

FINANCE COMMITTEE

Tuesday 26 June 2001
(Morning)

Session 1

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FINANCE COMMITTEE 17th Meeting 2001, Session 1

CONVENER

*Mike Watson (Glasgow Cathcart) (Lab)

DEPUTY CONVENER

*Elaine Thomson (Aberdeen North) (Lab)

COMMITTEE MEMBERS

*Mr David Davidson (North-East Scotland) (Con)

*Donald Gorrie (Central Scotland) (LD)

*Mr Adam Ingram (South of Scotland) (SNP)

*Dr Richard Simpson (Ochil) (Lab)

*Andrew Wilson (Central Scotland) (SNP)

*attended

WITNESSES

Dr Aileen Keel (Scottish Executive Health Department)

Bill McQueen (Scottish Executive Development Department)

David Reid (Scottish Executive Finance and Central Services Department)

Murray Sinclair (Scottish Executive Finance and Central Services Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Gerald McNally

LOCATION

Committee Room 1

Scottish Parliament

Finance Committee

Tuesday 26 June 2001

(Morning)

[THE CONVENER opened the meeting at 10:03]

Items in Private.

The Convener (Mike Watson): I formally open the last meeting of the Finance Committee in this term—or is it session? I am never sure which word to use, but members know what I mean. As usual, I ask members to switch off their mobile phones and to switch their pagers to buzz.

No apologies have been submitted, but we know that our Aberdonian members have been delayed—courtesy of Great North Eastern Railway, I suspect. However, they will arrive.

I invite members to agree to discuss items 4, 5 and 6 in private.

Members indicated agreement.

Contingent Liabilities

The Convener: Item 2 is on a proposed amendment to the contingent liability that we considered in relation to the Scottish National Blood Transfusion Service in March. Dr Aileen Keel, the deputy chief medical officer, joins us again. I suspect that our meeting will be brief, Dr Keel, given that the proposal is the addition of a further clinical trial to the list that we agreed in March.

Unless you particularly wish to make some introductory remarks, Dr Keel—

Dr Aileen Keel (Scottish Executive Health Department): I will do so only if the committee would find it helpful if I said a little about the trial in question.

The Convener: You may do so if you like. I thought that the note from the health department covered that matter.

Mr Adam Ingram (South of Scotland) (SNP): I would like to hear Dr Keel's comments.

Dr Keel: The trial is of recombinant factor VIII. The Medicines Control Agency requires two viral inactivation steps before a product is licensed, but the current SNBTS licensed product has only one viral inactivation step. Therefore, the new trial aims to add the second viral inactivation step, so that the product can be licensed.

Because usage in Scotland has shifted over the past couple of years to recombinant factor VIII—the majority of haemophiliac patients use that product—it became possible only recently to consider conducting the trial in Scotland. The trial was started in Poland, but there is now a worldwide shortage of recombinant factor VIII, resulting in the likelihood of a number of Scottish patients having to go back to plasma-derived products. Therefore, four Scottish haemophilia centre directors have expressed an interest in the participation of their patients in the trial, which is why the matter has been brought before the committee today. It is expected that up to 15 Scottish patients might participate in the trial, which will provide data on safety and efficacy.

The Convener: Thank you. My only question is, why is there an acute shortage of recombinant factor VIII?

Dr Keel: There is a manufacturing problem. We are not quite clear about what has gone wrong, but the Food and Drug Administration in the USA has withdrawn from one manufacturer the licence to produce recombinant factor VIII. Although that action had a major knock-on effect throughout the world, we are reasonably well placed in Scotland, because our contracts were drawn up centrally

with manufacturers whom, we hope, will stick to the letter of those contracts. However, a number of Scottish haemophiliacs are likely to have to go back to using plasma-derived products. We hope that those who have never used plasma products, particularly children, will remain on recombinant factor VIII and that we will be able to safeguard their treatment. The trial is before the committee today because of the fundamental shortage of recombinant factor VIII.

Dr Richard Simpson (Ochil) (Lab): It is clear that there is a shortage, which I hope will be temporary. What is the long-term benefit of going back to non-synthetic factor VIII, if I may call it that? I understand the short-term benefit of having a back up, but do you expect periodic shortages?

Dr Keel: That is a possibility. When a manufacturing process is in the hands of perhaps only two or three suppliers, there is always a risk that there will be shortages. Some patients are not suitable for recombinant factor VIII and do not want to go on to it, and we must cater for them. England is not moving as rapidly to recombinant factor VIII usage as Scotland is, and there is a possibility that we might have to supply plasma-derived products across the border. This is a contingency plan for the shortage and for those patients who cannot have recombinant factor VIII.

The Convener: You say that

"It is not anticipated that this"—

that is, the trial—

"will significantly change the nature or amount of the liability."

Does that mean that liability will be pro rata, in terms of the other trials that are being undertaken and for which details were included with the note?

Dr Keel: Yes, that is a fair assumption.

The Convener: As there are no further questions, I ask the committee to agree to approve the proposal.

Members indicated agreement.

The Convener: Thank you very much for coming, Dr Keel.

We will wait for a few seconds while we change witnesses for the third agenda item.

Item 3 is consideration of another contingent liability. It is a new contingent liability and is rather more detailed than the previous one. We are pleased to have to assist us Mr McQueen, who is head of transport division 2 in the Scottish Executive development department; Mr Reid, who is head of the transport and European finance division in the Scottish Executive finance and central services department; and Mr Sinclair, who is the divisional solicitor for the Scottish Executive

development department.

I invite Mr McQueen to make an opening statement.

