Are trustees required to give reasons? The argument against

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Abstract This paper considers the case law which established the principle that trustees may keep confidential the reasons for the exercise of their discretions. It discusses a recent case, *Schmidt v Rosewood Trust*, as to the disclosure of documents to beneficiaries. It argues that the case does not in itself displace the principle of confidentiality, and that that principle should continue to be recognised by the courts. Tim Cox puts the opposing argument in the accompanying paper (see pp. 118–123).

Keywords: *exercise of discretion; reasons; confidentiality; trust documents; disclosure*

Introduction

Until recently, it seemed clear that the trustees of occupational pension schemes did not have a general duty to give reasons for the exercise of their discretions. The courts had held that, like the trustees of family trusts, pension scheme trustees were entitled to keep their reasons confidential.

A 2003 case, *Schmidt v Rosewood Trust*,¹ casts doubt upon the approach previously taken by the courts. It is possible that, in the future, the courts will be less willing to liken pension scheme trustees to the trustees of family trusts, and more inclined to class them alongside public bodies. In some circumstances, public bodies are obliged to give reasons for their decisions.

This paper argues that the *Schmidt* case does not, in itself, put paid to the right of trustees to keep their reasons confidential. It also argues that it would be unfortunate if the law developed in such a way as to impose a duty to give reasons.

Why the issue is important

The issue is important because of the so-called rule in *Hastings-Bass*.² A court (and likewise the Pensions Ombudsman — see *Wild v Smith*³) has only limited powers to intervene in the exercise of trustees' discretions. The fact that the court might have chosen to exercise a discretion in a different way than the trustees does not, in itself, mean that the trustees' choice can be declared invalid. However, the exercise of a discretion can potentially be overturned if the trustees failed to comply with their duties when reaching the decision. The courts have summarised those duties as follows.

- (a) The trustees must ask themselves the correct questions.
- (b) They must direct themselves correctly in law; in particular they must adopt a correct construction of the pension fund rules.
- (c) They must not arrive at a perverse decision, ie a decision to which no reasonable body of trustees could

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arrive, and they must take into account all relevant but no irrelevant factors.⁴

So a disgruntled beneficiary will need to show a breach of one of these duties if he wishes to challenge the exercise of a discretion. It will be difficult to mount a challenge on the basis of the questions or factors considered unless the trustees have given reasons for their decision.

The Londonderry case

The principle that trustees are not obliged to give reasons can be traced back to *Re Londonderry's Settlement*.⁵ The Marquess of Londonderry had set up a trust. His daughter was to some extent a beneficiary, and could benefit to a large extent if the trustees exercised a power to appoint capital in her favour. The trustees gave her a share of capital, but she was dissatisfied. She sought disclosure of relevant minutes and correspondence.

The case reached the Court of Appeal. Harman LJ, delivering the leading judgment, said that the Court's job was to resolve two principles which came into conflict or (as he put it) apparent conflict. The first was that 'trustees exercising discretionary power are not bound to disclose ... the reasons actuating them in coming to a decision'. The second principle was that the relevant documents had come into existence for the purpose of the trust, were in the possession of the trustees and were therefore 'trust documents'. As such they were the property of the beneficiaries, and open to the beneficiaries to inspect.

Harman LJ resolved the apparent conflict in simple fashion, saying (of the relevant minutes) that they were, 'in the absence of an action impugning the trustees' good faith, documents which a beneficiary cannot claim the right to

inspect ... if [the daughter] is allowed to examine these, she will know at once the very matters which trustees are not bound to disclose to her, namely, their motives and reasons'. On that basis he was sceptical about whether the relevant minutes could be considered trust documents at all — indeed his colleague Salmon LJ clearly thought that they were not. But even if they were, Harman LJ said they were 'protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure. If necessary, I hold that this principle overrides the ordinary rule [about the right to see trust documents]'.

The Chloride case

There was some uncertainty as to whether the *Re Londonderry* principle would hold good in a pensions context. The courts were wary about taking concepts which had developed under private trusts (where beneficiaries were mere volunteers), and applying those concepts to pension schemes (where members could be said to have contributed towards their benefits, either financially or through their service).⁶

The uncertainty was resolved (or so it seemed) by the so-called *Chloride* case — *Wilson v Law Debenture*.⁷ Chloride had sold a business to a company called CMP. The trustees of Chloride's pension scheme had discretion to decide how much to transfer to CMP's scheme. Two employees in the business were unhappy with the level of the transfer. They sought disclosure of minutes and other documents which might indicate the reasons for the trustees' decision.

