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Nottinghamshire Local Pension Board

LGPS Update

A paper by the Advisor to the Pension Board November 2020

Introduction

This paper informs the Board of developments in respect of some important issues in the LGPS since the Board last met on 12 December 2019. Two matters of major importance – the “McCloud” (age discrimination) case and the reform of Local Government Exit Payments are covered in Officer reports elsewhere on the Agenda of this meeting of the Pension Board. Therefore, this paper focusses on three other major issues – Firstly an overview of the 2019 Actuarial Valuation in the context of the Nottinghamshire Fund, Coronavirus and the LGPS; Secondly the Supreme Court decision of April 2020 regarding LGPS Statutory Guidance issued in 2016; Thirdly national LGPS Scheme Governance developments.

The report also provides a brief update on two other issues covered in LGPS Update reports received by the Board in 2019 - the MHCLG Consultation “Changes to the Local Valuation Cycle and the Management of Employer Risk” which was issued in May 2019, and secondly - Investment Pooling the present situation regarding national guidance. In addition, the paper reports back on the presentation, on 12 March 2020, to the Nottinghamshire Pension Fund Committee of the Pension Board Review 1 April 2018 to 31 March 2019.

The issues covered in this paper are:

- Overview of the 2019 Actuarial Valuation, Coronavirus and the LGPS
- Scheme Governance – Good Governance in the LGPS project
- Supreme Court Case regarding 2016 Statutory Guidance
- MHCLG Consultation “Changes to the Local Valuation Cycle and the Management of Employer Risk”
- Investment Pooling – the situation regarding national guidance
- Presentation to Pension Fund Committee – 12 March 2020

1. Overview of the 2019 Actuarial Valuation, Coronavirus and the LGPS

On 31 March 2020 the Actuary to the Nottinghamshire Fund, Barnett Waddingham, issued their Valuation Report relating to the Actuarial Valuation as at 31 March 2019 and the Rates and Adjustments Certificate which sets the individual Employer Contribution rates for the period 1 April 2020 to 31 March 2023. This was in accordance with the requirements as to Actuarial Valuations as set out in Regulation 62 of the LGPS Regulations 2013 (as amended).

Using the assumptions agreed with the Nottinghamshire Fund the Actuary in his Valuation Report calculated, as at 31 March 2019, the value of the Fund's liabilities was £5,820m compared to assets of £5,415m, a deficit of £405m and a Funding level of 93%. This compared to a Funding level of 87% at the 2016 Actuarial Valuation. Therefore, at the whole Fund level the Funding level had clearly improved since 2016 and was approaching full funding for past service accrued. The Actuarial Valuation Report for 2019 may be accessed at https://www.nottinghamshire.gov.uk/media/2885041/nott-march-2019-valuation-report.pdf

In considering the deficit/surplus and Funding level it is however important to note that the deficit/surplus and Funding level are only measurements at a particular point in time based on past experience and, crucially, assumptions about the future. Therefore, it is important to look beyond the headline Funding level and to consider how it has been determined.

The Valuation Report sets out how the Funding level has been determined. Based on past experience since 2016, compared to assumptions made at the 2016 Valuation, alone, the Fund would have been (I calculate) approximately 104% Funded. This is primarily because in the words of the Valuation report (page 11) *"Investment returns have been strong since 2016 leading to an estimated improvement in the position of just under £680m. The Fund's investment returns have been 10.3% p.a. on average compared to the prudent long term return assumption at the last valuation of 5.4% p.a. over the three year period."* However, in preparing the Valuation report the Actuary also has to make assumptions for the period going forward to which the Valuation applies – that is to 31 March 2022.

In determining assumptions going forward the Fund Actuary has, overall, taken a more prudent view than at the previous Valuation. The most significant change is a reduction in the financial assumptions, most notably a reduction in the Discount Rate from 5.4% p.a to 4.8% p.a which reflects lower long term investment expectations than at the 2016 Valuation. I would suggest that given market and LGPS developments over the period since 2016 an assumption of lower future investment returns is reasonable. Therefore, taking account of both experience since the last Valuation and assumptions going forward the Actuary arrived at a Funding level for the whole Nottinghamshire Fund of 93%.

