

SCOTLAND / JUDGMENT

Bain and Others, Petition for Directions [2002] ScotCS 55 (28th February, 2002)

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[2002] ScotCS 55 [New search] [Help] Bain and Others, Petition for Directions [2002] ScotCS 55
(28th February, 2002) EXTRA DIVISION, INNER HOUSE, COURT OF SESSION Lord
Cameron of Lochbroom Lord Johnston Lord Wheatley P561/01 OPINION OF THE COURT
delivered by LORD CAMERON OF LOCHBROOM in PETITION of DONALD BAIN and
OTHERS Petitioners; for DIRECTIONS

Act: McNeill, Q. C.; MacLay Murray & Spens (Petitioners) Alt: Davidson, Q. C., Howlin; R.
Henderson (Scottish Ministers): Cunningham; MacRoberts (Representative Beneficiary) 28
February 2002 Scottish Homes is a body corporate constituted under and in terms of the Housing
(Scotland) Act 1988 ("the 1988 Act") and is the successor to the Scottish Special Housing
Association under and by virtue of section 3 of and paragraph 1 of Schedule 2 to the 1988 Act. The
superannuation fund maintained by the Scottish Special Housing Association was transferred to
Scottish Homes by S. I. 1988/2192 by virtue of and in terms of paragraph 10(4)(a) of Schedule 1 of
the 1988 Act. Schedule 1 also made certain provisions in respect of pensions for staff of Scottish
Homes. The Scottish Homes Superannuation Fund ("the Fund") was established in terms of and
by virtue of paragraph 10(2) of Schedule 1. The Fund was thereafter maintained under and in
terms of the Local Government Superannuation (Scotland) Regulations 1987 ("the 1987
Regulations") and is now maintained under and in terms of the Local Government
Superannuation (Scotland) Regulations 1998 ("the 1998 Regulations"). The petitioners comprise
the present members of the Superannuation Committee of Scottish Homes. From documents
produced, it appears that on 4 November 1990 the Board of Scottish Homes agreed to establish a
Superannuation Committee, all to be members of the Board and to hold office subject to annual
re-appointment by the Board. At that time they were given the following remit: "To administer
Scottish Homes Superannuation Fund in terms of the Superannuation Act 1972 and Regulations
made thereunder. To appoint Managers to advise on the investment of the fund moneys in
accordance with the Regulations, to invest the fund moneys accordingly and to receive reports

from the managers each quarter. To submit a formal Report and Accounts for approval by the Board for each year ending 31 March. To submit such other Reports as may be requested by the Board." Shortly before January 1993 concern appears to have been expressed as to the formal relationship between the Board and the Superannuation Committee. In a report to the Superannuation Committee dated 18 January 1993, it was noted that in terms of the 1987 Regulations Scottish Homes was the administering authority and was in the same position as a local authority. It was also noted that the 1987 Regulations placed a positive statutory obligation on Scottish Homes to invest the Fund's moneys in accordance with the Regulations and in so doing to take proper advice at reasonable intervals. Reference was also made to paragraph 17(1) of Schedule 1 to the 1988 Act which provided, for and in connection with the discharge of its general functions or powers, that Scottish Homes might establish committees (whose members need not be members of Scottish Homes) as appeared to Scottish Homes to be appropriate. The report noted that the Board minute of 4 November 1990 "complies with the statutory requirements for a proper delegation of powers". In a report to the Board dated 5 April 1993 it was noted that at its meeting of 18 January 1993 the Board had approved the appointment of new fund managers to manage the investment of the Superannuation Fund for five years from 1 April 1993. At the same time the Board had asked that a paper be prepared outlining a revised remit for the Superannuation Committee and inviting the Board to nominate the Committee membership. The report contained proposals for the terms and conditions of the Superannuation Committee and for the Committee membership. At its meeting on 5 April 1993 the Board approved these proposals with a remit as outlined in the report and with the appointment of the individuals nominated in it. The revised remit of the Committee was as follows: "(a) to administer Scottish Homes Superannuation Fund in terms of the Superannuation Act 1972 and Regulations made thereunder. to appoint managers to advise on the investment of the fund monies in accordance with the Regulations, to invest the fund monies accordingly and to receive reports from the managers each quarter. To submit a formal report to the Board for the year ending 31 March which will include the Annual Accounts and Report, performance reports and other indicators. To submit such other Reports as may be requested by the Board. The Committee shall meet a minimum of four times per year which shall coincide with the Investment Managers' quarterly report." In November 1996, following the coming into force of section 16 of the Pensions Act 1995 ("the 1995 Act"), the Committee endorsed proposals for the introduction of member nominated committee members from 1997. In a letter dated 14 February 1997 the Chairman of the Committee amongst other things set out the functions of the Committee members as follows: "(a) to maintain and administer the Superannuation Fund transferred to Scottish Homes from Scottish Special Housing Association in accordance with The Local Government Superannuation (Scotland) Regulations 1987, any amendments made thereto and any statutory provisions

