Neutral Citation Number: [2023] EWHC 2 (Ch)

Case No: HC-2016-003617

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PENSIONS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 January 2023

Before :

DEPUTY MASTER BRIGHTWELL

- -

Between :

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CROYDON	**Claimant**
- and -	
OASIS COMMUNITY LEARNING	**Defendant**

- -
- -

Sebastian Allen (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Nigel Giffin KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 26 September 2022

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Wednesday 4 January 2023.

Deputy Master Brightwell:

Introduction

1. This is an application by the defendant to amend its defence and counterclaim in these pension proceedings, opposed by the claimant on the ground that it seeks to raise a new claim after a period of limitation has expired and not arising out of the same facts or substantially the same facts out of which the defendant has already claimed a remedy. Some explanation of the background to the claim is first required in order to understand the application before the court.

2. In these debt proceedings issued in December 2016, the claimant is acting as administering authority for the London Borough of Croydon Pension Fund, which is part of the Local Government Pension Scheme (the "LGPS"). It claims the payment of unpaid secondary contributions said to be due from the defendant in respect of a rates and adjustment certificate issued in 2014 pursuant to regulation 36 of the Local Government Pension Scheme (Administration) Regulations 2008, SI 2008/239. The defendant is a scheme employer for the purposes of the LGPS, and is the proprietor (so far as is relevant for the purposes of this application) of four academies, formerly under local authority control as maintained schools. The four academies are:

   i) Oasis Academy Shirley Park ("Shirley Park"), which converted from maintained status on or around 1 September 2009.

   ii) Oasis Academy Coulsdon ("Coulsdon"), which converted on or around 1 September 2008.

   iii) Oasis Academy Ryelands ("Ryelands"), which converted on or around 1 May 2014.

   iv) Oasis Academy Byron ("Byron"), which converted on or around 1 September 2012.

3. The teaching staff of the academies are generally members of the Teachers' Pension Scheme. It is other staff of the defendant who are relevant members of the Fund. The dispute arises as a result of the allocation of the past service deficit of the Fund upon the conversion of each academy.

4. The debt proceedings were stayed by an order of Master Matthews dated 16 January 2017, pending the determination of a complaint by the defendant to the Pensions Ombudsman.

5. By that complaint, the defendant challenged the method adopted by the claimant in setting the deficit reduction contributions required from the defendant in complying or purportedly complying with regulation 36 of the 2008 Regulations. The issue raised before the Pensions Ombudsman was the past service adjustment, and in particular the

question of what deficit had been attributed to the employer at the valuation date. The rates set under a rates and adjustment certificate must both enable future benefits accruing from the valuation date to be met, and also to eliminate over an appropriate period the deficit which has been revealed.

6. The defendant's case summary explains the point thus:

> "Fundamentally, the issue is this. Contribution rates need not be the same for all employers, because the legislation allows the contributions rate to be 'increased or reduced by reason of any circumstances peculiar to that employer'. In relation to deficit contributions, it is typical for employers to be called upon to meet, over an appropriate period in that employer's circumstances, whatever portion of the overall fund deficit is treated as properly attributable to that employer. One approach to that exercise in the academy conversion scenario (which was followed here) is notionally to allocate a certain share of the fund assets to the academy proprietor at the time of conversion, but with that initial notional asset allocation being based upon attribution of a share of the deficit at the point of calculation. The substantive issue is whether, for these four academy conversions, the Claimant and/or the fund actuary has acted lawfully in the way that a share of deficit has been attributed to the Defendant."

7. The defendant alleged before the Pensions Ombudsman that the claimant's decision to adopt what a report of its actuary dated 16 September 2011 called "Method B" was unlawful. Method B is also known as the "non-active cover method", and was one of two methods identified by the actuary. The other has been called the "actives only" approach, as a proportionate share of the deferred and pensioner members is not attributed to the academy. The defendant has complained that Method B could not lawfully be adopted as it made the defendant responsible for a deficit attributable to persons whom the defendant had never employed. Method B, as the defendant alleges, was based upon the attribution of a share of fund assets to the school in question, with a notional retention by the claimant of enough of those assets to cover the deficit relating to deferred and pensioner members, with the balance notionally allocated to the defendant but with such balance reduced to take account of the deficit attributable to those who never became its employees.

8. The defendant's assumption in the appeal to the Pensions Ombudsman and, indeed in the existing defence and counterclaim in the debt proceedings, was that Method B had been adopted in relation to the conversion of all four academies. As will be discussed further below, it has transpired since the Ombudsman's determination that it was in fact adopted for the later conversions of Byron and Ryelands, but not for Shirley Park and Coulsdon. Upon or following those earlier conversions (when the conversion process was new and not well established), the claimant adopted the "proportionate transfer of deficit" approach. The claimant has pleaded (in response 7 of the response dated 5 August 2022 to a Part 18 request made by the defendant) that the

proportionate transfer of deficit approach operated in relation to Coulsdon and Shirley Park as follows:

> "This involved nominally allocating the deficit in the Fund emerging from the 2007 valuation to Oasis in proportion to the payrolls of the Defendant and the Claimant. Under this method — which was not the same as Method B — the academy would then have allocated to it such assets as gave effect to that proportion of the deficit, which in the case of both Coulsdon and Shirley Park was zero because their proportions of the deficit exceeded the value of the liabilities in relation to the active LGPS members being transferred."