A higher overall Funding level does not, however, necessarily result in lower overall Employer Contributions. The Employers Contribution rate comprises two elements – the Primary rate and the Secondary rate. The Primary rate covers the cost of future service accrual and has increased at whole Fund level because of the reduction in future anticipated returns as expressed by the Discount Rate. The Secondary rate covers the cost of recovering past service deficits which has reduced as a result of the improved Funding level from 2016 to 2019. Overall, the combined changes to the Primary and Secondary rates result in *"generally stable contributions"* for Employers. Details of individual Employer Contribution Rates are set out on pages 28 to 59 of the Valuation Report. Details of individual Employer Contribution Rates as set at the previous Valuation can be found on pages 19 to 39 of the Valuation Report issued in March 2017 https://www.lgpsboard.org/images/Valuations2016/Nottinghamshire2016.pdf

The latest Valuation Report issued on 31 March 2020 was issued after world financial markets began to materially adversely react to the implications of Coronavirus. This can reasonably be dated to Monday 24 February following the decision over the weekend of 22/23 February of Italy to quarantine 10 towns in response to Coronavirus. The period from late February to the end of March 2020 saw dramatic falls in investment markets. Looking at the Quarter January to March 2020 global equity prices fell heavily with the MSCI World Index down 21% (in $ terms). As the Quarter progressed it also became clear that many companies would either suspend or reduce Dividend payments going forward. European and UK equities were especially badly affected with the MSCI EMU Index down 25% (in Euro terms) and the FTSE All Share down 25% (in £ terms). The benchmark United States S&P 500 index lost 20% as did the Japanese Nikkei 225.

Page 16 of the latest Valuation Report specifically addresses the issue of COVID-19 including the statement *"Since the valuation date there has been some very significant movements in investment markets and in particular over the three months to 31 March 2020, largely driven by the COVID-19 crisis."* Page 16 also includes the statement *"…no adjustments have been made to the valuation results or to the employer contributions previously agreed. The results are based on the position as at 31 March 2019."* This leads to the question as to why the Actuary did not take into account the effects of COVID-19 and whether this was a reasonable approach?

Page 16 provides a clear explanation of the approach of the Actuary as it also includes the following statements *"However, our funding model is designed to help withstand short-term volatility in markets as it is a longer term model and we also use smoothed assumptions over a six-month period with the ultimate aim of setting stable contributions for employers. Therefore, although the falls in equity and corporate bond markets have been significant, the ongoing funding position under our model will not have fallen to the same extent, as the model helps to mitigate some of the impact of extreme events"* and *"…. The impact of the COVID-19 crisis will be fully considered as part of the 2022 valuation when we revisit employer contributions."*

Additional to the clear and logical explanation of the Fund Actuary there are a number of other factors which support the approach of the Actuary not to adjust the Valuation results or Employer contributions as a result of market reaction to COVID-19 in the period to 31 March 2020. These include:

- The LGPS is an open scheme with an overall strong covenant due to the proportion/size of Employers with taxpayer/government backing and therefore able to take a long-term outlook

- The fact that at 31 March 2020 it was very uncertain how COVID-19 would affect the long term economy and investor returns

- The three other Actuarial firms who provide services to the LGPS also did not change their Valuation results or proposed Employer contribution rates as a result of COVID-19

- During March 2020 Governments and in particular central banks, most especially the United States Federal Reserve the most important of central banks, introduced unprecedented support to help stabilise financial markets. By 31 March 2020 there was clear evidence that these actions would prevent the possibility of a financial market "meltdown."

Since March 2020 there has been an ongoing recovery in financial markets. Despite the very significant downturn in markets during February and March 2020 the value of the assets of the Nottinghamshire Fund were as at 30 September 2020 clearly in excess of the value as at the date of the last Actuarial Valuation. At 31 March 2019 (the Valuation date) the value of the Fund's assets was £5.4 billion. Following the severe turbulence in world financial markets in February/March 2020 the value of the Fund at 31 March 2020 was just over £5.0 billion. However, as a result of the recovery in markets from late March 2020 the value of the Fund was approaching £5.6 billion as at 30 September 2020.

