LGA will be providing the South Yorkshire Pensions Authority ("SYPA") with a copy of this Opinion.

2. Under r.53 of the Local Government Pension Scheme Regulations 2013 (SI 2013 No 2356 – "the LGPS Regulations"), each of the administering authorities listed in Part 1 of Schedule 3 must maintain a pension fund for the LGPS, and the administering authority is "responsible for managing and administering the Scheme" in relation to any person for whom it is the appropriate administering authority. There may be, and usually will be, a number of different employers in relation to any given LGPS fund. They may be the bodies listed in Schedule 2 to the 2013 Regulations, or they may be admission bodies. They are required to make the pension contributions and other payments into the fund provided for at r.67 et seq of the LGPS Regulations. Contributions will also be received from active members. Provision is made for what may be credited to and paid out of the fund, and for the management and investment of LGPS funds, by what will shortly be the Local Government Pension Scheme (Management and

Investment of Funds) Regulations 2016 (SI 2016 No 946, coming into force on 1 November 2016 to replace similar existing legislation).

3. I understand that hitherto the general assumption has been that the functions of administering authorities are not touched by FSMA regulation. On the basis of the detailed analysis below, my conclusion is that that assumption is essentially correct.

4. This request for advice has been prompted by a query raised by the external auditors to one particular authority (SYPA). As I explain at paragraph 25 below, the auditors' stated basis for raising that query is in my view misconceived. However, to come to a correctly analysed conclusion on the overarching issue does require a rather more detailed consideration of the legislation and the FCA Handbook. Because those materials are complex, and potentially give rise to numbers of sub-issues, the clearest approach will be to set out first my analysis of the most central question that arises, and then consider possible variants and other less crucial issues.

5. That central question is, in my view, whether an administering authority is subject to FCA regulation by virtue of article 37 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001 No 544 as amended – "the Activities Order"), which provides that:

> "Managing assets belonging to another person, in circumstances involving the exercise of discretion, is a specified kind of activity if – (a) the assets consist of or include any investment which is a security or a contractually based investment . . ."

6. Under FSMA s 19, there is a general prohibition on the carrying on of a "regulated activity" in the United Kingdom by anyone other than an authorised person or an exempt person. An administering authority would not be an exempt person, so it will require FCA authorisation if it carries on a regulated activity as defined by FSMA s 22. So far as material, s 22

provides that an activity is a regulated activity is an activity of a specified kind which is carried on by way of business and relates to an investment of a specified kind. Investments of a broad sort are specified, and would undoubtedly include those of an LGPS fund. So the question is whether the administering authority carries on a specified activity, and (if so) whether it does so by way of business.

7. Leaving aside the "by way of business" point for the moment, does an administering authority carry on the article 37 activity of "managing assets belonging to another person, in circumstances involving the exercise of discretion"? If so, the assets will certainly include securities or contractually based investments. There is likewise no doubt that an administering authority does manage assets, and that it does so in circumstances involving the exercise of discretion.

8. So the critical issue is whether the assets in an LGPS fund are assets "belonging to another person", i.e. a person other than the administering authority. There is no doubt that the assets in the fund are *legally* owned by the administering authority and no one else. However, article 37 would in my view also apply in a case in which the *beneficial* ownership of the assets was vested in another person.

9. Accordingly, article 37 would *prima facie* catch the administering authority if it held the fund assets as trustee for the scheme members and/or employers. However, I do not think that the administering authority is a trustee. The Court of Session held in relation to the similar Scottish scheme in *Re Bain* 2002 SLT 1112 that there was no free-standing trust apart from the statutory scheme, and therefore that the administering authority was not a trustee as such. The judgment in the earlier Scottish case of *Martin v City of Edinburgh DC* 1988 SLT 329 proceeds on the basis that the LGPS fund is a trust fund, but the point does not appear to have been argued in that case.

10. In my view, the reasoning in *Bain* is convincing and correct. There is no reason to think that any relationship of trustee and beneficiary is created separately from the terms of the statutory scheme. Whilst such a relationship could be created by the statute itself, that is not what the LGPS Regulations say that they are doing, and nor is it their effect. The administering authority has specific statutory duties, but it is not a trustee, even though in some respects it may resemble one. No doubt the administering authority also owes fiduciary duties to scheme employers and members (as I have advised on a previous occasion), but that is a different matter. No trust is expressly created, and there is no warrant for implying one where the statutory provisions by themselves are sufficient to define the relationship between the parties concerned.

