Must or may pension scheme trustees take ethical factors into account in their investment decisions? In short, trustees are not prohibited from taking ethical factors into account, but they must exercise their investment powers for the purposes of their trust and for no other purpose.

The relevant definition of the word "ethical" in the OED is "of or pertaining to morality or the science of ethics" and of the word "ethics" is "the science of morals; the department of study concerned with the principles of human duty". The law defines neither the word "ethical" nor the term "ethical investment". Trust law is necessarily linked with ethics. Difficulties arise, however, in the conflict between the trustees' duty to the objects of their trust (the beneficiaries and the form of benefit to be provided for them), and their personal moral duties to objects other than the objects of the trust.

The classic statement of the legal meaning of investment given in re Wragg, [1919] 2 Ch 58 is that it includes the application of

> money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield.

A trustee's duty of care in relation to investments is the so-called "prudent man" test, which is derived from Re Whiteley (1886), in which the court said that a trustee must

> take such care as an ordinary prudent man of business would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

Sections 33 to 36 of the Pensions Act 1995 require pension scheme trustees to prepare a written statement of investment principles (SIP), obtain advice and monitor their investment manager's performance; and the Occupational Pension Schemes (Investment) Regulations 2005, regulation 2 lists six policies to be included in the SIP, of which the following is relevant to the present question.

> (vi) the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments;

In Cowan v Scargill [1985] Ch 270 (also known as the Re the Mineworkers' Pension Scheme Trusts) the five trustees of the board of ten trustees objected to the inclusion in the investment plan of investment in oil, in overseas investments and in land overseas, on the grounds that investments in competition with coal were contrary to union policy. The court held that the duty of the trustees was to act in the best interests of the beneficiaries, whatever the trustees' personal views or moral reservations. Here are some extracts from the judgment.

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> When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.
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> … trustees must put on one side their own personal interests and views. … They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the views that they hold.
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> … by way of caveat … if the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainment, as well as armaments, I can well understand that it might not be for the "benefit" of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities … The beneficiaries might well consider that it was far better to receive less than to receive more money from what they consider to be evil and tainted sources.

In Harries v the Church Commissioners for England [1992] 1 WLR 1241, which is not a pensions case, the Church Commissioners sought a declaration that they were obliged to have regard to the object of promoting the Christian faith and thus to apply ethical considerations to their choice of investments. Here are some extracts from the judgment.

> Most charities need money; and the more of it there is available the more the trustees can seek to accomplish. In most cases this prima facie position will govern the trustees' conduct.
>
> Trustees may … accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment.
>
> They must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees.

Later this year the Supreme Court is expected to hear an appeal by the Palestine Solidarity Campaign against the Court of Appeal’s decision in [1918] EWCA Civ 1284, that there is nothing objectionable in the Government’s guidance, that it is inappropriate to use pension policies to pursue boycotts, disinvestment and sanctions against foreign nations or the UK defence industries, except when implemented by the Government.

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