As reported to the Pension Fund Committee on 10 September 2020 (Agenda Item 13) the Fund Officers carefully monitored the impact of market movements and the performance of the Fund's investment managers at the peak of the market turmoil (February and March 2020) and continue to do so on an ongoing basis. The Fund has continued to receive regular oversight and support from its Independent (Investment) Advisor William Bourne. Furthermore, as the report (Paragraph 4) to the 10 September 2020 Committee stated *"…The Fund's investment strategy and asset allocation continue to be kept under consideration. However we are long term investors and market volatility in itself will have a limited impact on the Fund."*

2. Scheme Governance – Good Governance in the LGPS project

The Board has previously received detailed updates on the national Scheme Advisory Board's Good Governance in the LGPS project in the training session held before the meeting held on 12 December 2019 and in papers to the Board, presented at the 11 September 2019 and 4 December 2018 meetings. This update will summarise the earlier updates and cover developments since December 2019.

This project is the most important development presently underway in the LGPS as it seeks to fundamentally enhance and strengthen the governance of the individual LGPS Funds across England and Wales (over 80 in total). Completion of the project and its effective implementation across the LGPS in England and Wales is surely the most effective means of maintaining the existing and longstanding local management of the LGPS and avoiding the possibility of compulsory amalgamations of individual Funds going forward.

In August 2018 the Scheme Advisory Board (SAB) invited proposals from interested parties to assist it in developing options for change with regard to the relationship of LGPS Pension Funds to their existing host authorities for consideration prior to potentially making recommendations to the Secretary of State. Hymans Robertson were awarded the contract to work with the SAB to develop possible options.

In July 2019 Hymans Robertson issued a report to the Scheme Advisory Board which did not suggest any structural change in relation to the number of LGPS Funds in England and Wales (87 at the time this report was issued) but rather proposed a framework for improving governance at individual Fund level based on an 'outcomes-based' approach. This to be based on minimum standards including assurance on sufficiency of administration and other resources (quantity and competency) and appropriate budget; explanation of policy on employer and scheme member engagement and representation in governance; crucially a system of regular independent review of governance of each Fund was proposed. Enhancement to training for Pension Committee Members and updating of the Statutory Guidance on LGPS governance issued in 2008 were also proposed.

The Board meeting of the SAB held on 8 July 2019 agreed that the SAB Secretariat (Officers) should in liaison with the project team from Hymans Robertson and Scheme stakeholders develop a detailed plan to implement the conclusions from the Hymans Robertson report for presentation to the November meeting of the SAB. Two stakeholder working groups (the Standards & Outcomes Group and the Compliance & Improvement Group) were established to work with Hymans Robertson on the Phase II report. [The Advisor to the Nottinghamshire Pension Board was a member of both working groups].

A report by both working groups and Hymans Robertson, including detailed implementation proposals was considered by the SAB and issued in November 2019. This report – the Phase II report included a broad range of proposals which may be summarised as follows:

1. The Ministry for Housing Communities and Local Government (MHCLG) to produce Statutory Guidance to establish new governance requirements for Funds to effectively implement the proposals in the Phase II report

2. Each Administering Authority (LGPS Fund) must have a single named officer responsible for the delivery of all LGPS related activity for the Fund – “the LGPS Senior Officer”

3. Each Administering Authority must publish an annual Governance Compliance Statement that sets out how they comply with the governance requirements for LGPS Funds as set out in the new Statutory Guidance

4. Each Fund must produce and publish a Conflicts of Interest Policy including reference to key conflicts identified in the Statutory Guidance

5. The new Statutory Guidance should refer all involved in the management of the LGPS, and in particular those on decision making Committees (the Pension Fund Committee) to the guide on statutory and fiduciary duty which will be produced by the Scheme Advisory Board (SAB)