11. If that is right, then the remaining point to consider is whether the concept of assets "belonging to another person" in article 37 might be one that was broad enough to extend beyond cases in which it was possible to identify one or more other persons as the legal or beneficial owners of those assets. Might it, rather, be possible to say that assets belonged to another person in any case where the legal owner was not entitled to treat those assets simply as his own, but rather had to administer them for the benefit of others? That would be an accurate characterisation of the position of the administering authority under the statutory scheme.

12. This broader interpretation is not impossible as a matter of language. The concept of "belonging to another person" is not a defined one, and must ultimately be interpreted in this particular statutory context. It could be argued that the purpose which the concept serves in article 37 is simply that of identifying the cases in which FSMA regulation is appropriate because the person managing the assets is not doing so simply for his own benefit, and where others are at risk if he does not discharge the task properly. It would then be said that the broader interpretation set out in the preceding paragraph was consistent with that purpose.

13. Although I acknowledge that this is an argument that could be advanced seriously, I do not ultimately think that it would be correct. I say that for a number of reasons:

    (i) Although it may be a possible meaning of "belonging to another", it is not the most natural meaning. For example, in *Stokes v Costain Property Investments Ltd* [1984] 1 WLR 763 the concept of belonging was treated as a matter of ordinary language, rather than as a term of art, and as being synonymous with ownership.

    (ii) I also note that in *Citicorp Trustee Co Ltd v Barclays Bank plc* [2013] EWHC 2608 (Ch), the court rejected an argument that the term "beneficial ownership" in a contractual document could refer to an economic as opposed to a proprietary interest.

    (iii) Applying the broader interpretation would make the precise reach of the FSMA and the Activities Order both wide and uncertain, something against which a court would probably lean given the potential criminal consequences of pursuing a regulated activity without authorisation. If pursued to its logical conclusion, that broad interpretation would potentially bring within article 37 a range of situations in which a party was managing its own assets but owed contractual duties to others in respect of them, in a way that seems unlikely to have been intended. Indeed, it might be said that in all cases where a statutory body has assets which it uses to perform or fund functions carried on in the public interest, it has to administer those assets for the benefit of others, yet it seems very unlikely that article 37 was intended to catch all such cases.

(iv) Finally, I think it is a telling point that article 66 of the Activities Order contains a number of exclusions from article 37 which are expressly for the benefit of trustees (and could not, in my view, be read as applicable to an administering authority, if the broader interpretation of article 37 applied so as to catch it). It would seem anomalous if article 37 was interpreted so as to catch managers of assets who were not trustees, without there being any equivalent exclusions. Rather, articles 37 and 66 should be interpreted as part of a consistent scheme, which is a further indication that "belonging to another" should be limited to cases where another person has legal or beneficial ownership of the assets.

14. If I am right in the views just expressed, then article 37 would not apply here. I note for completeness that, if I was wrong in saying that the administering authority is not a trustee, then it would become relevant to look at the article 66 exclusions. However, whilst article 66(3) contains a general exclusion of trustees from article 37, there is a clawback from that exclusion if the assets in question are held for the purposes of an occupational pension scheme (which would include the LGPS). That clawback only applies if the trustee is treated as carrying on the article 37 activity by way of business by virtue of article 4 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001 No 1177 – "the Business Order"). In effect that takes one back to the question of whether the administering authority carries on the management of LGPS assets by way of business for the purposes of FSMA s 22, since article 4 of the Business Order will be the decisive provision in that respect as well. Subject to certain exceptions, article 4 deems the management of assets of an occupational pension scheme, as an article 37 activity, to be by way of business. In my view, if one of the exceptions applies, the intention of the legislation must be that the activity is *not* carried on by way of business, whatever the position

might be if one was simply applying the ordinary meaning of that concept. In other words, if the administering authority was (contrary to my view) a trustee, both the question of whether its management of assets was a specified activity, and the question of whether it was carried on by way of business, would turn upon whether it fell within one of the article 4 exceptions relating to occupational pension schemes.

