

London Borough of Hammersmith & Fulham

Report to: Pensions Sub Committee

Date: 29/09/2020

Subject: Supreme Court Decision on LGPS Investment Guidance

Report of: Phil Triggs, Director of Treasury and Pensions

Summary

1.1 The purpose of this report is to provide a briefing of the recent Supreme Court ruling on the Local Government Pension Scheme Investment Guidance and provide details of potential implications for LGPS Funds.

Recommendations

1. The Sub Committee is recommended to note the content of this report
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LBHF Priorities

Please state how the outcome will contribute to our priorities

Our Priorities	Summary of how this report aligns to the LBHF priorities
<ul style="list-style-type: none">• Being ruthlessly financially efficient	Ensuring good governance for the Pension Fund should ultimately lead to better financial performance in the long run for the Council and taxpayer.

Legal Implications

None

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Verified by Phil Triggs

Background Papers Used in Preparing This Report

None

DETAILED ANALYSIS

1. Background

- 1.1. This paper provides information on the recent Supreme Court ruling on the Local Government Pension Scheme (LGOS) Investment Guidance. Under his statutory power, the Secretary of State for Housing, Communities and Local Government (MHCLG) issued Guidance on Preparing and Maintaining an Investment Strategy Statement (ISS) (“the guidance”).
- 1.2. Under the LGPS (Management and Investment of Funds) Regulations 2016 (“the regulations”), LGPS administering authorities in England and Wales are required to follow that guidance when formulating their Investment Strategy Statement (ISS). The guidance directs how social, environmental and governance considerations should be taken into account, and included two guidance passages (below), which provoked a legal challenge led by the Palestine Solidarity Campaign Ltd:
 - 1) “...the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.”
 - 2) The second passage states that authorities “should not pursue policies that are contrary to UK foreign policy or UK defence policy”.

2. Supreme Court Ruling

- 2.1. On 29 April 2020, the Supreme Court handed down its judgment, ruling against the Secretary of State. The court decided that by including these two passages in the guidance, the Secretary of State had exceeded his statutory powers.
- 2.2. In his judgment, Lord Wilson concluded:
- 2.3. “Irrespective of whether the misconception to which I have referred played a part in leading the secretary of state to include in the guidance the two passages under challenge, I conclude that his inclusion of them went beyond his powers. HOW (Lord Wilson’s capital letters) does not include WHAT. Power to direct HOW administrators should approach the making of investment decisions by reference to non-financial considerations does not include power to direct (in this case for entirely extraneous reasons) WHAT investments they should not make.”

- 2.4. The ruling, which was by a 3-2 majority, will likely be disappointing to the Government, albeit one which it will have to accept. The Government is expected to respond to the ruling with revised investment guidance and possible additional secondary legislation.

3. Potential implications

- 3.1. It is believed that there will be a number of potential implications for LGPS funds:

- Increase in correspondence from campaign groups. This ruling could see a significant increase in the volume of approaches that administering authorities receive from a range of campaigners, activists and pressure groups. There is a possibility that these groups will see this ruling as giving LGPS funds a green light to pursue a range of divestment strategies and will want to ensure that their particular area is included. Funds need to prepare themselves for this increase in interest and ensure that they have the necessary governance and processes in place to manage it.
- Need to remain aware of the lawful requirements of the guidance, including those regarding ESG issues. The guidance directs that LGPS funds may take purely non-financial considerations into account (in addition to financial considerations), provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.
- Consideration given to the review of ISS and Responsible Investment policies. While it is not believed that the existing guidance would have stopped any LGPS Funds from setting out their views as a responsible investor, any updated guidance from MHCLG will need to be reviewed in due course, especially as to the “whats” and the “hows”. Any red lines to be drawn by government may have to be lifted out of guidance and inserted into secondary legislation.
- Role of central government in “guiding” LGPS investment strategy. Lord Wilson held that LGPS fund assets are not public monies, and the Supreme Court has now made it clear that responsibility for investment decisions rests entirely with the administering authorities.
- It remains to be seen if the MHCLG responds to this ruling, beyond deleting the unlawful passages from its guidance, given that this judgment cannot be appealed. Other matters concerning the Government at present may drive the timing of any future response.
- It is noted that the version of the statutory guidance currently published on www.gov.uk no longer includes the two passages that were ruled unlawful by the Supreme Court.

4. Risk Management Implications

4.1. None

5. Other Implications

5.1. None

List of Appendices: None