6. Each Fund must produce and publish a policy on the representation of Scheme Members and non Administering Authority Employers on its Committees, explaining its approach to representation and voting rights for each party

7. The new Statutory Guidance to contain an enhanced requirement, compared to that at present, for key individuals within the LGPS, including Officers and Pension Committee Members to have knowledge and understanding to carry out their roles effectively

8. A requirement for Chief Finance Officers (the Section 151 Officer) to undergo LGPS relevant training as part of their Continuing Professional Development

9. Administering Authorities must publish a policy setting out their approach to the delivery, assessment and recording of training plans

10. CIPFA and other relevant bodies to be asked to produce appropriate guidance and training for Section 151 Officers and to consider including LGPS training within their qualification syllabus

11. Each Administering Authority to document key roles and responsibilities relating to the LGPS Fund and publish a roles and responsibilities matrix setting out how key decisions are reached

12. Each Administering Authority must publish a Pensions Administration Strategy

13. Each Administering Authority must report the Fund's performance against an agreed set of national indicators designed to measure standards of service

14. Each Administering Authority must give proper consideration to pay and recruitment policies, including as appropriate market supplements, relevant to the needs of their pension function. Administering Authorities should not simply apply general council staffing policies such as recruitment freezes to the LGPS function

15. Each Administering Authority must undergo a biennial Independent Governance Review and, if applicable, produce the required improvement plan to address any issues identified

16. Independent Governance Reviews (IGR) will be assessed by a SAB panel of experts to look for outliers and areas of concern. The panel may refer an unsatisfactory IGR to The Pensions Regulator or further escalate to the MHCLG

17. The Local Government Association to consider establishing a peer review process for LGPS Funds.

The full Good Governance in the LGPS Phase II report may be accessed at https://www.lgpsboard.org/images/PDF/HymansRobertson_GoodgovernanceintheLGPS_Phase-II_November2019.pdf

At the Board meeting of the SAB held on 6 November 2019 it was agreed that:

- The Good Governance Phase II report to be published

- The SAB Secretariat, with Hymans Robertson and stakeholders, should develop Phase III of the project including the draft Statutory Guidance and key performance indicators

- Comments on the Phase II recommendations be invited

- Final proposals for Phase III to be considered on 3 February 2020

At the meeting of the Scheme Advisory Board held on 3 February 2020 it was agreed that the two working groups who prepared the Phase II report be combined to form an Implementation Group. [The Advisor to the Nottinghamshire Pension Board was appointed a member of the Implementation Group]. It was further agreed that this group prepare a detailed paper for consideration by the Board at its meeting in May 2020 to include proposals for necessary changes to the LGPS Regulations and new Statutory Guidance, the establishment of Key Performance Indicators, and the process for the independent assessment of LGPS Fund governance.

The Implementation Group began its work in February 2020. In March an initial draft of the new Statutory Guidance on Governance in the LGPS and draft paper on the role of the LGPS Senior Officer were issued and circulated for comments. The social distancing restrictions introduced by the government in March prevented the group meeting in person. Telephone conferencing discussions were held but attendance was limited due to the fact that local government Officers on the group were engaged in responding to Coronavirus.

Therefore, on 6 April at a virtual meeting involving the SAB Chair, Vice Chair and Chairs of the Investment and Cost Management Committees it was agreed to stand down the Implementation Group until further notice but that the project team at Hymans Robertson be asked to continue to work on papers for consideration by the Implementation Group once meetings again become viable.

Hymans Robertson have continued to work on the Good Governance project and momentum has increased again. Further work has been undertaken on draft papers including on the form of the independent governance review and the Key Performance Indicators (KPIs) to be utilised by all LGPS Funds as well as additional work on the role of the LGPS Senior Officer. Hymans Robertson have also engaged in discussions with individual Officers.

