ACA conference 2016

A trustee goes on trial for professional negligence: summary

Negligence is a complex and challenging area of the law. This is particularly the case in the context of pensions, where the position is becoming ever more heavily regulated.

A pension scheme trustee takes on onerous duties to the scheme and its beneficiaries. A trustee needs to ensure that he performs his role as a trustee to the highest standard as if the trustee falls short it can result in the trustee being held liable for the (possibly) significant losses which can arise from those mistakes. This can be either by the Pensions Ombudsman, the Pensions Regulator or by the Courts.

This means the risk of a claim against trustees is increasing all the time and trustees need to be aware that their actions can have serious consequences for them personally.

In the session we put a trustee on trial for the negligent breach of his investment duties. The key facts of the case study were as follows.

- Rubbish Limited is the sole employer of the Rubbish Pension Scheme, a defined benefit pension scheme. The Trustees of the Scheme are Mr Litter and Mr Lightfinger, appointed by Rubbish Limited, and Mr Doubting, the member nominated Trustee.

- At the start of 2008, the Scheme had assets of £10m and was 80% funded on the scheme funding basis. Following a period of poor investment performance, in July 2008 the Trustees took advice on their investment strategy from Serious & Partners, a firm of investment consultants.

- Serious recommended a change in investment strategy from 100% in UK equities to investing 39% of the assets in a global tracker fund and the remaining 61% in gilts and corporate bonds.

- As a result of this advice, the Trustees resolved to change their investment strategy. They asked Serious for a short list of fund managers to beauty parade. They also decided to disinvest the whole fund and put it in cash until they had appointed a new fund manager.

- In September 2008, the Trustees decided to appoint Useful Fund Managers. However, the Scheme's assets were not reinvested because of a disagreement between Mr Lightfinger and the rest of the Trustees. Mr Lightfinger wanted to invest £500k of the Scheme's assets in shares in Rubbish Limited. After much wrangling, this investment was made in April 2011.

- Mr Lightfinger then went to work in Australia and refused to answer emails. The Scheme's assets were not reinvested and remained in cash.

- The Scheme's assets other than the £500k in Rubbish Limited shares and a £2m unsecured loan to Rubbish Limited were reinvested in April 2014 with the new fund managers.

- The April 2015 valuation reveals that the shares are worthless, Rubbish has not made any loan repayments and the Scheme's assets have fallen to £6m. As a result, tPR has replaced the Trustees with an independent Trustee, Trusty Trustees Limited.

- Mr Lightfinger is being sued for negligence by Trusty Trustees Limited on behalf of the Scheme's beneficiaries.

The case against Mr Lightfinger:

- Trusty Trustees have claimed that Mr Lightfinger failed to follow a suitable investment policy by allowing the Scheme's assets to remain invested in cash until April 2014.

- The loan to Rubbish offended the employer related investment provisions.

- Mr Lightfinger is personally liable – he is not able to rely on the Scheme's indemnity and exoneration provisions because the conduct complained about relates to the investment of Scheme assets.

- Therefore, Trusty is claiming compensation for the alleged negligence amounting to the difference between the actual value of the Scheme's assets and what the value would have been if they had been invested in accordance with the advice received in 2008.

The judge concluded after argument on each aspect of the case (and a vote from the audience) that:

- Mr Lightfinger had breached his investment duties and his negligence had caused the losses Trusty claimed.

- Mr Lightfinger should be personally liable for the loss since he had not acted reasonably or honestly.