9. This methodology, applied in relation to Coulsdon and Shirley Park, is said to have been set out in reports from the then Fund actuary dated 22 June and 10 November 2010 respectively, and then approved by the claimant.

10. By a determination dated 4 May 2021, the Pensions Ombudsman dismissed the defendant's complaint. By an order dated 30 July 2021, Bacon J granted permission to the defendant to appeal that dismissal.

11. The stay in the debt proceedings imposed in 2017 was initially extended but, by an order of Leech J dated 21 January 2022, it was directed that the appeal should in the future be case managed jointly with the debt proceedings to the extent that any further case management directions are required in the appeal. This was so as to enable the defendant to pursue arguments not available before the Pensions Ombudsman that the transfer agreement entered into between the parties upon the conversion of each academy contractually prevented the claimant from requiring the defendant to meet the costs of pensionable service in respect of persons who had before the date of the conversion in question ceased to work at the relevant academy, alternatively imposed on the claimant an obligation to indemnify the defendant against any such liability. Furthermore, the defendant has brought an original counterclaim (i.e. for the purposes of Limitation Act 1980, s.35(3)) seeking the repayment from the claimant of sums paid under what is said to be the claimant's unlawful approach, but giving credit for those sums which are said to be the maximum that could have been demanded under a valid and lawful approach. That counterclaim seeks the repayment of sums paid back to the year to 31 March 2009 in the case of Coulsdon, and back to the year to 31 March 2010 in the case of Shirley Park.

12. Further statements of case in the debt proceedings have been filed and served and the hearing before me was initially listed as a case management conference in the debt proceedings. Shortly before the hearing, however, it became clear that the defendant's request for consent to its proposed amendments would not be granted and an application by the defendant to amend its defence and counterclaim was issued on 20 September 2022. This meant that the parties prepared speedily for what might have been viewed as a heavy application and the skeleton arguments were conspicuously brief given the complexity of the issues involved, but both parties were

keen to proceed with the application. The application is unopposed in several respects and I deal here only with those aspects which are opposed.

13. In paragraphs 31 to 45 of the defence, the defendant argues that no rates and adjustment certificate could properly have required the defendant to make contributions at the secondary rate in respect of the cost of providing pensions to individuals whom the defendant had never employed. This section of the defence both alleges a breach of the transfer agreements in this regard, and at paragraphs 38 and 39 explicitly incorporates paragraph 18(i) to (iii) of the Grounds of Appeal in the appeal against the determination of the Pensions Ombudsman in alleging that the claimant erred in its approach taken to the setting of secondary contributions. The arguments raised in the appeal are thus brought within the debt proceedings in order to enable the defendant to pursue its counterclaim. Paragraph 18 of the Grounds of Appeal alleges that the Ombudsman erred in law as follows:

> "(i) Under the relevant legislative provisions (as set out at paragraph 83 of the Determination), any adjustments to the primary employer contribution rate in the case of individual employers had to be ones which should be made 'in the actuary's opinion'. The Ombudsman should have held that, on the evidence, the actuary had not expressed any opinion as to whether Method A or Method B should be adopted. Rather, the choice had improperly been left to the Pension Committee itself.
>
> (ii) Further, whilst the actuary's report had stated that proponents of Method B 'argue that it is "fairer" [the actuary's inverted commas]', the actuary had not itself endorsed that view. Also, the only reason given in the report for preferring Method B was that it offered 'more protection for the Council', which had nothing to do with fairness, but was simply a matter of offering a better financial outcome to the Respondent in its capacity as a scheme employer (not in its capacity as administering authority). Accordingly, the Ombudsman –
>
> > (a) Erred in concluding that the choice of Method B was supported by professional advice;
> >
> > (b) Ought to have held that the only reason put before the Pension Committee (and, by implication, adopted by it) for preferring Method B was that it would advantage the Respondent in its capacity as a scheme employer, and that for the Respondent to prefer its own interests in such a manner was inequitable, maladministrative and unlawful, representing in particular a breach of the Respondent's fiduciary duty as administering authority, and a breach of its public law duty to exercise its powers for proper purposes; and

(c) Ought to have held that Method B was intrinsically unfair and inappropriate and could not be adopted rationally or in accordance with the Respondent's fiduciary duties as administering authority.

(iii) The Ombudsman ought in any event to have held that the Pension Committee's consideration of the matter was so inadequate as to be unlawful and to amount to maladministration, on the basis that –

(a) The report to the Pension Committee in November 2011 by the Respondent's Head of Pensions and Treasury ('the HPT report') merely reproduced sections of the actuary's report. It made no attempt to advise members of the Pension Committee as to their proper role and how it should be approached.

