

**LOCAL GOVERNMENT PENSION SCHEME
("LGPS")**

**BORDER TO COAST PENSIONS PARTNERSHIP LIMITED
("Border to Coast")**

O P I N I O N

INTRODUCTION

1. I am instructed to advise twelve LGPS "administering authorities" ("the Authorities"). They are:-

- (1) Bedford Borough Council, which administers the Bedfordshire Pension Fund;
- (2) Cumbria County Council, which administers the Cumbria Pension Fund;
- (3) Durham County Council, which administers the Durham Pension Fund;
- (4) The East Riding of Yorkshire Council, which administers the East Riding Pension Fund;
- (5) Lincolnshire County Council, which administers the Lincolnshire Pension Fund;
- (6) Middlesbrough Borough Council, which administers the Teesside Pension Fund;
- (7) Northumberland County Council, which administers the Northumberland Pension Fund;

- (8) North Yorkshire County Council, which administers the North Yorkshire Pension Fund;
- (9) The Council of the Borough of South Tyneside, which administers the Tyne and Wear Pension Fund;
- (10) The South Yorkshire Pensions Authority, which administers the South Yorkshire Pension Fund;
- (11) Surrey County Council, which administers the Surrey Pension Fund; and
- (12) Warwickshire County Council, which administers the Warwickshire Pension Fund.

2. Border to Coast:-

- (1) Is a “Teckal” entity wholly-owned and controlled by the Authorities;
- (2) Provides asset pooling services to each of the Authorities;
- (3) Has issued share capital comprising 12 A shares of nominal value; and
- (4) Has Articles of Association, which are before me, and which (i) refer, as regards appointment of Directors (Article 18.1), to a Shareholders’ Agreement (“the Shareholders’ Agreement”),

which is before me, and which (ii) provides (Article 20) for Directors' expenses.

3. Clause 2 of the Shareholders' Agreement identifies the business of Border to Coast. Clause 4 relates to finance and regulatory capital. Clause 6 is concerned with amongst other matters a Strategic Plan and the Annual Budget.

4. Clause 7 relates to Directors and Management, including Board appointments; and Clause 8 to Board Meetings and Resolutions. The conduct of Border to Coast's business is addressed in Clause 9. Schedule 1 contains matters reserved for shareholder approval.

5. In addition to the Shareholders' Agreement there is an Inter Authority Agreement ("the IAA"). This establishes governance arrangements in relation to Border to Coast. This is supplemented by a "Governance Charter", which is before me, dated March 2019 ("the Governance Charter").

6. The IAA relates to a statutory Joint Committee ("the JC") of elected members from the Authorities established pursuant to Sections 101 and 102 of the Local Government Act 1972 ("LGA 1972"). The purpose of the JC is to undertake the activities set out in the "Terms of Reference" at Clause 9 and

Schedule 1. Schedule 2 contains the Constitution of the JC. Schedule 4 sets out shared objectives.

7. The provisions of Schedule 1 include that:-

- “1. The primary purpose of the Joint Committee is to exercise oversight over the investment performance of the collective investment vehicles comprised in the BCPP Pool.
2. The Joint Committee will provide effective engagement with the Authorities as the BCPP Pool vehicles are established and ultimately operated. It will encourage best practice, operate on the basis that all partners have an equal say and promote transparency and accountability to each Authority.”

8. The provisions of Schedule 2 include that:-

- “1. The Joint Committee shall consist of one elected member appointed by each Authority. The member so appointed must at all times during the appointment, be a member of the committee or sub-committee of that Authority which discharges the functions of that Authority with respect to pensions.”

“7. Each member of the Joint Committee shall comply with any relevant code of conduct of his or her Authority when acting as a member of the Joint Committee.”

9. The shared objectives in Schedule 4 include:-

“1. To provide to the authorities a compliant and effective means of meeting the Government’s requirement for the pooling of LGPS funds and thereby to achieve scale, improve governance, enhance capability and capacity to deliver infrastructure investment and fees savings and to comply with any current and future governance requirements placed on the investment function of LGPS administering authorities.”

10. My advice is sought with respect to Non-Executive Directors of Border to Coast being two elected members of the Authorities and appointed as Directors by the Authorities as shareholders in Border to Coast (“the Directors”). There is before me a “Role Profile” for such Directors, who have a “contract for services” with Border to Coast, by whom they are remunerated.

11. There is also before me a JC Report on 16 January 2018 about these appointments. This refers to the potential level of remuneration.