In the High Court, it was 'forcefully' pointed out that members of a pension scheme were not the same as beneficiaries under a family trust, in that the members' rights had contractual and commercial origins. Against this, the

Court considered the 19th century case law about the duties owed by the trustees of a charity and the fiduciary duties which company directors owed to shareholders when exercising a discretion to register the transfer of shares (*Re Beloved Wilkes' Charity; Re Gresham Life Assurance Society, ex p Penney*⁸). One principle which emerged was familiar, namely that the exercise of discretion could not be challenged unless there was some irregularity in the way the decision had been reached. But Rattee J drew out a more interesting point: that is, in the absence of evidence to the contrary, a trustee was presumed to have exercised his discretion properly. Members of a pension scheme might have purchased their interests, but the question was as to the nature of the interest which they had purchased. Where a clear discretion was conferred, there was no reason not to apply the well-established principle that reasons did not have to be given.

Schmidt v Rosewood Trust

Schmidt v Rosewood Trust is felt by some to herald a retreat from the position reached in the *Londonderry* and *Chloride* cases, although — as *Schmidt* was decided by the Privy Council — it is not binding on the UK courts. Vadim Schmidt was a potential beneficiary under at least one of two Isle of Man trusts. He was also the administrator of his late father's estate. The father had been a beneficiary, and substantial sums had been paid out on his behalf. In his capacity as administrator, Vadim alleged that these sums had not been fully accounted for. There was also an allegation that breaches of fiduciary duty by the trustee (for example, overcharging) had reduced the amount available for distribution to the father. Vadim sought disclosure of accounts and information about the trusts' assets.

The Privy Council held that, where a person sought disclosure of a document, it was not imperative to determine whether the document was a trust document, or whether the person had a proprietary interest in it, as *Londonderry* might suggest. A proprietary interest was neither a necessary, nor a sufficient, condition for disclosure.

The better approach was to regard the right to seek disclosure of documents as one aspect of the court's jurisdiction to supervise, and to intervene in, the administration of trusts. Lord Walker quoted with approval an Australian case, *Hartigan Nominees v Rydge*,⁹ which suggested that any right of a beneficiary to see documents was based not on a proprietary interest, but on the trustees' fiduciary duty to keep the beneficiary informed and to render accounts. The right to seek intervention applied not just to beneficiaries but also to potential beneficiaries and objects of powers, who could not be said to have a proprietary right.

The Privy Council said there were three areas in which the court might have to form a discretionary judgment: (1) whether to intervene on behalf of a potential beneficiary or object of a power; (2) what documents should be disclosed; and (3) what safeguards should be imposed as to the use of those documents.

The case was sent back to the Isle of Man court for a decision on the facts. The Privy Council did, however, say that it thought Vadim had a powerful argument for disclosure of documents accounting for sums paid on his father's behalf. He would also have a strong claim as to documents showing whether breaches of fiduciary duty had reduced the amount available for distribution.

Does *Schmidt* help us to identify where trustees are obliged to give or disclose reasons? The answer, unfortunately, seems to be 'no'. As to

disclosure, it has been argued that the case makes for a new era of uncertainty. In the past, where a person sought disclosure, trustees knew that they had to apply the two principles discussed in *Londonderry*. In theory, this was fairly straightforward; for example, if the applicant did not have a proprietary right, then it was clear that there was no obligation to disclose. Post-*Schmidt*, it seems that trustees will have to form a view as to what line the court might take in exercising its inherent discretion.

Perhaps this does lead to greater uncertainty, but the truth is that, even pre-*Schmidt*, the position was not as clear as the theory might have suggested. It was sometimes difficult to determine whether a particular document did or did not come within the 'trust document' definition — witness the somewhat different views of Harman and Salmon LJ in *Londonderry* itself. And there did seem to be an element of circularity in Salmon LJ's comment that a document could be a trust document only if and to the extent that it contained 'information which the beneficiaries are entitled to know'.