At the 2 November 2020 meeting of the Scheme Advisory Board (SAB) working papers on the LGPS Senior Officer role and the proposed KPIs were circulated. The introduction to these stated *"These working papers address 2 of the recommendations which the working groups identified need further detail before they can be implemented. Please note that these are draft working papers which set out the thinking and feedback received to date. Not all stakeholders have had an opportunity to comment on all areas and we recognise that different stakeholders have different views. These papers do not therefore at this stage represent a consensus position."* A possible example of the new Governance Compliance Statement was also circulated, together with a possible example of the summary page of a report issued under the proposed Independent Governance Review arrangements.

It was recommended that the SAB agree these four working papers along with other relevant materials be circulated to the Implementation Group, Treasurer's groups and other relevant parties for comment. It was further recommended that finalised proposals be presented to the February 2021 meeting of the SAB.

Once SAB has considered the finalised proposals, and possibly made any amendments it considers appropriate, it will then share these with the MHCLG. For proposals to become applicable to individual LGPS Funds this would require the MHCLG to consult on revised Statutory Guidance (and possibly some changes to the actual LGPS Regulations), consider responses to the Consultation and issue final guidance/regulations.

The MHCLG were represented on the Phase II Working Groups and are on the (Phase III) Implementation Group. A senior representative from MHCLG also attends the meetings of the Scheme Advisory Board. Therefore, the proposals of the Good Governance in the LGPS project are likely to be adopted, eventually, by the MHCLG and compliance with them required of LGPS Funds through the issuing, in due course, of new Statutory Guidance on Governance in the LGPS (and if necessary, amendment to the LGPS Regulations).

It is very difficult, however, to suggest when the proposals of the Good Governance in the LGPS project may become mandatory on individual LGPS Funds such as Nottinghamshire. Once MHCLG issues a Consultation a period of six months might be anticipated for the actual Consultation (likely 13 weeks), consideration of responses and issuing of the final Statutory Guidance (and if necessary, any amendments to the LGPS Regulations). This period however could be longer. Furthermore, as the paper to the SAB of 2 November 2020 states *"Board members also need to be mindful of the strong statement from MHCLG that in view of other competing priorities, eg, 95k Cap and McCloud remedy, they are unlikely to be able to devote any time to the good governance project over the next six months or so."* Consequently, it would seem unlikely that the MHCLG will issue any Consultation on the Good Governance proposals until the late spring/summer of 2021 at earliest. Therefore, it would seem that the proposals will not become mandatory on individual LGPS Funds until late 2021 at earliest but much more likely not until sometime in 2022.

3. Supreme Court Case regarding 2016 Statutory Guidance

In 2016 the Local Government Pension Scheme (Management and Investment of Funds) Regulations were updated. To accompany the new Regulations the Government issued Statutory Guidance to assist Administering Authorities in the LGPS to formulate, publish and maintain their Investment Strategy Statement as required under the new Regulation 7. This was entitled "Guidance on Preparing and Maintaining an Investment Strategy Statement."

This Statutory Guidance was 10 pages long and provided much clear and helpful guidance to Administering Authorities. The Statutory Guidance did however include two short paragraphs that became the subject of a case led by the Palestine Solidarity Campaign which claimed that the inclusion of two specific paragraphs in the Guidance were unlawful and that they should be removed.

Before discussing the case initiated by the Palestine Solidarity Campaign and its implications it is essential to stress that the fundamental investment duty of an LGPS Administering Authority is not affected by this case. LGPS Funds, in the words of the 2016 Statutory Guidance, *“should make the pursuit of a financial return their predominant concern…”* Both the case taken by the Palestine Solidarity Campaign and the Judgement of the Supreme Court did not concern, challenge or alter this overriding duty.

The case raised by the Palestine Solidarity Campaign merely concerned the breadth of the ethical investments that Administering Authorities of the LGPS (such as Nottinghamshire) are permitted to make. In the Judgement of the Supreme Court of 29 April 2020 Lord Wilson defined (in paragraph 1) an ethical investment as follows *“By an ethical investment, I mean an investment made not, or not entirely, for commercial reasons but in the belief that social, environmental, political or moral considerations make it, or also make it, appropriate.”*

The paragraphs that the claimants believed were unlawful are in italics below:

- *“However, 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.”*

- An Administering Authority *“Should not pursue policies that are contrary to UK foreign policy or UK defence policy”*

The case was originally heard in the High Court in 2017 which declared the two passages in the Guidance under challenge to be unlawful. This decision was reversed by the Court of Appeal in 2018. Leave was granted for the case to be finally determined by the Supreme Court which heard the case in November 2019 and delivered its Judgement on 29 April 2020.