(b) Neither the HPT report nor the actuary's report made any attempt to set out in a clear or even-handed manner the arguments for and against adopting Method A or Method B.

(c) On neither of the subsequent occasions upon which the Pension Committee resolved to continue the existing approach in this and other respects was there any further substantive consideration of this issue."

14. It can thus be seen that this sets out three ways in which it is alleged that the claimant followed an unlawful or unfair procedure in reaching the decision to apply Method B when setting secondary contributions, and with reference to the notional allocation of Fund assets and liabilities which, it was common ground before me, is a once and for all exercise carried out at the point of conversion. This is a distinct line of argument from that which alleges that the actuary was not entitled to specify secondary contributions whose intention and effect was to make the defendant responsible for those never employed by it (although there is some overlap in paragraph 18). That latter argument is pleaded at paragraphs 36 and 37 of the defence, and the claimant has consented to amendments which enable the addition of a new paragraph 36A and for this point to be argued in relation to all four academies.

15. The disputed proposed amendment is contained within paragraph 39A of the draft amended defence and counterclaim, having already set out in new paragraph 36A that the proportionate transfer of deficit approach had been adopted by the claimant on the conversion of Coulsdon and Shirley Park. Paragraph 39A pleads:

"In the case of Coulsdon and Shirley Park, the Claimant has yet to disclose any material showing the basis upon which or the reasons why the proportionate transfer of deficit approach was adopted, save for two letters from the then fund actuary dated 22 June 2010 and 10 November 2010, and relating to Coulsdon and Shirley Park respectively. However, so far appears from those

> letters, no analysis of or justification for the approach taken was produced until well over a year after the respective conversions, no consideration was given to any specific alternatives, and the only reason given for the adoption of the proportionate transfer of deficit methodology (apart from that of consistency with unspecified 'recent similar cases') was that it aimed to '[keep] the deficit recovery contribution rate of Croydon Council the same before and after the transfer of staff'. This aim was not a legally relevant consideration or a proper purpose for which to approach the setting of contributions for the Defendant as an employer, because it did not give effect to the statutory requirement, as set out in paragraph 17 above, that the secondary rate of contributions should reflect (only) 'circumstances peculiar to that employer'. Further, the methodology described in the 22 June 2010 and 10 November 2010 letters appears not to be based on any attempt to assess what deficit was properly attributable to those who actually were or had been employed at Coulsdon or Shirley Park, as opposed to the Claimant's workforce generally. For these reasons, and pending further disclosure, the Defendant's case is that the decisions taken in relation to notional asset allocation, and the subsequent demands for contributions based upon that allocation, were unlawful."

The application

16. The defendant's application to amend engages CPR 17.4(2) because the claimant contends that the disputed amendment, both as an allegation in the defence and also through its proposed incorporation into the counterclaim, is brought after the expiry of a period of limitation.

17. The four-stage approach applied by the court when determining whether to grant permission for disputed amendments is set out in *Re One Blackfriars Ltd (in liq.); Hyde (as joint liquidators of One Blackfriars Ltd v Nygate*) [2019] EWHC 1516 (Ch) at [26]. The test is as follows:

> "Q1. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to Q2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (Stage 1).
>
> Q2. Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to Q3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (Stage 2).
>
> Q3. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the Court has no discretion to permit the amendment (Stage 3).

Q4. If the answer to Q3 is yes the Court has a discretion to allow the amendment. (Stage 4)."

18. The judgment set out, at [29]–[30] and [32]–[33], a helpful summary of the approach to be applied at the second and third stage, as derived from the most recent cases:

> "29. I derived most assistance from (a) two recent decisions of the Court of Appeal namely: *Mastercard v Deutsche Bahn AG* [2017] EWCA Civ 272 and *Samba Financial Group v Byers and Others* [2019] EWCA Civ 416 and (b) *Diamandis v Willis* [2015] EWHC 312 (Ch) which helpfully draws together and accurately summarises the main Court of Appeal decisions prior to *Mastercard* and *Samba*.
>
> 30. The four points which I derive from *Mastercard* are as follows:
>
> 30.1 Whether a new claim arises out of the same or substantially the same facts as an existing claim is not a matter of discretion or case management but is a substantive question of law which depends on analysis and evaluation to obtain the correct answer [35] & [36].
>
> 30.2 Care needs to be taken with *Goode v Martin* [2001] EWCA Civ 1559. An important feature of that case is that in order to make out her newly formulated claim, the claimant did not need to plead <u>any</u> additional facts beyond those already in the defence [42].
>
> 30.3 Differences in the nature and scope of <u>counterfactual</u> matters between an existing claim and a new claim can amount to a substantial difference for the purpose of Stage 2 as defined above [46].
>
> 30.4 An applicant may not generally rely on new facts pleaded in a Reply as being facts already in issue for the purpose of Stage 2 as defined above [64].
>
> ….
>
> 32. As to the *Samba* case, I take the following four points from it:
>
> 32.1 It is of critical importance to carry out a careful comparative evaluation of the scope and nature of the facts in issue in the existing claim and the facts alleged in the new claim [49].
>
> 32.2 If on evaluation, the new claim is of an entirely different character from the existing claim, the threshold for permission will not be met. Broadly similar allegations, implicitly made or understood will not do [50].
>
> 32.3 In the vast majority of cases, what is 'in issue' in an existing claim will usually be determined by examination of the pleadings alone. It will be the

primary, and probably the only, source of material for deciding the question [52].