Notably absent from *Schmidt* is any discussion as to the giving of reasons. The issue simply did not arise. Vadim was seeking disclosure of certain basic information about what had in fact been done: what sums had been paid on behalf of his father and on what basis, and whether the available funds might have been reduced by overcharging or the like. It is not surprising that the Privy Council thought Vadim had a strong claim to this information, especially given that he was standing in his father's shoes in his capacity as administrator.

Schmidt did not specifically disapprove, then, the *Londonderry* principle that trustees are entitled to keep their reasons

confidential. It must be arguable that that principle remains, even if the other conflicting principle — that beneficiaries are entitled to see trust documents — is now felt to be too simplistic. The Privy Council did say that 'no beneficiary ... has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place.'

What causes concern about this statement is the concept of a balancing exercise. If such an exercise is to be performed where, in the past, trustees could simply have asserted their right to keep reasons confidential, then we may be entering new and very uncertain waters. Lord Walker (who gave the leading judgment in *Schmidt*) may well be inclined to take the law in that direction. In a 1996 paper,¹⁰ he emphasised, after discussing *Londonderry*, that that judgment was given 'in the context of a family settlement of a discretionary nature'. Pension schemes differed in that members were not volunteers. In the circumstances, he said, there were strong arguments that trustees should be ready to justify their decisions. These arguments had of course been considered in the *Chloride* case, but that case seemed 'to treat *Re Londonderry* as a rather more precise and definitive statement of principle than it may be'. Lord Walker felt that, as regards the giving of reasons, pension schemes had at least as much in common with official bodies as they had with family trusts. And he noted that 'in administrative law the tide is running towards a general duty to give reasons for decisions'. The parallels between trustees and official bodies have

been noted in a number of subsequent cases, the courts remarking that the *Hastings-Bass* rule is 'virtually identical' to the *Wednesbury* principles to which the decisions of official bodies are subject.¹¹

The administrative law cases

Even if pension scheme trustees were subject to the same rules as official bodies, it is not clear that they would be obliged to give reasons for decisions. The traditional position of the courts has been that there is no general duty under public law to give reasons.¹² A duty would arise only where reasons were demanded either by the nature and impact of the decision (for example, if the decision affected a person's liberty)¹³ or by the decision itself (for example, if the decision was, on the face of it, aberrant).¹⁴ The fact that, in the absence of reasons, an applicant might find it impossible to challenge an official body's decision was not in itself grounds for requiring reasons to be given.

It has been suggested that the Court of Appeal's judgment in the recent *Asha Foundation* case may have been a significant development in the law.¹⁵ The case related to the allocation of funds between charities by the Millennium Commission. The *Asha Foundation* was a disappointed applicant. The judgment is notable for a statement that 'in the case of a decision of the sort that the Commission was making, as a matter of good administration and fairness the body concerned should give such reasons as are appropriate and reasonable in the circumstances'. The main focus of the Court was on the content of the reasons to be given, rather than on whether reasons were required in the first place. However, to suggest that this will become the norm in future public law (or pensions) cases seems to overlook an important fact. The Commission had

promised potential applicants that reasons would be given. In the words of the Court:

'Setting aside the promise to give reasons ... it seems to me that there was no more obligation on the Commission than to do what they did, which was to say that they preferred the other applications over and above that of *Asha* and that in those circumstances *Asha* must regrettably be declined. But [counsel for *Asha*], rightly in my judgment, attaches particular importance to the promise which was made. The case turns on the consequence of that promise.'

So, in the absence of a promise, the Court would have accepted that no reasons — or at least no meaningful reasons — would have to be given, notwithstanding the effort invested by *Asha* in the application process, and the large sums at stake. Indeed, even in the light of the promise, the Court felt that the obligation on the Commission was very limited; it was required only 'to give reasons which would be appropriate in the circumstances'. What the Commission had done, as described above, was sufficient to meet its obligation.

Why trustees should be entitled to withhold reasons

In *Londonderry*, Lord Harman said that washing family linen in public would lead to 'strife and also odium for the trustees and embarrassment in the performance of their duties'. Feelings may not run so deep in the pensions context, but the issue identified by Lord Harman still applies. Disclosure of reasons can lead to bad feeling as between the relevant member and his employer, other members or the trustees themselves, who may of course be fellow employees.