- (b) to conduct the functions of the Superannuation Committee within the terms of the remit of such Committee as determined by Scottish Homes
- (c) to manage the Superannuation Fund at all time exclusively in the best interests of all members of the Fund

- (d) to appoint, where appropriate, suitably qualified and experienced agents, advisers and consultants to assist them in the performance of the above functions, to have regard to their proper advice, obtained at reasonable intervals and to exercise due supervision and control over them." The letter included arrangements for the election of two committee members nominated by members of the Fund to join four members of the Board of Scottish Homes on the Committee. The Committee now includes two such committee members. The Fund is maintained by employees' contributions and by contributions from the participating employer providing the balance of the cost. Scottish Homes is the participating employer. Since about 1997 the Fund has carried a significant surplus over requirements and Scottish Homes has not been required to make any contributions in order that the funding level should not exceed the maximum level permissible by the Inland Revenue. It is anticipated that further contributions from Scottish Homes will not be required for a number of years. There is no express power either in the 1987 Regulations or in the 1998 Regulations permitting the application of surplus to augment members' benefits. The Scottish Executive has informed Scottish Homes that a new Housing Bill has been proposed under which the main functions of Scottish Homes, together with its assets and liabilities and its employees will transfer to Scottish Ministers operating as a new Executive Agency. Scottish Homes will then become a residuary body. Scottish Homes residuary body will continue as a non-departmental public body governed by the existing terms of the 1988 Act until it discharges a range of residuary functions. Thereafter it will be abolished by Scottish Ministers. It is the current view of the Scottish Executive that the Fund will require to be held by the residuary body at the creation of the new Executive Agency until a new Civil Service Pension Scheme is introduced. This scheme will replace the current Civil Service Pension Scheme within the lifetime of the residuary body. It is the view of the Scottish Executive that when employees of the Executive Agency ultimately join the new Civil Services Scheme, winding up the Fund will be considered with the possibility of pensioners and deferred pensioners being transferred to another Local Government Pension Scheme. Following discussion between the petitioners, Scottish Homes and the Scottish Executive concerning the proposals for change, and in particular the manner in which the rights of members, pensioners and deferred pensioners in the Fund be treated, the petitioners have become concerned as to the proper characterisation of their position in respect of the Fund and their obligations towards the members, pensioners and deferred pensioners. An issue has arisen as to whether or not fiduciary duties are owed by the petitioners to these employees and former employees. The petitioners contend that the Fund is held on trust for the members, pensioners and deferred pensioners, that Scottish Homes stand in the position of employer, that the petitioners are the trustees of the Fund, and that the Fund is a "trust scheme" for the purposes of the 1995 Act. In consequence, the petitioners are subject to the duties, obligations and penalties imposed by the 1995 Act and at common law upon the trustees of a trust scheme. This contention is supported by the representative beneficiary, who has entered the process as a respondent, to the extent that it is contended that the scheme constitutes a trust and Scotland Homes are the trustees. For the Scottish Ministers it is contended that the scheme, being a statutory scheme, is not a trust and that all the necessary powers and duties are to be