32.4 A fact which the other party may or may not need to plead or respond to is not a fact already 'in issue' in the original claim. It is important to recall what was said about the policy underlying Section 35 of the Limitation Act by Hobhouse LJ in *Lloyds Bank v Rogers* [1997] TLR 154:

> "The policy of the section was that if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts." (emphasis added by Floyd LJ) [57]."

33. The helpful assistance on the content of Stages 2 and 3 from *Diamandis* which I set out below has to be read in light of *Mastercard* and *Samba*:

Stage 2

"[48] As regards Stage 2 ('new cause of action') from the recent analysis of the authorities by Longmore LJ in *Berezovsky v Abramovich* §§59 to 69, the following principles arise:

(1) The 'cause of action' is that combination of facts which gives rise to a legal right; (it is the 'factual situation' rather than a form of action used as a convenient description of a particular category of factual situation: *Lloyds Bank v Rogers* at 85F and *Aldi Stores* at §21).

(2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made: *Darlington* at 370C-D and see also *Berezovsky* §59. (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).

(3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the

highest level of abstraction. *Berezovsky* §60 citing *Cooke v Gill* (1873) LR 8 CP 107 and *Paragon Finance*.

(4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading: *Berezovsky* §§61 and 62.

(5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: *Berezovsky* §64 and *Aldi* §26. Nor is the addition of a new remedy, particularly where the amendment does not add to the 'factual situation' already pleaded: *Lloyds Bank v Rogers* per Auld LJ at 85K.

Stage 3

[49] As regards stage 3 ("arising out of the same or substantially the same facts") a number of points emerge, particularly from *Ballinger* [*v Mercer Ltd* [2014] 1 WLR 3597] at §§34 to 38:

(1) 'Same or substantially the same' is not synonymous with 'similar'.

(2) Whilst in borderline cases, the answer to this question is or may be substantially a 'matter of impression', in others, it must be a question of analysis: *Ballinger* §§35 and 36.

(3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

(4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate: *Ballinger* §38. At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial: *Finlan* at §§56 and 57 citing *Smith v Henniker-Major* at §96.

(5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence: see *Berezovsky* §73 and *Goode v Martin* [2002] 1 WLR 1828 where the Court of Appeal interpreted CPR 17.4(2) so as to produce a just result where an amendment involved the introduction of no new facts. There the facts in

> question had been raised in the defence, though not in the original statement of claim."

19. With that summary in mind, I bear in mind that in the context of this application the first and second questions are connected. There is a question whether paragraph 39A is a pure defence, or a counterclaim in its own right, separate from its introduction into the counterclaim in support of a claim that the assets in the Fund be reallocated or that the defendant be repaid the amounts alleged to have been wrongly demanded by the claimant and paid over. A defence properly so-called cannot be time barred: McGee, *Limitation Periods*, 9th edn, 23-076, citing *Henriksens Rederi A/S v THZ Rolimpex* [1974] QB 233. The Court of Appeal in that case held that a set off or counterclaim arising out of the same transaction from that on which the claimant relies was not within section 28 of the Limitation Act 1939 (the precursor of section 35(1) of the Limitation Act 1980). If the proposed amendment arises out of the same transaction as is raised by the claim, there will be a pure defence.

20. Mr Giffin KC, representing the defendant on the application, submits that proposed paragraph 39A is a pure defence. He also says that it is a public law defence, which can always be relied on as a defence to a private law claim. For that proposition he relies on statements such as that of Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [70], where it is clear that judicial review (i.e. with its three-month time limit) need not be obtained as a condition for defending the proceedings.

21. Mr Giffin further submits, by reference to the categorisation explained in the *Henriksens Rederi* case at 247–248, as summarised by McGee at 23.077, that this is a counterclaim that goes directly in diminution of the sums due to the claimant and is thus to be treated as a pure defence for that reason. It is clear from that case that for such a counterclaim to be a true defence it must arise out of the same transaction as the claim: see at 233F, where Lord Denning MR begins his discussion by so saying (and the sub-heading says likewise).