15. The relevant exception here would be article 4(1)(b), which essentially applies where all day to day decisions in the carrying on of the activity are taken on behalf of the person concerned by a person authorised to carry on article 37 activities (or an exempt or overseas person). I was told at the consultation that the great majority of LGPS administering authorities do in fact delegate the management of scheme assets to authorised persons. Accordingly, whilst the application of article 4(1)(b) would ultimately have to be looked at on a case by case basis, it seems likely that most authorities would be able to rely upon it.

16. I therefore conclude, so far as article 37 is concerned, first, that it does not apply to LGPS administering authorities because they are not trustees; and secondly, that even if they were trustees, it is likely that most of them would be treated as not carrying on that activity by way of business (and, by the same token, would be within an exception to article 37).

17. If I am right in that conclusion about article 37, then I do not think that any of the other specified activities set out in the Activities Order will apply in a normal LGPS case. Specifically, I would make the following comments on some of the articles of the Activities Order that might potentially appear relevant:

    (i) The most obvious one, article 40, deals with the safeguarding and administration of investments, but again it only applies in relation to assets "belonging to another" – so the same reasoning as above again applies.

(ii) It does not seem to me that an administering authority buys or sells investments as an agent (article 21), arranges deals in investments within the meaning of article 25, or advises on investments (article 53).

(iii) Article 14 applies to a person who deals in investments as principal, but the administering authority would normally be excluded from that by article 15, so long as it was not doing something falling within article 15(1). I do not think that an administering authority carries on any of the article 15(1) activities. It is right that article 15(4) makes the article 15 exclusion from article 14 subject to article 4(4), which in effect means that an investment service or activity carried on by an investment firm on a professional basis will fall within article 14. However, an administering authority will not be an investment firm as defined by article 3(1), potentially for a number of reasons, but most obviously because of Schedule 3 paragraph 1(h) concerning pension funds.

18. It only remains to consider two possible respects in which an administering authority might possibly be carrying on a specified activity by virtue of something other than what might be described as its normal core functions.

19. First, article 53E of the Activities Order catches the activity of advising on the conversion or transfer of pension benefits, i.e. advice "on the merits" of a scheme member or survivor taking one of the steps identified in article 53E(1)(c). I was told at the consultation that administering authorities have been strongly advised by the LGA not to give such advice, and it can be assumed that they would not normally do so.

20. Secondly, article 52 of the Activities Order catches the activity of establishing or operating a stakeholder or personal pension scheme. The

LGPS itself obviously does not fall into those categories, but I did wonder whether the making of arrangements under r.17 of the LGPS Regulations might engage article 52. Under r.17, members' additional voluntary contributions may be made pursuant to a scheme established by an administering authority and an AVC provider. However, I was told at the consultation that such a scheme would not be in the nature of a stakeholder or personal pension scheme. It seems unlikely in any event that anything done by the administering authority under r.17 would involve carrying on the business of doing so, as required by article 3 of the Business Order before the requirement for FSMA authorisation would bite. I understand the FCA's general approach to such matters (which strikes me as correct) to be that carrying on a business calls both for some element of continuity in the activity, and for some commercial context. I would not have thought that either element would be present here.

21. I therefore conclude that an LGPS administering authority will not, certainly in any normal case, be carrying on a specified activity by way of business because of what it does in that capacity, as administering authority of its own fund.

22. It still remains to consider the position where the administering authority is an FSMA authorised person for some other reason. That is true of SYPA, because it manages another South Yorkshire fund on behalf of its administering authority, and has taken the view that it should be authorised for that purpose[1]. A local authority which was an administering authority might also be an authorised person for entirely unconnected reasons, e.g. because it was carrying on some form of consumer credit business.

23. In principle, if a person is authorised, then the FCA may regulate not only the activity that calls for authorisation, but other things done by that

[1] That seems likely to be correct, although I have not considered the issue specifically for the purposes of this Opinion.

person as well. It is easy to see why there are some cases in which that may be appropriate. The particular concern here is with the Client Assets Sourcebook (CASS) section of the FCA Handbook. In fact, CASS paragraph 1.2.2 provides specifically that it applies to unregulated activities "to the extent specified".