THE GOVERNANCE CHARTER

12. The Governance Charter:-

- (1) Was agreed both by the Board of Border to Coast and by the JC;
- (2) Sets out how Border to Coast will conduct its own internal governance; and
- (3) Is a public domain document.

13. A diagram within Clause 1 shows the governance structure. Clause 1.1 sets out the purpose of the Governance Charter; and Clause 2 sets out Border to Coast's Strategy. Clause 3 sets out the roles of each Authority and of amongst others the JC.

14. Clause 4 addresses the role of the Authorities as shareholders. Its provisions include that:-

“As noted in the advice provided to the Partner Funds by Eversheds in January 2017, a shareholder representative must be nominated (as the Administering Authority cannot physically appear at a Company's shareholder meeting). Further, “such a person is representing the Administering Authority and acting on

instructions from the Authority. It does not therefore matter legally whether that person is a member or an officer since no delegated powers are being exercised.

Eversheds also advised that ordinarily conflicts of interest were not expected to arise between the customer and shareholder roles. It was therefore possible in the ordinary course of events for the same representative to hold both shareholder and Joint Committee roles. However, Eversheds did recommend that each Administering Authority may wish to have a conflicts of interest policy in place.”

15. Clause 5.1 relates to the roles of the Board and the Non-Executive Directors. Appendix 111 sets out the Legal and Regulatory Duties of the Board, including duties under the Companies Act 2006. It refers to the seven Nolan Principles of Public Life.

THE DIRECTORS

16. The JC nominated two individuals to act as Non-Executive Directors of Border to Coast, Councillor Sue Ellis (from South Yorkshire Pension Fund) and Councillor John Weighell (from North Yorkshire County Council). The nominees were approved by the Border to Coast Board, the Shareholders, and subsequently by the FCA, and took up their appointments last autumn.

17. Shortly after accepting the appointment Councillor Weighell made a disclosure pursuant to Section 30 of the Localism Act 2011 (“LA 2011”) of a pecuniary interest in Border to Coast. As Councillor Weighell chairs the Pension Committee of North Yorkshire Council he sought a dispensation pursuant to Section 33 of LA 2011 from that Council’s Standards Committee.

18. The terms of the dispensation offered were that he should leave the room whenever a matter concerning Border to Coast was discussed which would include approval of minutes of meetings. Councillor Weighell determined that he was unable to work effectively within the proposed dispensation. He resigned from his role as a director of Border to Coast so that he could continue to be an effective chair of the Pensions Committee of North Yorkshire Council.

19. The majority of the Authorities remain broadly supportive of the principle of having shareholder nominated directors, so long as they can operate effectively and without unreasonable conflicts of interest. They are, however, concerned that the experience of one of the initial Directors threatens the satisfactory operation of their respective Pensions Committees or of the Board of Border to Coast.

20. Pensions Committees overseeing the provision of LGPS Schemes have a variety of tasks to perform. These can broadly be divided into administration and Investment functions. Different Committees place different emphasis on their oversight of these functions, with some focussing heavily on investment, and others spending a considerable amount of time overseeing administrative functions (including valuations and dealing with members and employers). Such differences in focus will have an impact on the amount of business affected by any dispensation relating to a Directorship of Border to Coast.

21. Specifically areas of concern are decisions in a Pensions Committee (or its Investment Sub-Committee) about:-

- (1) Making asset allocation (where choices are made as to whether to invest with Border to Coast (a potential area of conflict between Fund and Company) or as to which of the investment vehicles offered by Border to Coast should be invested in and in what amounts;
- (2) Directing future investment direction (the Funds have the right to suggest that sub funds that might be created by Border to Coast to meet particular needs); and

- (3) Overseeing investment performance of the investments made by the Pool on the Fund's behalf.

22. The Authorities are not concerned at this stage about possible conflicts in the other direction, where a Director might favour a particular fund manager. This is regarded as being a matter for Border to Coast to regulate. At present the Authorities are satisfied that Border to Coast has suitable measures in place to manage the potential for such a conflict through its own disclosure and conflicts of interest policy.

23. It is also the case that manager procurement is undertaken using an OJEU compliant process which results in selection. The Board have a role in approving that process. However, the procurement is undertaken by officers, and it is the process (and scoring) that results in selection decisions.

24. Border to Coast does not carry out any administrative functions for the Funds. There is a general acceptance that the Funds will invest through Border to Coast.