In their Judgement the Supreme Court determined by a majority of 3 to 2 that the two passages in the Guidance under challenge were indeed unlawful as in issuing them the Secretary of State had exceeded his powers. As part of the Judgement (in paragraph 31) Lord Wilson stated *“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.”*

On 11 May 2020 the LGPS Scheme Advisory Board for England and Wales posted the following initial statement on its website: *‘The SAB welcomes the clarity brought by the judgement of the Supreme Court in the case of R (on the application of Palestine Solidarity Campaign Ltd and another) Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent). In seeking to restrict the outcome as well as the considerations* *taken account of by an LGPS administering authority when developing its responsible investment policy, the government has been judged to have overstepped its powers. It is the Board's view that Responsible Investment policy decisions belong at the local level reflecting: the need to pay pensions both now and in the future; local democratic accountability and the views of scheme members; and that outcomes of policy developments should not be subject to restrictions based on unrelated matters'*

The Judgement issued by the Supreme Court is 35 pages long and statements made by the Judges in this may clearly have implications beyond the issue of the two passages in the Statutory Guidance which were the subject of the case. Therefore, the Scheme Advisory Board (SAB) agreed that its Secretariat, in conjunction with the Board's legal adviser, draft a statement summarising the Judgement for publication on the Board's website. This was to include the direct effect of the decision and possible indirect impacts of the decision.

The SAB issued their (five page) note on the Judgement on 8 June 2020 which *"seeks to clarify the direct legal impact of the Supreme Court's judgement in relation to investment guidance issued by the Secretary of State. It also includes items of interest from the court's reasoning in reaching its judgement that may inform the thinking of both scheme stakeholders and government in the future."* In three separate places (pages 2,3,4/5) the comment is made that the Judgement does not change the fundamental duties of LGPS Administering Authorities in relation to their investment or other powers and confirms that the Administering Authority remains *"responsible for investment decisions".*

Comments in the note on ***"The Decision and its Direct Impact"*** include:

- *The outcome of the decision is that the Secretary of State went beyond his powers by including the contested passages in the guidance. The reissued guidance from July 2017 (with the relevant passages removed) remains valid.*

- *The judgement does not change the fundamental duties and responsibilities of LGPS administering authorities in relation to their investment or other powers. The administering authorities remain responsible for investment decisions.*

In the section **"Are LGPS Funds Public Money?"** the SAB note very helpfully addresses issues considered in paragraphs 28 to 30 of the Judgement issued by the Supreme Court in April 2020. One of the arguments that was raised by the Barrister (Julian Milford) representing the Secretary of State at the hearing before the Supreme Court in November 2019 was the concept that LGPS Funds are *"public money."* The SAB note contains the following statement on this issue which, I think, it is helpful to quote below in full. I have however highlighted in bold the two paragraphs that perhaps merit particular attention.

“In pursuing an argument that administering authorities were part of the machinery of state, MHCLG also argued that LGPS funds are “public money”. What MHCLG appear to have argued is that because LGPS funds are ultimately funded by the taxpayer, they are effectively the government’s money and therefore the government has the power to direct how those funds should be used via guidance.

Lord Wilson rejected this argument, quoting Sir Nicolas Browne-Wilkinson VC from the Imperial Tobacco case[2], making the point that contributions are paid by both employees and employers and that employer contributions are made in consideration of the work done by their employees and so represent another element of the employees’ overall remuneration.

Lord Wilson came to the conclusion that LGPS funds should rather be viewed as representing employees’ money rather than public money.

This comment may be at risk of being taken out of context and should not be interpreted as meaning that LGPS funds are owned or controlled by the members. It is clear elsewhere in the judgement that the LGPS is a statutory pension scheme and that the primary responsibility for delivering the functions of the LGPS rests with its administering authority.

