

The Complex Role of a Trustee of a Pension Scheme

Fiona Thornton, Partner, L.K. Shields, Solicitors
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Frequently, being selected as a trustee is regarded as a position of honour within an organisation and the role carries a certain amount of kudos. However, being a trustee is a complex business. Essentially, the pension trust consists of an amalgam of specific obligations and objectives set out in the trust deed and rules, statutory duties and general trust law duties imposed by the courts.

Personal liability attaches to the trusteeship role. On being appointed a trustee he or she needs to have a clear understanding of their obligations and rights so that he or she is in a position to properly discharge them, thus avoiding the risk of personal liability. Trustees of pension schemes are usually individuals so this is a very important issue to bear in mind when agreeing to be appointed. (However, corporate bodies sometimes are appointed trustees. That said, individuals who run corporate trust companies are likely to have similar personal accountability, although this point has not been decided in Ireland.)

So what are these obligations and rights?

A trustee's obligations arise irrespective of the size of the fund. Reading the texts and, indeed, the cases on what exactly comprise trustee responsibilities can be quite baffling. There is no clear number specific trustee duties and they can merge into one another and different interpretations and characteristics of trustees' duties have been handed down in case law over the years. That said, the following is a brief run through of the main issues.

Trustees must:

- Account. - At its most basic level a beneficiary is entitled to ask the trustee what has become of the trust fund in which he is interested and the trustee is obliged to provide an account of monies laid out.
- Invest the scheme's assets – but only in accordance with the powers granted by the trust instrument or statute.
- Comply with terms of the trust (e.g. to collect contributions and invest them and to pay the pension benefits in accordance with the rules).
- Not to delegate their intrinsic functions unless expressly permitted.
- Consult appropriate experts and take advice in carrying out their trusteeship.

- Not make a profit from the trust, unless permitted under the terms of the trust.

This central duty is one of the reasons why trustees cannot charge for their services unless authorised under the governing documents. It also explains why pension deeds usually specially permit trustees to act notwithstanding that they may be a scheme beneficiary and that their decisions cannot be challenged on the basis of this conflict of interest.

Conflicts of interest abound in pension schemes, especially since the trustees are likely to be employees and beneficiaries. They may feel under pressure to accommodate employer requests irrespective of their “independent” trustee role. Conflicts of interest are a reality in every day decisions which trustees may be involved in (for example, agreeing the terms of an early retirement/voluntary package which is partially to be funded out of a scheme’s ongoing surplus where one or more of the trustees is potentially a beneficiary of the early retirement/voluntary package programme or dealing with employer requests to amend the plan’s provisions.)

The Pensions Board’s trustee handbook recognises this issue and states at paragraph 2.10.1 “Take advice – conflicts of interest should not necessarily prevent trustees acting in good faith. In situations where trustees are conscious of a possible conflict of interest it may be necessary, before a decision is taken, to obtain legal, actuarial or other professional advice, as appropriate.”

- Understand the terms and provisions of the trust deed and rules.
- At all times act in the best interests of the beneficiaries of the pension scheme as a whole. This does not mean that all beneficiaries must be treated equally but their respective interest in the fund must be considered. Equal weight must be given to each type of beneficiary. The trustees must act fairly. The standard of care which the trustee must apply is to take such care “as an ordinary prudent man would take if he were minded to make an investment for the benefit of the people for whom he felt morally bound to provide”.
- Safeguard the assets. Trustees must ensure that contributions are paid and received.
- Provide for the proper investment of the resources of the scheme in accordance with its rules.
- Make arrangements for the payment of benefits as provided under the rules as they become due.

- Ensure proper membership and financial records are kept.
- Ensure that when the scheme is wound up its resources are applied in accordance with the provisions of the Pensions Act, 1990.
- Register the scheme with the Pensions Board.
- Comply with Revenue rules (where the plan is a Revenue approved one).
- Be mindful of the confidential nature of their trust. In other words, it is inappropriate to disclose confidential data on salary/wage levels, and health information made available to enable the trustees to discharge their duties.
- Comply with data privacy laws.

The above is not an exhaustive list.

Trustees have a range of powers and discretions.

There is a general principle that if the trustees are not empowered to take a certain course of action they are not permitted to do so and cannot do so; so it is of vital importance that the trust documentation setting up the trust or over-riding law (e.g. the Pensions Act, 1990) enables them to give effect to an action which they consider would be appropriate. (For example, the trust deed and rules might be silent in a defined contribution arrangement as to whether the trustees could arrange with the member that the benefits which could be secured at the time of the member's retirement would include a spouse's pension. In such a case, it would be necessary to amend the documentation to enable the purchase of a contingent pension.)

Many of the powers given to trustees enable them to effectively administer and run the pension scheme. (For example, they will be usually given power enabling them to delegate payment of benefits to third parties, enabling them to invest the assets of the plan with the power to appoint an investment manager and custodian for such purpose.)

Some powers are discretionary. Frequently the discretionary powers are only exercisable in conjunction with the sponsoring employer of a plan. However, this is not always so. (Examples of discretionary powers can include the power to deal with surplus either in an on-going situation (when it has been disclosed as a result of an actuarial valuation) or on winding-up the plan. Other examples include the allocation of death-in service lump sum benefits or determining whether early retirement pension can be given on grounds other than ill-health.)