25. Whilst pensions pooling is intended to take the day to day investment decisions away from individual Pensions Committees (including the choice of

fund managers) the Pensions Committees retain the function of oversight of the Pooling Body (in this case Border to Coast), of investment performance and also the decisions as to asset allocation for the funds under their control. This means that they are regularly involved in scrutinising the pooling body and will work with it to shape the available investments to meet their own strategic investment objectives.

STANDARDS

26. There are four obligations upon elected members under LA 2011 and Regulations thereunder:-

- (1) Proper conduct, in accordance with the Nolan Principles and the relevant Code of Conduct: Sections 27 and 28;
- (2) Registration of interests: Section 29;
- (3) Disclosure of pecuniary interests on taking office: Section 30;
and
- (4) Limitations upon participation in meetings in consequence of pecuniary interest: Section 31.

27. These limitations are however subject to Section 33, which relates to dispensations, in limited circumstances.

28. The Non-Executive Directorships in Border to Coast being paid:-

- (1) They should be registered; and
- (2) There will be occasions when there will be a disclosable pecuniary interest (“DPI”) that will prima facie prevent participation in the business of the Pensions Committee of the Authority; but
- (3) This is subject to appropriate dispensation by the Authority from time to time.

29. As pension pooling develops, there is, as my helpful Instructions observe, some emerging guidance on governance that should be taken into account. This includes:-

- (1) October 2016 CIPFA guidance for LGPS administering authorities on “Investment Pooling: Governance Principles”, which deals at pages 17/18 with “Recognizing and Managing Potential Conflicts of Interest”;

- (2) The January 2019 Review by the Committee on Standards in Public Life of “Local Government Ethical Standards”, pages 43-51 inclusive of which relate to Councillors’ interests; and
- (3) January 2019 draft Statutory Guidance on Asset Pooling, Section 4 of which relates to Governance.

ADVICE SOUGHT

30. I am asked eight questions. I address them in the order in which they are raised in my Instructions dated 4 June 2019.

FIRST QUESTION

31. I am asked whether the holding of a paid role as a Non-Executive Director of Border to Coast should cause any Councillor holding that role to disclose it.

32. My answer is: “Yes”.

33. This is in accordance with both Sections 29 and 30 of LA 2011.

SECOND QUESTION

34. In addition, Section 31 of LA 2011, subject to Section 33 thereof, requires disclosure at meetings, and restricts participation in them, when there is a DPI. I am asked whether I can give any general guidance as to the circumstances in which a member of a Pensions Committee of an Authority has, or does not have, a DPI by virtue of being a paid director of Border to Coast.

35. I agree that the situations described in (1) and (3) of paragraph 21 above are obvious conflicts of interest that would be caught by Section 31 of LA 2011.

THIRD QUESTION

36. I am asked whether it is open to the Standards Committee (or equivalent) of any authority to allow a Councillor disclosing a DPI to continue to participate in the business of the Authority which involves Border to Coast.

37. My answer is: "Yes".

38. Section 31 of LA 2011 provides:-

“(1) Subsections (2) to (4) apply if a member ... of a relevant authority –

(a) is present at a meeting of the authority or of any committee, sub-committee, joint committee or joint sub-committee of the authority,

(b) has a disclosable pecuniary interest in any matter to be considered, or being considered, at the meeting, and

(c) is aware that the condition in paragraph (b) is met.

(2) If the interest is not entered in the authority’s register, the member ... must disclose the interest to the meeting, but this is subject to section 32(3).

(3) If the interest is not entered in the authority’s register and is not the subject of a pending notification, the member ... must notify the authority’s monitoring officer of the interest before the end of 28 days beginning with the date of the disclosure.

(4) The member ... may not -

(a) participate, or participate further, in any discussion of the matter at the meeting, or

- (b) participate in any vote, or further vote, taken on the matter at the meeting,

But this is subject to section 33.”

“(10) Standing orders of a relevant authority may provide for the exclusion of a member ... of the authority from a meeting while any discussion or vote takes place in which, as a result of the operation of subsection (4), the member ... may not participate.”

39. Section 33 provides (emphasis added):-

“(1) A relevant authority may, on a written request made to the proper officer of the authority by a member ... of the authority, grant a dispensation relieving the member ... from either or both of the restrictions in section 31(4) in cases described in the dispensation.