24. An administering authority which is an authorised person will fall within the CASS definition of an "OPS[2] firm" (which specifically includes an LGPS administering authority[3]), and it will carry on "OPS activity" within the meaning of CASS paragraph 1.4.1. So the gateway to regulation is crossed. However, so far as I can see, all the substantive provisions of CASS need there to be a "client" before they can bite. A client is defined as a person to whom the firm provides or intends to provide a service in the course of carrying on a regulated activity. I am sceptical that administering authorities, in fulfilling their statutory functions, should be regarded as providing a service either to scheme employers or to scheme members, but in any case they do not do so in the course of carrying on a regulated activity. The whole point, if my earlier analysis is correct, is that the administering by an authority of an LGPS fund is not a regulated activity.

25. SYPA's external auditors have made the point that the definition of "client" is said to include a fund even if it does not have separate legal personality. So far as I can see from the relevant communications, it is by dint of looking at this provision in isolation that they have suggested that the CASS provisions may bite on what SYPA does as administering authority.

[2] i.e. occupational pension scheme.

[3] It did strike me that it was surprising that such express provision was made, in view of my general conclusion that administering authorities do not require FSMA authorisation by virtue of their activities as such. However, what is in the FCA Handbook cannot drive the interpretation or application of the legislation that determines which activities need authorisation. In any case, it was explained to me at the consultation that there was a specific historical reason for this provision being included in the Handbook, namely to ensure that proper provision was made in relation to administering authorities if they did engage in giving advice to scheme members (cf. paragraph 19 above).

However, this is misconceived. First, even if it can be said that on this basis a service is provided to the fund, that does not mean that it is provided in the course of carrying on a regulated activity. For the reasons already given, SYPA is not carrying on a regulated activity when it acts as an administering authority. Secondly, the auditors' analysis overlooks the straightforward point that "fund" is itself a defined term. It means either an AIF (alternative investment fund) within the meaning of article 4(1)(a) of Directive 2011/61/EU, or a collective investment scheme within the meaning of FSMA s 235. The LGPS is neither of those things. Accordingly, the extended definition of "client" is simply irrelevant.

CONCLUSIONS

26. In managing an LGPS fund, the administering authority is not carrying on a regulated activity, and does not require FSMA authorisation. Nor do the substantive provisions of CASS apply to the activities of an administering authority acting as such, even though that authority may have FSMA authorisation for some other reason.

27. I shall be pleased to give my Instructing Solicitor any further advice which may be required.

NIGEL GIFFIN QC

11KBW

17 October 2016

11 King's Bench Walk
Temple
London EC4Y 7EQ

IN THE MATTER OF
THE LOCAL GOVERNMENT
ASSOCIATION

AND IN THE MATTER OF
ADMINISTERING AUTHORITIES
UNDER THE LOCAL GOVERNMENT
PENSION SCHEME

OPINION

Thelma Stober
Corporate Legal Adviser
Local Government Association
Local Government House
Smith Square
London SW1P 3HZ

LOCAL GOVERNMENT PENSION SCHEME ("LGPS")

PENSION BOARDS

O P I N I O N

INTRODUCTION

1. I am instructed to advise the Local Government Association ("the LGA") on three, related, questions:-

(1) The legal status of a Local Government Pension Scheme ("LGPS") Pension Board;

(2) The legal relationship between such a Pension Board and the "scheme manager"; and

(3) The "conflict" described below.

2. The LGPS operates pursuant to the Superannuation Act 1972 and Regulations thereunder (together "the LGPS Regulations"), which are subject to frequent amendment. A feature of the regime is the "administering

authority". The "administering authority" will be administering on behalf both of itself and of other LGPS employers.

3. As a matter of general principle, an apparent conflict between differing legislative provisions should always be resolved if possible by finding a way in which the provisions can be read together and reconciled. The legislative provisions in issue here are contained in the Local Government Act 1972 ("LGA 1972") and the Public Service Pensions Act 2013 ("the 2013 Act").

PENSION BOARDS: THE 2013 ACT

4. Pension Boards are a creature of the 2013 Act. Section 1(1) of the 2013 Act states that Regulations thereunder ("Scheme Regulations") may establish "schemes" for the payment of pensions and other benefits to or in respect of persons specified in subsection (2). Subsection (2) provides that those persons include local government workers, as defined. Sections 2 and 3 and Schedules 1-3 make further provision about Scheme Regulations.