22. Mr Allen, appearing for claimant, accepts that the claimant has public law duties in its capacity as administering authority for the Fund. He submits, however, that for present purposes the duties which the defendant by paragraph 39A alleges have been breached are fiduciary duties. Furthermore, the Supreme Court has held, in *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774 that an administering authority for the LGPS is a quasi-trustee. At [12], Lord Wilson JSC said this:

> "On 30 June 2014, some two years prior to the issue of the guidance, the Law Commission of England and Wales had, following consultation, published a report entitled *Fiduciary Duties of Investment Intermediaries* (2014) (Law Com No 350). The government had generally accepted the Commission's recommendations; and, as will become clear, the report, which in places

> specifically addressed the local government scheme, clearly influenced the drafting of part of the guidance. It is therefore worthwhile to keep in mind the following statements in the report: (a) at para 4.3(3), that the local government scheme was not technically a trust but that at a practical level the duties of those managing its assets were similar to those of trustees; (b) at para 4.79, that in practice administering authorities under the scheme considered themselves to be quasi-trustees, acting in the best interests of their members, and that, in so far as they might consider whether to take account of wider or non-financial factors in relation to investment, the rules applicable to pension fund trustees should also apply to them, and (c)…."

23. Accordingly, the claimant submits, the attempted challenge by the defendant to the procedure adopted by the claimant in the allocation of assets upon the conversion of Coulsdon and Shirley Park involves a claim that the claimant acted in breach of trust in 2010. The claimant therefore contends that paragraph 39A on analysis involves a counterclaim in respect of an alleged breach of trust, not arising from the same transaction as the claim, which is barred by section 21(3) of the Limitation Act 1980. That subsection provides:

> "Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."

24. Mr Giffin submits that this analysis is wrong. He argues that the LGPS does not create a trust (which is confirmed by the Supreme Court in the *PSC* case). Whilst he recognises that the defendant alleges breach of fiduciary duty by the claimant, as well as breach of its public law duties, section 21(3) cannot be extended to such a breach by the application of section 36 of the Limitation Act 1980, because no equitable relief is claimed; the defendant's counterclaim is a claim in restitution. Mr Giffin submitted that a party who is relying on a breach of fiduciary duty on the way to seeking a common law remedy is not to be taken to seek equitable relief. Finally, he submitted that section 21(3) applies only to claims brought by a beneficiary, and on any view the defendant is not a beneficiary under any trust or quasi-trust.

Stage 1

25. With those submissions in mind, I turn to the questions I must ask myself. The first is whether it is reasonably arguable that paragraph 39A raises a claim that is outside the applicable limitation period. The formulation of the question perhaps presupposes that the court is able to determine what the relevant limitation period would be, with arguments about applicability often turning on disputes about the facts. In this case, there is no agreement on the relevant period, or even on the correct characterisation of

the amendment, both as to whether it is a counterclaim or a true defence and, if the former, as to what cause of action it involves.

26. Paragraph 39A pleads that the claimant took into account irrelevant considerations and acted for an improper purpose by reference to actuary's letters in 2010. It can therefore be seen as an allegation that the claimant acted in breach of both its public law and fiduciary duties. Paragraph 18(ii) and (iii) of the Grounds of Appeal in the appeal, concerned with the adoption of Method B in 2011, argues that the alleged procedural flaws were breaches of both public law and fiduciary duties.

27. The interaction between the public law and fiduciary duties of an administering authority for the purposes of the LGPS is a matter of some uncertainty and I have not received submissions as to the precise boundary between the two. That this boundary is not clearly established in authority would seem to be evident from the defendant's skeleton argument in support of its (successful) application for permission to appeal the decision of the Pensions Ombudsman. This explains, consistent with the *PSC* decision, that an administering authority is a public body exercising statutory functions of a public nature and is accordingly subject to normal public law principles, including the obligation to exercise powers for a proper purpose and the obligation to have regard to relevant, and to disregard irrelevant, considerations.

28. The defendant's skeleton argument in support of the appeal then goes on to argue that the administering authority owes fiduciary duties to employers such as the defendant, which mean that it must act even-handedly between the different scheme employers and that it may not use its unique position to favour its own interests over interests of the scheme members or those of other scheme employers. As the Law Commission report referred to at [22] above, and cited by the Supreme Court in the *PSC* case, uncontroversially explains (at 3.48 to 3.50, and 3.62 to 3.65) the obligation to exercise powers for a proper purpose and taking account of only relevant considerations are also incidents of the exercise by a fiduciary of a power. Mr Allen drew my attention in this regard to the classification of Lord Walker of Gestingthorpe JSC in *Pitt v Holt* [2013] 2 AC 108 at [60] of such challenges to the exercise of a trustee's powers under the *Hastings-Bass* rule, and to the fact (see at [93]) that in such cases the trustee's act is voidable and not void, at least where there is no fraud on the power. He thus distinguished the challenges (whether or not already pleaded) to the process adopted by the claimant from the challenge to the outcome on the grounds of unlawfulness or irrationality, i.e. that the claimant was not entitled to place the burden of meeting the deficit attributable to deferred and pensioner members onto the defendant.