The right of confidentiality also provides important protection against

speculative complaints and litigation. As Lord Harman said, 'nobody could be called upon to accept a trusteeship unless, in the absence of bad faith, he were not liable to have his motives or his reasons called in question either by the beneficiaries or the court'. Pension scheme trustees may be able to meet the cost of any litigation from scheme funds, but they have a duty to safeguard those funds for beneficiaries. They may well want to avoid a situation where funds have to be used to fend off a series of queries and challenges. The position of trustees differs markedly from that of public bodies here, in that a pension scheme member can bring a complaint before the Pensions Ombudsman for little or no cost. Launching judicial review proceedings in respect of a public body is a much more expensive undertaking, and is subject to the leave of the court.

There is also a practical point. Where a diverse group of trustees exercises a discretion, it is quite possible that all trustees will reach the same decision but each will have their own different reasons. In these circumstances, the attempt to put together a single set of trustee reasons may well be futile.

The maladministration issue

The Pensions Ombudsman might be said to have moved the debate on. He argues that, since he is able to decide not only cases involving disputes of fact or law, but also those involving maladministration which has caused injustice,¹⁶ his powers are in certain respects wider than those of the courts. An example is the case of Mr Allen.¹⁷ Mr Allen had asked to take early retirement and had been told that his pension would be subject to an actuarial reduction. The trustees had decided not to waive the reduction. Mr Allen asked to see minutes of the relevant meeting.

The trustees refused. The Ombudsman said:

'... there is no legal duty on the Trustee to make copies of their minutes available to him ... It would be wrong however to conclude that the absence of a breach of law means there is no maladministration. Maladministration is in some ways a wider concept than a breach of law ... As a matter of good administrative practice, trustees should provide reasons for their decision to those with a legitimate interest in the matter and, subject to the need to preserve rights to privacy of individual members, should also make the minutes of their meetings available to scheme members'.

It is difficult to square this with the principle which emerges from *Londonderry* and the *Chloride* case, namely that trustees have a positive right to keep their reasons confidential — that there is a 'special reason which protects the trustees' deliberations on a discretionary matter from disclosure'. It seems strange that relying on protection afforded by the law should amount to maladministration. Why should that protection not override any duty of trustees to disclose information as a matter of good administration, in the same way that (according to *Londonderry*) it overrides the duty to disclose documents under trust law?

Conclusion

Schmidt focussed on just one of the conflicting principles in *Londonderry* — the principle as to trust documents and proprietary interests. The case did not consider the principle of confidentiality. However, that principle seems to be under threat. If — following *Schmidt* — the courts take the view that they must reach a discretionary judgment as to what should be disclosed in any given case, they may see confidentiality not as an absolute right, but merely as a factor

to be considered. That would be a radical, and regrettable, reversal of the principle highlighted in the *Chloride* case; namely that, unless there is evidence to the contrary, a trustee is presumed to have exercised his discretion properly.

Note

This paper is based on the case put forward by Richard Evans in a debate at the Occupational Pensions Law Reports Conference 2003. It represents only one side of the argument, and should not be taken as a definitive statement either of the law or of Richard's views. It should be read in conjunction with Tim Cox's paper (see pp. 118–123).

References

- 1 [2003] 3 All ER 76.
- 2 From *Re Hastings-Bass* [1975] Ch 25; [1974] 2 All ER 193.
- 3 [1996] OPLR 129.
- 4 *Harris v Shuttleworth* [1995] OPLR 79.
- 5 [1965] Ch 918.
- 6 *British Coal Corporation v British Coal Staff Superannuation Scheme Trustees* [1995] 1 All ER 912, [1994] OPLR 51.
- 7 [1995] 2 All ER 337; [1995] OPLR 103.
- 8 (1851) 3 Mac & G 440; (1872) 8 Ch App 446.
- 9 [1992] 29 NSWLR 405, [1999] 43 PBLR (40).
- 10 *Some Trust Principles in the Pensions Context* [1996] PLR 107.
- 11 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).
- 12 *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651.
- 13 *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92.
- 14 *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310.
- 15 [2003] All ER(D) 81 (Jan).
- 16 Pension Schemes Act 1993, s. 146.
- 17 (2002) L00370.