found within the primary legislation and in the Regulations made under the statutory powers granted in that primary legislation. We begin by examining the proposition that the petitioners themselves are the trustees of a trust. In our opinion, the proposition founders at the first hurdle. Mr McNeill accepted that it was necessary to find a deed whereby the petitioners were appointed to a trust separate from the statutory scheme, that the funds had been transferred to trustees and that those appointed to the Committee held those funds in the capacity of trustees owing fiduciary duties derived from that deed directly to the beneficiaries. This would require, firstly, that Scottish Homes were empowered to make such a transfer of funds and, secondly, that some act or deed can be specifically pointed to by which such a deed had been set up and one such that the trust had a legal personality separate from Scottish Homes. He accepted that no such trust was in being when Scottish Homes came into existence in 1988. It is sufficient to say that when driven to pointing to the act or deed which set up the independent trust, Mr McNeill accepted that his submission began with the establishment of the Committee in terms of Minute of the Board dated 5 April 1993, which, he said, set up the Committee with a legal personality. However it is plain from the documents produced that the Committee was already in existence and that it had been established by reference to the powers granted to Scottish Homes to delegate to committees the discharge of the general functions or powers of Scottish Homes in terms of paragraph 17(1) of Schedule 1 of the 1988 Act. Furthermore, by reference to the same documents it is clear that in April 1993 the Board of Scottish Homes was not doing anything other than clarifying the remit of the Committee in administering the funds, a function with which Scottish Homes were charged under the Regulations as the administering authority. Mr McNeill accepted that even after 1993 Scottish Homes could at any time disband the Committee. There is nothing in the terms of the Board's minutes in April 1993 that suggests anything of an intention to create a trust in the sense of an act equivalent to delivery or transfer of the funds as trust funds or indeed anything to demonstrate the irrevocable character of a trust (see, for instance, Lord President Emslie in *Clark Taylor & Co* 1981 SC 111 at p. 115). We therefore reject the proposition contended for by the petitioners. Thus the substantial issue in the case relates to the proper characterisation of the scheme whereby Scottish Homes administer the Fund. In this matter it is important to take into account the provisions of the 1987 Regulations which were in force when Scottish Homes came into being. Regulation A3 provided that the Regulations, with the modifications set out in a schedule, should apply to "the Scottish Special Housing Association and its employees as though it were a body described in Part 1 of Schedule 3 and an administering authority". Part 1 of Schedule 3 related to those bodies whose employees are to be, or entitled to become, pensionable employees for the purpose of pensionable employment in terms of Part B. Part C deals with payments by employees. In paragraph C1 it is provided that in relation to a pensionable employee of an administering authority the appropriate superannuation fund is the fund administered by that authority. Paragraph C2 provides that a pensionable employee shall make contributions "to the appropriate superannuation fund in respect of every employment in which he is a pensionable employee" and also for the amount of that contribution. Paragraph C11 provides for the deduction and recovery by an employing

authority of a pensionable employee's contributions by way of deduction from the remuneration payable to that employee. Part D deals with reckonable service for the purpose of ascertaining entitlement to benefits under the Regulations and for the purpose of calculating them. Part E sets out the benefits under the Regulations. Specific provision is made for various cases and circumstances affecting benefits, including transfers, local government reorganisation, the payment of gratuities and allowances and forfeiture of rights. In Part N provision is made for decision taking by the body concerned as to any questions arising as to rights and liabilities under the Regulations of persons and also for appeals to the Secretary of State from such decisions. Part P relates to superannuation funds and payments by authorities. In particular paragraphs P5 to P11 make detailed provision for the management of the funds, use and investment of the moneys forming parts of the funds not for the time being required to meet payments to be made out of the funds under the Regulations, for accounts, audits, and periodical valuations with actuary's certificates. Paragraph P11 provides for employer's contributions to the appropriate superannuation fund in each year in terms of the actuary's certificate. Part R provides for miscellaneous powers and duties placed upon authorities, including supply of information to certain employees and the keeping of records. Part S makes provision for the continuation in force for certain purposes of Regulations revoked by the 1987 Regulations and for election to take benefit under the 1987 Regulations. The most cursory reading of the 1987 Regulations makes clear that it provided a detailed scheme that encompassed the whole ambit of the structure of a superannuation scheme. It suffices to say that the scheme of the 1998 Regulations is essentially similar to that of the 1987 Regulations. The 1987 Regulations and the 1998 Regulations were made by the Secretary of State in the exercise of powers conferred upon him by the Superannuation Act 1972 ("the 1972 Act"). Section 7 of the 1972 Act provides that the Secretary of State may: "by regulations make provision with respect to the pensions, allowances or gratuities which, subject to the fulfilment of such requirements and conditions as may be prescribed by the regulations, are to be, or may be, paid to or in respect of such persons, or classes of persons, as may be so prescribed," being persons employed in local government service or others for whom it is appropriate, in the opinion of the Secretary of State, to provide such pensions and others. It has frequently been stated that there is no magic in the use of the word "trust". We refer, for instance, to the speech of Lord Chancellor Cairns in *Gillespie v City of Glasgow Bank*