29. Whilst this was not drawn to my attention, I note that the defendant specifically argues in the appeal that an administering authority owes a fiduciary duty to the other scheme employers. In the context of a defined benefit scheme, the Law Commission report likewise expressed itself thus (at 5.29):

> "Clearly, in economic terms, the employer has an interest in the performance of the scheme. However, it is less clear how far the law obliges trustees to take into account the interests of the employer. In many cases, the employer will be an express beneficiary under the terms of the trust. The trust instrument may, for example, include provisions allowing for the payment of a surplus to the employer, even where the scheme is ongoing. However, in the absence of express provision, employers are not beneficiaries under the scheme: and there is some debate in England & Wales over whether they may be considered a 'quasi-beneficiary'."

30. This discussion leads me to the conclusion that there is a reasonable argument that in order to make good the allegations in paragraph 39A the defendant would have to establish a breach of a fiduciary duty owed to it as an employer by the claimant acting as quasi-trustee in the sense explained by the majority in the Supreme Court in the *PSC* case. I also consider it to flow from this that it is also reasonably arguable that the defendant is to be treated as a beneficiary of a quasi-trust and to be treated as pursuing a claim for or in respect of a breach of trust when challenging the process followed by the claimant in notionally allocating assets and liabilities upon the conversion of each academy.

31. In *Central Bank of Nigeria v Williams* [2014] 1 AC 1189, a claim concerned with the application of section 21 of the Limitation Act 1980 to claims in accessory liability, and thus to the application of the section to constructive trustees, Lord Sumption JSC at [9] said this of what are known as constructive trustees of the first kind:

> "The problem is that … the phrase 'constructive trust' refers to two different things to which very different legal considerations apply. The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations."

32. While the case was concerned with the applicability of section 21(1), this discussion shows that for a person to be treated as a trustee for the purpose of the Act, what is required is the lawful and voluntary assumption of fiduciary obligations in relation to trust property, and an intention to act as trustees. The reference to company directors may also be relevant in the context of the LGPS, directors also being treated as quasi-trustees in some respects.

33. Despite it being established that the LGPS does not constitute a trust, it is also established that an administering authority does intend to assume fiduciary obligations as quasi-trustee in relation to property it administers but does not own beneficially. Those fiduciary duties are owed to the members of the scheme and, arguably, to the other employers such as the defendant. The defendant argues that the claimant breached those fiduciary duties in 2010, in a manner which affected the secondary contributions paid (and, according to the defendant, overpaid) in the years thereafter. I therefore consider it to be reasonably arguable that section 21(3) of the 1980 Act applies and that the amendment sought to be introduced by paragraph 39A is outside the relevant limitation period.

34. Furthermore, I do not consider that the allegations in paragraph 39A arise from the same transaction as those relied on by the claimant in the amended particulars of claim. The claimant relies on the rates and adjustment certificate issued by it in 2014, following an actuarial valuation of the assets and liabilities of the Fund as at 31 March 2013. Whilst the initial notional allocation of assets and liabilities upon conversion of an academy forms the basis of each triennial valuation and subsequent certificate, the determination of that initial funding position is a distinct exercise from the actuarial valuation and issuing of a rates and adjustment certificate as was required under regulation 36 of the 2008 Regulations. The initial notional allocation previously made was an assumption that informed that exercise but no reconsideration of it was part of the exercise. Accordingly, in accordance with the principles discussed in the *Henriksens Rederi* case, the defendant's claim falls to be treated as a counterclaim even though it is formally placed within the defence as well as being incorporated into the counterclaim. It is not a pure defence.

35. Mr Giffin did not argue that the defendant relied in relation to paragraph 39A only on alleged breaches of public law duties, eschewing any reliance on any breach of fiduciary duty. His formulation expressly stated that there was a breach of fiduciary duty on the way to a common law remedy. I do not consider that I am able in the context of an amendment application to determine whether the alleged breach of public law duties would, if established, suffice to entitle the defendant to the relief it seeks. Not least in circumstances where I have heard no submissions on this point, I consider it to be reasonably arguable that the public law arguments alone would not suffice.

36. It is reasonably arguable that the claimant is a trustee for the purposes of section 21, and that paragraph 39A seeks to introduce a claim in respect of a breach of trust by a person who is owed fiduciary duties and is thus to be treated as a beneficiary. I also consider it to be arguable that section 2 of the 1980 Act (which provides for a six-year period of limitation for claims in tort) applies by analogy by reason of section 36, the challenge to the allocation decisions being a claim for equitable relief concerning an alleged breach of fiduciary duty. Mr Giffin did not accept that the defendant was seeking equitable relief but, again, I consider it to be arguable that public law relief

does not suffice for the defendant's purposes, either in its defence or in its counterclaim.

37. Mr Giffin suggested in his reply that, if necessary, the defendant would rely on the contention that the claimant did not know of the methodology adopted by the claimant on the conversion of Coulsdon and Shirley Park until receipt of the Part 18 response of 5 August 2022. In order to invoke section 32(1)(c) of the Limitation Act 1980, the cause of action must arise out of the mistake in question: McGee at 20.052. Any allegation of deliberate concealment by the claimant (and it is not clear whether such allegation is being made) would no doubt be contested and I assume that it would be reasonably arguable that there was no such deliberate concealment. This point, accordingly, does not affect my decision as to stage 1.