There is no suggestion that the assets of an LGPS fund legally vest in anybody but the administering authority. We do not believe that Lord Wilson was making such a suggestion. In fact, Lord Carnwath specifically states that, “responsibility for investment decisions thus rests with the administering authorities””.

The full text of the SAB note on the Supreme Court Judgement can be found at the link https://www.lgpsboard.org/images/Guidance/SAB_SCSN062020.pdf This SAB note on the Supreme Court Judgement provides Administering Authorities with helpful information as to the overall consequences of the Judgement.

In conclusion the Judgement issued by the Supreme Court on 29 April 2020 determined that the Secretary of State exceeded his powers by including in the Statutory *“Guidance on Preparing and Maintaining an Investment Strategy Statement”* of 2016 the (few) lines contested in the case relating to not pursuing policies that are contrary to UK foreign policy or UK defence policy. The contested lines (but nothing else) were removed from a revised version of the Statutory Guidance issued in July 2017 (following the original High Court ruling) and this remains valid in its entirety.

The Judgement does not in any way suggest that Administering Authorities, such as Nottinghamshire County Council, are not completely responsible for investment decisions relating to their LGPS Fund. Indeed, in paragraph 42 of the Supreme Court Judgement Lord Carnwath explicitly stated “*…Responsibility for investment decisions thus rests with the administering authorities.”*

Finally it is worth restating that it can be said with certainty that the Judgement does not undermine the overriding duty of the Administering Authority, in the words of the 2016 Statutory Guidance on Preparing and Maintaining an Investment Strategy Statement, that *"…schemes should make the pursuit of a financial return their predominant concern…"* This element of the Statutory Guidance was not disputed in this case.

Note: The full Supreme Court Judgement referred to above can be accessed at https://www.supremecourt.uk/cases/docs/uksc-2018-0133-judgment.pdf

4. MHCLG Consultation "Changes to the Local Valuation Cycle and the Management of Employer Risk"

The LGPS Update report presented to the Board at its meeting held on 11 September 2019 (Agenda Item 6, Appendix 1) included a section describing and explaining the proposals in the Consultation issued by MHCLG on 8 May 2019 entitled "Changes to the Local Valuation Cycle and the Management of Employer Risk." This Consultation closed on 31 July 2019.

No response was issued by the MHCLG until early 2020 when a first partial response was issued. This resulted in the Local Government Pension Scheme (Amendment) Regulations 2020 which came into force on 20 March 2020 but have effect from 14 May 2018. This gives Administering Authorities such as Nottinghamshire County Council certain additional discretions regarding exit payments which may be paid to an Employer exiting a LGPS Fund.

A second partial response was issued on 26 August 2020. This included reference to the need for new regulations to allow Administering Authorities to manage and mitigate risk in the context of COVID-19. Consequently, the Local Government Pension Scheme (Amendment) (No. 2) Regulations 2020 came into force on 23 September 2020. These are concerned with three issues:

- The review of Employer contributions by the Administering Authority – The Administering Authority now has greater ability to review Employer Contributions between Actuarial Valuations where there has been a significant change to the liabilities or covenant of an Employer.

- The spreading of Exit Payments – This expressly permits the Administering Authority the discretion to allow an Employer to spread exit payments to be paid to the Fund over a period it *"considers reasonable."*

- Deferred Debt Agreements – The Administering Authority *"may enter into a deferred debt agreement"* with an exiting Employer in certain circumstances. Where an Employer ceases to employ any active members the Administering Authority, at its discretion, may permit the deferment of any due exit payment and instead permit the payment of regular (*"secondary rate")* contributions to cover the exit payment due. A

Deferred Debt Agreement may be terminated in a number of circumstances including where *"…the administering authority is reasonably satisfied that the deferred employer's ability to meet the contributions payable under the deferred debt arrangement has weakened materially or is likely to weaken materially in the next 12 months."*

As at 25 November 2020 the MHCLG were still to publish its response to the other matters in the Consultation including proposed changes to the LGPS Actuarial Valuation Cycle and proposed changes to the requirements for some Education sector Employers to offer LGPS membership to their new non teaching Employees.