- (1879) 6 R.(H. L.) 104 at p.107. The question is whether the circumstances of the case are consistent with the interpretation of a trust, and in particular, its creation, and absolutely inconsistent with any other interpretation. It is perhaps easiest in this matter to consider how Parliament has regarded an occupational pension scheme established, as here, by way of regulations made under statute. Under the Pension Schemes Act 1993 ("the 1993 Act") such schemes can be categorised as both an occupational pension scheme and a public service pension scheme by virtue of the provisions of section 1 of that Act. As Millett L. J. observed in *Westminster City Council v Haywood* 1998 Ch. 377 at pp.404-5 these are very wide definitions and a scheme can fall within both definitions. However

when regard is had to the provisions of the 1995 Act and in particular the definition section, section 124, a distinction is made between a "trust scheme", which is defined as an occupational pension scheme established under a trust, and "a public service pension scheme". The latter has the meaning given by section 1 of the 1993 Act, namely: "an occupational pension scheme established by or under an enactment or the Royal prerogative or a Royal charter, being a scheme - (a) all the particulars of which are set out in, or a legislative instrument made under, an enactment, Royal warrant or charter ..." The scheme for which Scottish Homes is responsible as the administering authority, is one established under an enactment, the 1972 Act, and all the particulars of the scheme are set out in a legislative instrument made under an enactment, namely the Regulations made under the 1972 Act. It is therefore not a trust scheme but a public service pension scheme. As section 16 of the 1995 Act sets out, it is only in relation to a trust scheme that the statutory requirement for member nominated trustees applies. That is sufficient to dispose of the submissions made for both the petitioners and the representative beneficiary that the public service pension scheme which is managed by Scottish Homes as the administering authority, is a trust. The cases cited in support of these submissions, in particular *Allan's Trustees v Lord Advocate* 1971 S. C.(H. L.) 45 and *Clark Taylor & Co. Ltd.* 1981 SC 111, do not appear to us to bear upon the matter being concerned with the creation of private trusts. We would add that there is nothing in the case of *Westminster City Council v Haywood* cited to us by the petitioners, which assists in this matter. That case was concerned with the jurisdiction of the Pensions Ombudsman in a complaint of maladministration. It is worthy of note, too, that in the letter dated 14 February 1997 already referred to, the Chairman of the Committee referred to the introduction of member nominated Committee members from 1997 and explained the proposals as follows: "The proposals arise from the Pensions Act 1995, which enables the appointment of member nominated trustees to Trustee Boards responsible for Pension Funds. Our Fund is a statutory body, governed by Local Government Regulations. As such, it was not obliged to adopt the proposals for member nominated trustees which apply to bodies constituted under Trust Law only. However, the Committee welcomed the opportunity to involve staff more fully in the management of their Fund. They recommended adoption of the proposals by the Board of Scottish Homes as further evidence of their commitment to follow best practice in Fund management. I am now glad to report that the Board have agreed that these proposals should be carried out". While it may be said that it was not accurate to describe the Fund as a "statutory body", the writer was entirely correct in indicating that the provisions of section 16 of the 1995 Act did not apply to the scheme administered by Scottish Homes. In seeking answers to the questions posed in the petition, parties were agreed that in particular questions 1 and 2 were not aptly framed, but that if we were of opinion that the scheme was not established under a trust, the first question fell to be answered in the negative and the remaining questions did not require to be answered. On that basis and in the light of the conclusions that we have set out above, we answer the first question in the negative, the remaining questions being superseded.

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Prepared on 28 October 2026 · Esheria