5. Moving on to governance, Section 4 of the 2013 Act provides that Scheme Regulations must provide for a "person" to be responsible for managing or administering the scheme and any statutory pension scheme that it

is connected with. That could include a local authority, governed by LGA 1972, in its existing capacity as an LGPS "administering authority".

6. Section 5 of the 2013 Act then relates to Pension Boards. It is central for present purposes.

7. Subsection (1) of Section 5 states that Scheme Regulations must provide for the establishment of a "board" with responsibility for assisting the scheme manager in relation to matters specified in subsection (2). Subsection (3) provides that this is with a view to securing the "effective and efficient governance and administration" of the scheme.

8. Subsection (4) of Section 5 sets out provisions which Scheme Regulations must contain. They include important provisions for avoiding conflicts of interest, as defined by subsection (5), on the part of a "member" of the Pension Board.

9. They also include provision, critical for present purposes, as to the membership of the Board: Section 5(4)(c). The Pension Board under the 2013 Act must include, in equal numbers, "employer representatives" and "member

representatives", each as defined in subsection (6). This is very different from a local authority committee under LGA 1972.

10. Subsection (7) of Section 5 of the 2013 Act provides that where the scheme manager of a scheme is a "committee of a local authority" the Scheme Regulations "may" provide for that committee "also" to be the Pension Board for the purposes of Section 5. This sits uneasily with subsection (4)(c).

11. However, it is apparent from Section 5(7) of the 2013 Act that:-

(1) It is possible for a Pension Board (under the 2013 Act) and a local authority committee (under LGA 1972), and therefore their respective memberships, to be the same; and

(2) This may sometimes be the case and sometimes not.

12. There are accordingly two situations to consider:-

(1) Where a Pension Board and a local authority committee are the same; and

(2) Where they are not.

13. Section 6 of the 2013 Act makes further provision about Pension Boards. However, the 2013 Act is silent as to the legal status of a Pension Board. Nor does it purport to amend LGA 1972.

14. Paragraph 44 of the Explanatory Notes for the 2013 Act states, with reference to Section 5 of the 2013 Act (emphasis added):-

> "Subsection (7) relates to the public service schemes that are administered by local authorities and fire and rescue authorities. It makes provision for pension boards for the pension schemes for fire and rescue workers and local government workers in England, Scotland and Wales. It allows for scheme regulations in those schemes to provide that where a local authority has appointed a committee to carry out its responsibilities to manage or administer the pension scheme, that committee may also be the pension board. The committee will then have the dual role of responsibility for administering the scheme, and responsibility for ensuring good governance and compliance with requirements imposed by the Pensions Regulator. The provisions on conflicts of interest and representation of interests will need to be satisfied for a local authority committee to be the pension board for the scheme."

15. This reaffirms that:-

(1) There may, or may not, in a particular case, be a "dual role"; and

(2) If and when there is a "dual role", there must be compliance with the provisions of the 2013 Act as to "representation of interest" and conflicts of interest (by implication, without prejudice to compliance also with LGA 1972).

16. Nonetheless, this does not readily resolve the apparent discrepancy in the primary legislation between:-

(1) On the one hand, the ability under Section 5(7) of the 2013 Act for a local authority committee (i) to be also the Pension Board and (ii) to carry out a dual role as local authority committee and Pension Board; and

(2) The mandatory provision in Section 5(4)(c) of the 2013 Act as to representation of (employer and member) interests, which requires particular membership of Pension Boards under the 2013 Act which is at variance with the customary membership of local authority committees.

PENSION BOARDS: THE 2015 REGULATIONS

17. Pursuant to the 2013 Act there have been made the Local Government Pension Scheme (Amendment) (Governance) Regulations 2015, SI 2015/57 ("the 2015 Regulations"). Their provisions include inserting into the LGPS Regulations "Part 3: Governance", beginning with Regulation 105.

18. Regulation 106 is headed "Local pension boards: establishment". Regulation 106(1) and (2) provides (emphasis added):-

> "(1) Each administering authority shall no later than 1st April 2015 establish a pension board ("a local pension board") responsible for assisting it -
>
> (a) to secure compliance with -
>
> (i) these Regulations,
>
> (ii) any other legislation relating to the governance and administration of the Scheme and any connected scheme, and
>
> (iii) any requirements imposed by the Pensions Regulator in relation to the Scheme and any connected scheme; and
>
> (b) to ensure the effective and efficient governance and administration of the Scheme and any connected scheme.