(2) A relevant authority may grant a dispensation under this section only if, after having had regard to all relevant circumstances, the authority -

- (a) considers that without the dispensation the number of persons prohibited by section 31(4) from participating in any particular business would be so great a proportion of the body transacting the business as to impede the transaction of the business,

- (b) considers that without the dispensation the representation of different political groups on the body transacting any particular business would be so upset as to alter the likely outcome of any vote relating to the business,
 - (c) considers that granting the dispensation is in the interests of persons living in the authority's area,
 - (d) ... , or
 - (e) considers that it is otherwise appropriate to grant a dispensation,
- (3) A dispensation under this section must specify the period for which it has effect, and the period specified may not exceed four years,
- (4) ...”

40. To my mind, both (c) and (e) are capable of being generally applicable in the circumstances.

FOURTH QUESTION

41. My views are sought on the extent to which it would be reasonable (or legal) for any dispensation to operate. In other words, can a blanket

dispensation be given which recognises the close relationship between the Authorities and Border to Coast and allows the Director to play a full role using discretion to determine when an actual conflict arises (in conjunction with the Authority's Monitoring Officer)? Alternatively, are there any limits on the extent of the dispensation that can be granted?

42. I consider that a blanket dispensation can be given which allows a Pensions Committee member to be a Director of Border to Coast and retain full participation in the Pensions Committee.

43. I suggest that the dispensation simply state that the member may participate fully at meetings of the Pensions Committee (and/or Sub-Committee) in relation to matters concerning Border to Coast, save the remuneration of Directors.

FIFTH QUESTION

44. The fifth question is premised on a dispensation being potentially available. As indicated above, my opinion is that a dispensation is indeed potentially available.

45. I am asked to provide guidance as to the appropriate extent of such a dispensation. As indicated above, my opinion is that it does not require to be limited, save as not to apply to the remuneration of Directors and can be provided in a blanket fashion, rather than on a meeting by meeting basis.

SIXTH QUESTION

46. An alternative route is for the Councillor not to be paid by Border to Coast for being a Non-Executive Director. In my opinion, this would allow the continued participation of the Councillors in the business of their respective Pensions Committees. There would in my view be no offence contrary to Section 34 of LA 2011. Nor in my view would decisions of the Pensions Committee be challengeable.

47. A possible complication however might be if Border to Coast reimbursed the Councillors for expenses. In principle, I regard this as distinct from payment and unobjectionable. However, care would have to be taken to ensure that the “expenses” were not such as to appear to constitute concealed remuneration.

SEVENTH QUESTION

48. The seventh question does not arise on the basis of my above views. However, whereas I see no legal impediment to broadening the group of candidates for Non-Executive Directors of Border to Coast to avoid direct conflicts, I for my part do see the value of a candidate being at least a Pensions Committee member and preferably its chair.

EIGHTH QUESTION

49. Finally, I am asked to consider whether a member holding a remunerated post as a Director of Border to Coast disqualifies the member from holding office as a member, given that the appointment, albeit at the invitation of Border to Coast, is confirmed by the Authority, as shareholder. My answer is: “No”.

50. Section 80(1)(a) of LGA 1972 provides:-

“(1) Subject to the provisions of section 81 below, a person shall be disqualified for being elected or being a member of a local authority . . . if he -

- (a) holds any paid office or employment (other than the office of chairman, vice-chairman, deputy chairman, presiding member or deputy presiding member or, in the case of a local authority which are operating executive arrangements which involve a leader and cabinet executive, the office of executive leader or member of the executive) appointments or elections to which are or may be made or confirmed by the local authority or any committee or sub-committee of the authority or by a . . . joint committee ... on which the authority are represented or by any person holding any such office or employment:”

51. Section 81 is not relevant for present purposes.

52. Section 80(1)(a) and Section 80(2) (b) were considered by Richards J. as he then was, in Islington London Borough Council v Camp (2004) LGR 58, in which I appeared for Ms Camp, at pages 75-80 inclusive.

53. The question is whether the paid office as Director of Border to Coast is made or confirmed by the Authority. In that event, there would be disqualification.

54. I do not however believe that the appointment is made or confirmed by the Authority. It is as I see it made by Border to Coast, and never confirmed by the Authority as such. I regard the confirmation as being by the shareholders of Border to Coast. No confirmatory decision appears to be made through the Authority's decision making processes. Moreover, the Authority is one only of twelve shareholders.

CONCLUSION

55. I shall be happy to discuss any point that may arise and to advise further as required.

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JAMES GOUDIE QC
10 June 2019

**LOCAL GOVERNMENT PENSION
SCHEME
("LGPS")**

**BORDER TO COAST PENSIONS
PARTNERSHIP LIMITED
("Border to Coast")**

OPINION

56
10/06/19

David Hayward

South Tyneside Council