Stage 2

38. The second question to be addressed is whether paragraph 39A would add a new cause of action. I refer to the summary of the test set out by the Judge in the *One Blackfriars Ltd* case: see at [18] above. It is to be recalled that the defendant seeks by paragraph 39A to introduce an allegation that the adoption by the claimant of the proportionate transfer of deficit approach in 2010 was based upon legally irrelevant considerations or taken for an improper purpose.

39. With that test in mind, Mr Giffin submitted that paragraph 39A introduced no new cause of action. He said that the remedy sought by the defendant was entirely unchanged, and that the basis of the claim was the same as was already pleaded. This was that the claimant's demand was invalid because of the same basic complaint; the notional allocation of assets and liabilities in relation to Coulsdon and Shirley Park was flawed by procedural error. The same duty was in issue: the decision should be taken by the right person in accordance with the fiduciary duties and public law obligations owed by the administering authority. It is already pleaded that the decision has been made in the wrong manner; the new allegations are not materially different but only relate to a different date. It is already alleged that the cost of meeting the Fund's deficit has been loaded onto the defendant without proper consideration of the relevant factors.

40. Mr Giffin relied on *Savings and Investments Bank Ltd v Fincken* [2001] EWCA Civ 1638 at [32], where Peter Gibson LJ considered an application to amend a claim for rescission of a deed of settlement for breach of warranty for non-disclosure of assets where the amendment sought to introduce an allegation that further assets had not been disclosed. He said that the new allegation was a mere further instance or particular of how the warranty was breached by non-disclosure. I would also note what he said at [31]: "Where by an amendment a duty or obligation is pleaded which differs from the duty or obligation pleaded in the original pleading, there is likely to be a new cause of action".

41. A further statement of the application of the test at stage 2 is found in *Henniker-Major* at [96], where Robert Walker LJ said that, "in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading".

42. The conclusion I have reached is that paragraph 39A seeks to introduce a new cause of action:

    i) It is important to bear in mind that this paragraph (and paragraphs 38 to 40) alleges that the method of allocating assets and liabilities was reached by a flawed process. The disputed part of the application is thus concerned with that allegation. The separate allegation that Method B and the proportionate transfer of deficit approach were impermissible outcomes, because they required the defendant to make secondary contributions in respect of the cost of providing pensions to individuals whom the defendant had never employed, is pleaded above, including in amendments to which the claimant has consented.

    ii) I have to consider whether the factual situation is different from that already pleaded, and to do that by comparing the original and proposed amended pleadings at the highest level of abstraction. One of the essential facts which must be pleaded when challenging a decision is of course the decision itself. The decision impugned at paragraph 39A is an entirely different decision from that impugned by paragraph 38 and by the Ombudsman appeal. This is not the mere addition of further particulars of an existing allegation of breach of duty. This is so even though the fiduciary and public law duties upon the claimant will have been the same. The facts and circumstances informing the application of those duties at different times may have been different, as may the guidance available to administering authorities.

    iii) The proportionate transfer of deficit approach is a different approach from Method B even if it suffered from what the defendant contends to be a similar defect. The allegation that it was adopted for an improper purpose and as a result of inadequate deliberation cannot be assumed to replicate the particulars of the allegation concerning the adoption of Method B at a different time. It may be surmised that as a different decision was reached, the considerations taken into account may have been different. Such purposes and considerations will form part of the bare minimum of essential facts in the proposed new allegations, as a necessary part of the allegation of breach of duty.

    iv) There is no incorporation into paragraph 39A of any part of paragraph 18 of the Grounds of Appeal in the Ombudsman appeal; that is because the particulars of the alleged procedural flaws in the adoption of Method B do not apply to the adoption of the proportionate transfer of deficit approach in 2010.

The particularised complaints about the adoption of Method B are conspicuously fact sensitive.

v) The fact that the defendant does not seek a different remedy is not instructive. What is important is an analysis of the facts on which the defendant relies. Whilst it is true that, in some cases, the introduction of a claim to a different remedy on already pleaded facts will not constitute a new cause of action, the same reasoning does not necessarily follow in reverse.

43. Reliance was also made by Mr Giffin on the final sentence of paragraph 40 of the (unamended) defence. This reads as follows: "The Claimant has not yet seen evidence of the decision-making relevant to the 2008 and 2011 Certificates, but until such evidence has been produced, will contend that it is to be inferred that a similarly erroneous approach underlay those Certificates also". I do not consider that this sentence assists the defendant. It is no more than an implicit allegation that the notional allocation of assets for Coulsdon and Shirley Park also followed Method B (which is now not pursued). It cannot comprise an allegation that an entirely different decision was reached and was flawed for different, even if possibly related, reasons.