(2) Where the Scheme manager is a committee of a local authority the local pension board may be the same committee if approval in writing has been obtained from the Secretary of State."

19. Therefore:-

(1) It is repeated that a Pension Board may be the same as a local authority committee; but

(2) This will be so only if the local authority seeks and obtains and acts upon Secretary of State ("SoS") approval; and

(3) The approval process is potentially subject to judicial review.

20. Regulation 106 further provides (emphasis added):-

"(7) Except where a local pension board is a committee approved under paragraph (2), no member of a local pension board shall have a right to vote on any question unless that member is an employer representative or a member representative.

(8) A local pension board shall have the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions."

21. Regulation 106(7) of the 2015 Regulations is curious. It suggests that the representation of interests requirement of the 2013 Act may not necessarily apply in a dual role committee case.

22. Regulation 107 of the 2015 Regulations relates to the membership of Local Pension Boards. It provides (emphasis added):-

> "(1) Subject to this regulation each administering authority shall determine -
>
> (a) the membership of the local pension board;
>
> (b) the manner in which members of the local pension board may be appointed and removed;
>
> (c) the terms of appointment of members of the local pension board.
>
> (2) An administering authority must appoint to the local pension board an equal number, which is no less than 4 in total, of employer representatives and member representatives and for these purposes the administering authority must be satisfied that -
>
> (a) a person to be appointed to the local pension board as an employer representative has the capacity to represent employers; and
>
> (b) a person to be appointed to the local pension board as a member representative has the capacity to represent members.

(3) Except where a local pension board is a committee approved under regulation 106(2) (committee that is a Scheme manager is also local pension board) -

(a) no officer or elected member of an administering authority who is responsible for the discharge of any function under these Regulations (apart from any function relating to local pension boards or the Local Government Pension Scheme Advisory Board) may be a member of the local pension board of that authority; and

(b) any elected member of the administering authority who is a member of the local pension board must be appointed as either an employer representative or a member representative.

(4) Where a local pension board is a committee approved under regulation 106(2) (committee that is a Scheme manager is also local pension board) the administering authority must designate an equal number which is no less than 4 in total of the members of that committee as employer representatives and member representatives and for these purposes the administering authority must be satisfied that -

(a) a person to be designated as an employer representative has the capacity to represent employers; and

(b) a person to be designated as a member representative has the capacity to represent members."

23. Regulation 107(4) therefore addresses dual role cases, and provides in such cases for the representation of interests requirement in the 2013 Act to be preserved in the local authority committee.

24. Regulation 109 of the 2015 Regulations provides that an administering authority must have regard to Guidance issued by the SoS in relation to Local Pension Boards.

25. The Explanatory Memorandum to the 2015 Regulations states (emphasis added):-

> "7.9 Section 5(7) of the 2013 Act allows scheme regulation to provide for a committee of the administering authority constituted under section 101 of the Local Government Act 1972 which discharges the authority's pensions functions and the local pension board to act as a combined body. Regulation 106(2) provides that this may occur only where approval has been granted by the Secretary of State."

> "7.12. To ensure that scheme member and employer representatives of local pension boards have a decisive influence, Regulation 106(7) restricts the right to vote on questions to those representatives. This does not apply where there is a combined committee discharging an authority's pension functions and acting as the local pension board."

"7.14. Regulation 107 provides that each administering authority shall determine the membership of their local pension board …

7.15. Regulation 107(2) requires membership of a local pension board to consist of an equal number of scheme member representatives and employer representatives which is no less than four in total. This carries forward the requirement in section 5(4)(c) of the 2013 Act and ensures that each board will have the capacity to undertake the functions described at paragraph 7.5.

7.16 Before appointing scheme member or employer representatives to a local pension board, Regulation 107(2)(a) and (b) provides that the administering authority must be satisfied that they have the capacity to represent scheme members and employers respectively.