5. Investment Pooling – the situation regarding national guidance

The LGPS Update presented to the Board at its meeting held on 11 September 2019 and the training presented before the Board meeting held on 12 December 2019 both included detailed briefings on the position regarding national Guidance relating to Investment Pooling.

The Board was informed that in 2015 the Government had issued Guidance requiring individual LGPS Funds to form themselves into "Pools" for the purpose of pooling the management of their investments. This 2015 Guidance was broad in nature and consequently 8 Pools with very significant diversity in terms of structure and approach were subsequently approved. The Nottinghamshire Fund is one of eight LGPS Funds (together with Cheshire, Derbyshire, Leicestershire, Shropshire, Staffordshire, West Midlands and Worcestershire) who formed (and own) the LGPS Central Pool.

The Board were informed that on 3 January 2019 the MHCLG had issued an informal Consultation on new Statutory Guidance on Investment Pooling which sought to provide in one document clear enforceable guidelines. This had, however, resulted in over 90 responses including that the Consultation had breached Cabinet Office Principles, was *"unlawful,"* was "*unnecessarily prescriptive"* and that some of the content was a matter of Regulation rather than Statutory Guidance. In response the MHCLG indicated a that formal Consultation would take place in 2019.

As at the date of the last Board meeting on 12 December 2019 the MHCLG had not issued a formal Consultation on Statutory Guidance for Investment Pooling.

So far during 2020 there has been no Consultation issued on this matter. This is likely accounted for by a number of issues including but not restricted to the COVID-19 pandemic. The MHCLG have been particularly involved in both "McCloud" and the reform of Local Government Exit Payments and work on both these issues is continuing. Furthermore, there have been suggestions from some commentators that the Supreme Court Judgement of April 2020 regarding the Statutory Guidance on preparing and maintaining the Investment Strategy

Statement may have caused the MHCLG to give further consideration to any proposed new Statutory Guidance on Investment Pooling. This is because the April 2020 Judgement indicated that in the case of the Statutory Guidance on preparing and maintaining the Investment Strategy Statement the Secretary of State exceeded his powers of direction and was too prescriptive.

Therefore, it would not be surprising if there is not a further considerable delay before the MHCLG issues a Consultation on Statutory Guidance for Investment Pooling. Such a Consultation would likely last 13 weeks and result in a very significant response from LGPS stakeholders which may delay the issuing of the final Statutory Guidance further. This leads to the view that new Statutory Guidance on Investment Pooling may not be finalised until 2022 or later in 2021 at the earliest. In the meantime, individual LGPS Funds and Pools continue to progress asset pooling in accordance with the Guidance issued in 2015.

6. Presentation to the Pension Fund Committee – 12 March 2020

On 12 March 2020 I attended the Nottinghamshire Pension Fund Committee, on behalf of the Pension Board, to present the Nottinghamshire Pension Board Review 1 April 2018 to 31 March 2019.

At the Committee meeting I was given time, by the Chair, to both fully explain the background to the report as well as the content of the report itself. Following my presentation, the Members of the Committee asked a number of questions and made a number of observations. I am pleased to be able to report that the Pension Fund Committee were clearly both genuinely interested in and appreciative of the work of the Pension Board.

In addition, I was invited by the Chair and Members to remain for the entire Committee meeting including the Exempt Agenda items. During the remainder of the meeting I was impressed by the quality of the observations made, and the questions asked, by Committee Members to Fund Officers, the Independent Advisor and Investment Managers who attended the Committee meeting.

Based on my experience of attending the Pension Fund Committee on 12 March 2020 I believe that there is clear scope for further positive interaction between the Pension Board and Pension Fund Committee. This is highly desirable in terms of the Pension Board proactively fulfilling its role under Regulation 106 of the LGPS Regulations 2013 which is *"assisting"* the Administering Authority whose role, at Nottinghamshire, is exercised by the Pension Fund Committee.

John Raisin

25 November 2020