Stage 3

44. I am accordingly required to consider whether the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the defendant has already claimed a remedy in the proceedings: CPR 17.4(2). In doing so, I take account of the summary contained in the *One Blackfriars* case set out above.

45. Mr Giffin essentially adopted the submissions he had made at stage 2 on this point. He said that the defendant had already pleaded that the process by which the decisions were taken in relation to Coulsdon and Shirley Park was flawed. He further submitted that there was literally no expansion in the investigation that will be required. In that regard, he pointed to *One Blackfriars* at [71], where it was said that the court should at stage 3 consider what factual issues are already likely to arise at trial and, at [73], that one should avoid being distracted by differences that are only of peripheral importance. See too *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549 at 558 (cited in *Ballinger* at [34], and relied on by the defendant as it has later been approved):

> "The purpose [of the qualification to the power to amend] is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim."

46. Whilst it is not the end of the enquiry, I consider that the matters I have set out at [42] above are relevant to stage 3 as well. Before looking at the factual enquiry which the

court would carry out, they show that a different breach of duty is pleaded from the breach which is pleaded at paragraph 39 of the defence in relation to Byron and Ryelands. I again consider that the final sentence of paragraph 40 does not make any separate allegation concerning the methodology adopted in relation to Coulsdon and Shirley Park.

47. I agree with Mr Allen that if the amendment were permitted, the claimant would be required to carry out a different factual enquiry from that which will be required in relation to the process leading to the adoption of Method B. No complaint has been pleaded, in the defence and counterclaim or in the Ombudsman appeal, about the role of the actuary and of the claimant in 2010 or of the process by which the proportionate transfer of deficit approach came to be adopted by the claimant as an administering authority.

48. Mr Giffin is correct to say that the intrinsic unfairness of the allocation of assets is already pleaded, both on the basis of the transfer agreements, and in any event because a deficit in respect of deferred and pensioner members could not amount to a "circumstance peculiar to" the defendant as employer. The claimant has consented to an amendment to paragraph 37 of the defence which will enable the defendant to argue that the allocation decision in relation to Coulsdon and Shirley Park was inherently unlawful. It is not a relevant factor when considering paragraph 39A, which is concerned with the propriety of the process followed by the claimant in relation to Coulsdon and Shirley Park.

49. It is not possible to say at this juncture how extensive the additional factual enquiry would be if the amendment were permitted. That is partly because paragraph 39A is to an extent dependent on the need to provide further particularisation once disclosure has been granted. Such particulars as are given in paragraph 39A relate to the lack of consideration allegedly given by the claimant to the need to ensure that the rate of secondary contributions should reflect only circumstances peculiar to the employer in question. There is at the least an overlap (as there is in existing paragraphs 38 and 39) with the separate allegation that the notional allocation on the conversion of Coulsdon and Shirley Park was inherently unlawful. Nonetheless, the defendant clearly wishes its arguments in this regard to go beyond this, or paragraph 39A would be otiose. This separate line of argument would inevitably require the entire process of allocating the deficit on those conversions to be investigated, when the specific complaints raised about Method B are not applicable to the earlier conversions (the points made at [42](iii) and (iv) also being applicable here).

50. Because the amendment would necessitate an investigation into a decision which was not challenged in the defence, as it was pleaded that a different decision altogether was made in relation to Coulsdon and Shirley Park, I consider the amendment would require the claimant to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which it could reasonably be assumed to have investigated for the purpose of defending the unamended claim. This is a case

where analysis is a better guide than impression. With respect, I consider that Mr Giffin was inviting me to undertake an impressionistic comparison of the unamended and proposed amended claims. From that perspective, and considering that there is no change to the relief sought, the amendments can be seen to be relatively narrow. In light of the authorities, however, they do not arise from substantially the same facts as the unamended claim.

51. Accordingly, the amendment is not permitted, and the question of discretion at stage 4 does not arise.

Conclusion

52. I consider that it is reasonably arguable that the disputed amendment concerning the notional allocation of assets and liabilities on the conversion of Coulsdon and Shirley Park raises a counterclaim to be treated as brought by a beneficiary in respect of a breach of a trust and that it is reasonably arguably sought to be made outside the applicable limitation period. In my judgment, the amendment would raise a new cause of action, pleading that a different decision than that currently pleaded was procedurally flawed for reasons not currently pleaded. As the amendment would raise a different factual enquiry from that raised by the defendant's current pleading, I do not consider that it arises out of the same or substantially the same facts as a claim in respect of which the defendant has already claimed a remedy in the proceedings.

53. Accordingly, the application to amend is dismissed, save to the extent that the claimant has consented to it. The defendant should be left to issue a new claim if it wishes to do so, leaving the question of limitation to be resolved within such new proceedings. Mr Allen indicated that the claimant would wish to apply to strike such proceedings out. In those circumstances, I do not consider that it would be appropriate to grant permission to the defendant, but without prejudice to the question of limitation and disapplying the relation back that would otherwise occur by reason of Limitation Act 1980, section 35(1)(b).