7.17 Except where a local pension board is the same committee as the one discharging an authority's pension functions Regulation 107(3)(a) provides that no officer or elected member of an administering authority responsible for any pensions function under the 2013 Regulations (apart from any function relating to local pension boards on the Scheme's Scheme Advisory Board) may be a member of the administering authority's local pension board. This will ensure that no officers and elected members appointed to a local pension board will be in a position of scrutinising

their role elsewhere in the Scheme. Regulation 107(3)(b) provides that any elected member who is a member of a local pension board must be appointed as either an employer or member representative (and consequently will be entitled to vote on any questions).

7.18 Regulation 107(4) ensures that the requirement under Regulation 107(2) for an equal number of scheme member and employer representatives is maintained in the situation where a local pension board is the same committee as that discharging the authority's pension functions."

LOCAL AUTHORITY COMMITTEES

26. Local authorities have powers of internal delegation. They can however at any time revoke the delegation. Moreover, there are rules as to political balance.

27. Section 101 of LGA 1972 enables a local authority to arrange for the discharge of their functions by a committee, a sub-committee or an officer of the authority (or by any other local authority). It does not authorise the discharge of functions by a Board that is not a committee of the authority. Such a Board must derive its statutory powers elsewhere.

28. It is Section 102 of LGA 1972 that relates to the appointment of local authority committees. Section 102(1)(a) authorises a local authority to appoint a committee of the authority.

29. By Section 102(3) of LGA 1972 a local authority committee may generally include persons who are not members of the appointing authority. It may not consist exclusively of persons who are not members of the authority; but it may consist exclusively of persons who are members of the authority. There is a wide discretion as to membership. However, Section 102(3) also provides that a committee or sub-committee may not include members who are not members of the appointing authority if the committee or sub-committee is "regulating and controlling the finance of the local authority or of their area". A committee concerned with LGPS investments may be regarded as regulating and controlling the finance of the local authority. Insofar as members of the local authority and its committee structure cannot be employed by that authority itself, there can be members of a committee who are employed not by the administering authority but by another LGPS employer for which the authority is the administering authority.

30. Section 102 of LGA 1972 has not been amended by the 2013 Act: see Schedule 8 to the 2013 Act. However, Section 102 of LGA 1972 may, within

its own confines, be operated, albeit with great difficulty, so as to meet 2013 Act/2015 Regulations membership and other requirements, in a dual, or combined, role case. In such a hybrid case, general provisions as to local authority committees and members will apply, such as the Code of Conduct and the roles and responsibilities of the Monitoring Officer and the Chief Finance Officer.

STATUS

31. In my opinion, the starting point is that:-

(1) Pension Boards have no corporate status;

(2) They do, however, have a status, entirely pursuant to the 2013 Act and the 2015 Regulations;

(3) They are constituted exclusively under the 2013 Act and the 2015 Regulations; and

(4) They are not constituted at all under LGA 1972.

32. They are, therefore, in my opinion:-

(1) Not local authority committees; but

(2) May, or may not, be combined with a local authority committee, subject to the local authority wishing that, and subject to SoS approval.

33. The complication is indeed that, pursuant to the 2013 Act and the 2015 Regulations, a Pension Board may, or may not, also be, or be the same as, a local authority committee, constituted under LGA 1972. Certainly when the Pension Board is not also, or the same as, a local authority committee, I do not see how the Pension Board can be a local authority committee.

34. When, however, they are the same, then the Pension Board and the local authority committee will perform a "dual" or "combined" role. As I see it, in such a case the local authority committee will be governed by LGA 1972 in its administering authority/scheme manager role and by the 2013 Act and the 2015 Regulations in its Pension Board role.

RELATIONSHIP

35. In my opinion:-

(1) The relationship between a Pension Board and a LGPS administering authority as scheme manager under the 2013 Act is basically the same whether or not the scheme manager is also the Pension Board; and

(2) That relationship is governed entirely by the 2013 Act.

CONFLICT

36. When there is no dual or combined role, and the Pension Board, under the 2013 Act and the 2015 Regulations, and the local authority committee under LGA 1972 are separate, there is no conflict. The Pension Board will be appointed under and in accordance with the 2013 Act and the 2015 Regulations. The local authority committee will continue to be appointed under and in accordance with LGA 1972. There will be no need for their respective memberships to correspond totally or at all.