In modern pension documentation the power of amendment of the trust deed and rules is usually exercisable by the trustees with the consent of the sponsoring employer. This power is one of the most important powers which is exercisable by the trustees. It must be exercised properly and with due care and attention. The trustees must only exercise this

power where the entering into the deed can be said to be in the best interests of the beneficiaries as a whole.

It is considered that where trustees have discretionary powers they are required to consider, from time to time, whether it is appropriate to exercise those powers and that they cannot merely keep them in their kitbag and never look at them. Trustees can overlook this point. Where they are fully familiar with the trust deed and rules and are mindful of their obligations this duty will not be overlooked.

Having established what a trustee's duties and discretions are, in a given case, what happens next? The trustee needs to put them into practice in running the plan.

In arranging to look after a well managed pension fund the trustees regularly meet, (e.g. monthly or quarterly) to check how the plan's administration is running and if there are any issues arising. Such meetings enable the trustees to ascertain whether on-going contributions have been received and applied, that no issues arise in relation to pensions and payments or death claims. Investment performance will need to be reviewed (and depending upon the size of the fund in conjunction with the investment manager). Depending upon the circumstances, such a review will be carried out in conjunction with a third party professional.

The whereabouts and identity of assets needs to be verified; membership records need review. Routine business will cover confirmation that annual reports are issuing on time, that Pensions Act disclosure obligations are being complied with in relation to queries or members' booklets and so forth and that the accounts are in order.

Larger pension schemes are usually very well run and their trustees will have attended professional training courses as they are entitled to do, at the expense of the fund, under the Pensions Act, 1990. However, all trustees ought to take the time to attend such courses; the Pensions Board has a list of approved providers on its website.

In practice, tricky situations are likely to stand out like a proverbial sore thumb. They may involve transfer payments where the sponsoring employer is involved in the sale or purchase of a business (or scheme mergers consequent thereon), winding up a scheme, awarding discretionary entitlements (e.g. pension increases, early retirement pensions) altering the benefit structure, dealing with a claim for refund of surplus by the employer. When tricky issues arise in larger pension schemes the opportunity for downside is likely to be greater because the value of assets affected will be correspondingly larger too.

However, sometimes things go wrong. A trustee is in breach of trust if he or she fails to perform the duties required of him or her or acts in an unauthorised manner. It is necessary for the members to establish conduct which, in the opinion of the court, amounts to a breach of trust. In that event, the trustee has a personal exposure (and the same may be true of directors of trust companies).

Trustees are liable only for their own acts or omissions and not acts committed by co-trustees. But if a trustee turns a “blind eye” this can be regarded as sufficient grounds for imposing liability.

Since trustee liability is personal, trustees are not responsible for breaches of trust committed by their predecessors or by their successors. However, a new trustee must make reasonable enquiries and obtain relevant information about the affairs of the trust on being appointed. Having made such investigations (subject to the outcome of the enquiries) the new trustee is entitled to assume that there have been no prior breaches.

In relation to successor trustees, the fact that the actual event causing the loss to occur happened after a trustee has ceased to be such may not exonerate that trustee from personal liability if the termination of trusteeship took place in contemplation of the breach occurring.

The standard of care required of trustees in exercising their powers, duties and discretions is determined by reference to decided cases.

Because of the personal nature of trusteeship it is usual for pension deeds to contain a formal exoneration clause. In other words, under the trust documentation, trustees may be granted wide exoneration from primary liability. This will be drafted with a view to preventing trustees from being liable for certain losses. Also, trustees have the benefit of a statutory exoneration but this has been interpreted to have a narrow application.

Where two or more trustees are involved in a breach of trust, liability is joint and several, so each is liable in respect of the whole loss although all may not have been equally blameworthy. Judgement may be enforced against any one or more of them. Where this happened they can claim a pro rata reimbursement from their co-trustees.

As well as the exoneration clause there may also be an indemnity clause in the pension documentation. This clause will usually say that if the trustee is found in breach of trust the employer will indemnify the trustee for any amount which the trustee has to pay as a result from the breach. Generally, the provisions cover all personal liability unless the trustee is guilty of fraud. Commonly, where professional trustees are employed the indemnity will not apply if the trustee is guilty of negligence. It is also common for the trust deed to say that if the employer fails to indemnify the trustee, the trustee will be indemnified out of the fund. This can be very hard on the members where the breach of trust gives rise to an actual loss to the fund. The indemnity procedure will, of course, just mean that any loss which the trustee has made good will be reimbursed by the employer. It will not exonerate the trustee from the effects of possible legal proceedings by the members proving the breach and seeking recompense.

In defending any proceedings relating to whether trustees have acted appropriately in the exercise of their powers it is settled that they are not required to give reasons for their decisions. However, it is always open to the court to set aside or overturn their decision on the grounds that on the facts, notwithstanding that no reasons for it have been given, it is perverse; but this would be unusual.

The best advice is, of course, to carry out the trust role responsibly and in a way which cannot be criticised. In other words, when in doubt seek independent advice.

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