37. It will, however, be possible, with SoS approval, to have a dual or combined role only if the (voting) membership of the Pension Board and the (voting) membership of the local authority committee do correspond. This is theoretically possible but very difficult, given that there are different provisions

for membership in LGA 1972 on the one hand and in the 2013 Act and the 2015 Regulations on the other hand.

38. It may, however, not always be impossible, in that, as the 2015 Regulations and their Explanatory Memorandum suggest, it will be open to a local authority to appoint members to the committee under LGA 1972 who will meet the particular membership and representation requirements of the 2013 Act and the 2015 Regulations. That is the way in which apparently conflicting legislative provisions can, and, in my view, should be reconciled.

CONCLUSION

39. I do not regard the membership provisions of LGA 1972 and of the 2013 Act and 2015 Regulations as being mutually exclusive. I consider that a local authority committee under LGA 1972 is capable of being constituted, within the broad discretion under Section 102 of LGA 1972, so as to meet the requirements in the 2013 Act and the 2015 Regulations as to equal representation of member and employer interests.

40. However, in my opinion:-

(1) If DCLG believe that Pension Boards are local authority committees (constituted under the 2013 Act rather than under LGA 1972), they are wrong;

(2) A local authority committee can be constituted only under LGA 1972;

(3) When the Pension Board is not the same as a local authority committee it will not be a local authority committee;

(4) The Pension Board will be a local authority committee only, with the approval of the SoS, in a dual or combined role case.

41. My advice is that:-

(1) An administering authority should think long and hard before choosing to go down the combined role route;

(2) If nonetheless it does so, it must (i) take great care over the setting up of its arrangements and (ii) keep their workability or otherwise under constant review.

42. This is on account of the practical issues that arise when there is a combined role, as respects membership, capacity, insurance and reporting. As regards membership:-

(1) The 2013 Act and 2015 Regulations require –

(i) An equal number of member representatives and employer representatives,

(ii) That no officer or elected member of the administering authority who is responsible for the discharge of any function under the 2015 Regulations (apart from any function relating to local pension boards or the Local Government Pension Scheme Advisory Board) may be a member of the local pension board of that authority, and

(iii) All voting members to be either member or employee representatives;

(2) LGA 1972 –

(i) Allows for committee membership to include members who are not elected members of the authority, but not to exclude elected members entirely,

(ii) Bars officers of the local authority from serving on a committee, and

(iii) Removes the ability to include non elected members on a committee where the committee is a "finance committee", making investment decisions;

(3) Therefore, in order to meet the requirements both of the 2013 Act and of the 2015 Regulations on the one hand and of LGA 1972 on the other hand –

(i) The hybrid committee would need an equal membership of member representatives and employer representatives where –

(a) the member representatives are not officers of the administering authority, and

(b) the employer representatives include at least one elected member from the administering authority, but who is not someone with a delegated pension responsibility; and

(ii) The administering authority would need to place investment decisions in a separate (sub-)committee, consisting of elected members of the administering authority.

43. As regards capacity:-

(1) The 2013 Act regime requires that member representatives have the capacity to represent members, yet no officers of the administering authority itself are allowed to sit on a hybrid committee; and

(2) This problem is all the more acute in circumstances where the administering authority is by far the largest employer.

44. As regards insurance:-

(1) Given that a Pension Board is a creature of the 2013 Act and not a council committee, the council's indemnity insurance will not automatically cover the Pension Board's membership;

(2) There may nonetheless be circumstances in which the Pension Board's members would be potentially liable; and

(3) Therefore –

(i) The Council should extend its insurance, or

(ii) The Pension Board should procure its own insurance.

45. As regards reporting, the Council will have to decide upon arrangements for :–

(1) Specific reporting routes; and

(2) Access to statutory officers.

46. I have had the benefit of a Conference. I shall be happy to advise further as may be required. Useful Guidance, which I approve, has been provided by the Local Government Pension Board (last updated, 4 February 2015) especially at paragraphs 10.1-10.9.

11 King's Bench Walk
Temple EC4Y 7EQ

goudie@11kbw.com

JAMES GOUDIE QC
7 December 2015

LOCAL GOVERNMENT PENSION SCHEME ("LGPS")

PENSION BOARDS

O P I N I O N

Thelma Stober

Corporate Legal Adviser

Local Government Association