Bill McQueen (Scottish Executive Development Department): This item follows on from a members' business debate in the Parliament at the end of October last year on the Scottish Bus Group pension schemes, and from an announcement by the First Minister in December. Ministers seek the committee's approval for the Executive to incur a contingent liability by issuing indemnities to the trustees of the two Scottish Transport Group pension fund schemes, so that the trustees may receive comfort from the Executive and the assurance that they need to proceed to wind up the two pension funds and pay over the net surplus assets of the schemes to the final employer, which is the Scottish Bus Group, in accordance with the deeds of the two schemes and the Westminster Parliament's Scottish Transport Group (Pension Schemes) Order 1996.

If the indemnities are granted, the trustees will wind up the schemes by preparing final accounts and a balance sheet for agreement with the pension schemes office. After that, ministers' policy is for the SBG to be wound up by its parent company, the STG, a company that is wholly owned by Scottish ministers. Ministers will then wind up the STG by means of an order that they will bring before Parliament. On winding up, the assets of the STG will come to the Scottish consolidated fund.

Ministers' policy, by agreement with the Treasury, is to use up to £100 million of the amounts received from the STG on its being wound up to make ex gratia payments to former members of the two transport group pension fund schemes.

In the view of the Executive, it is right and proper to issue the indemnities. The pension fund surplus is large and a significant sum will come to the Scottish consolidated fund. The pension fund trustees are personally liable for their actions against any subsequent claims that might successfully be made against them. They therefore need the certainty of an indemnity from the Executive before they can proceed to wind up the schemes.

Only when the wind up of STG is complete will the Executive have the surplus funds. When it is complete, ministers' policy is to move as quickly as possible to make the ex gratia payments to former scheme members. The Executive has begun discussions with union representatives about the possible nature of that distribution of the £100 million that the First Minister mentioned.

The Convener: Thank you, Mr McQueen. I have

a number of points that I would like to put to you. Who are the trustees of the schemes at the moment?

Bill McQueen: Their names are in the indemnities.

The Convener: I do not necessarily want their names.

Bill McQueen: Do you want me to say how they are appointed?

The Convener: Yes.

Bill McQueen: The staff pension fund scheme trust deeds and rules set out that the trustees must be five in number and that they must be appointed by the company. The trustees were therefore appointed by the SBG.

The transport operatives pension scheme must have a minimum of three and a maximum of six trustees. They are appointed by the principal employer, which is the SBG.

The Convener: After the schemes are wound up, how long will the trustees continue to hold potential liability?

Bill McQueen: My understanding is that their liability is unlimited for the actions that they have taken as trustees and that therefore the indemnity that the Executive is offering to the trustees is also unlimited in duration.

10:15

The Convener: I am far from being a pensions expert and I know that pensions are a complex matter. If, once the schemes have been brought to an end, a trustee died, would the responsibility be with the remaining trustees? There would be no question of appointing anybody else after that, would there?

Bill McQueen: No. When the trustees receive the indemnities and wind up the schemes with the pension schemes office, their function as trustees is concluded, except that, as part of the indemnities, there is an obligation on them to assist the Executive if necessary in dealing with any claims that might subsequently arrive. Clearly, if a trustee is deceased, they are not able to assist further in that capacity.

I am not sure whether any of my colleagues can elaborate on that.

The Convener: I see that the surplus is to be divided. Part of it is to go to the Scottish consolidated fund and it is proposed that £100 million should go to scheme members, whom you described in your introduction as former scheme members. Paragraph 7 of the note states that, of the pension fund members,

“over 9000 members remained with the schemes transferred to Royal Life, and under 5000 transferred to successor schemes or personal pensions.”

They are former STG pension scheme members. Are they characterised as members for as long as they live and therefore in receipt of the pension?

Bill McQueen: Perhaps a better way of explaining the situation is to say that those members, at the time of the privatisation of the bus companies, had various options. They could have gone on to personal pension schemes; they could have gone to the succeeding bus companies' pension fund schemes and taken a transfer value with them; or they could have remained with the STG pension schemes, which transferred to Royal Life—now Royal & SunAlliance. Those last mentioned schemes became the obligation of Royal Life. Those who remained with that option will now receive a pension from Royal & SunAlliance if they have reached retirement age, or will—if they are still in employment—receive one when they retire. However, it is likely that the Executive would consider all those 14,000 members as potentially in the frame for receipt of ex gratia payments.

The Convener: Are the 14,000 members who are mentioned all retired and in receipt of a pension?

Bill McQueen: No, some are still working.

The Convener: I thought so.

Bill McQueen: Depending on their age, they might have reached retirement between the mid-1990s and now or they might still be in employment with a successor bus company, but have left their pension with the STG scheme and thus with Royal & SunAlliance.

The Convener: My final question follows from that. Would the proposed ex gratia payments of £100 million be paid to all scheme members irrespective of whether they are still in employment or retired and receiving payments from the scheme?

Bill McQueen: Ministers must reach that decision over the summer months before they come back to Parliament with their proposals for a dissolution order. There is reference in the note to ministers keeping an eye on what is happening south of the border.

We expect that all the STG scheme members—who have remained with Royal Life & SunAlliance and are receiving a pension or will receive a pension from that company when they retire—will be in the frame for ex gratia payments. It is likely that ministers would regard those who transferred to alternative schemes as also having a claim, but ministers are keeping that matter under review as they observe the outcome of the settlement south

of the border, to which the note refers, on who should have a claim on the moneys that are available for distribution in England.

The Convener: I said that my previous question was my final question, but it was not. You mentioned that unions were involved in negotiating on behalf of scheme members. Do the unions accept the proposal to make available £100 million and to put the remainder into the Scottish consolidated fund, or is it suggested that a larger sum might be more appropriate?

Bill McQueen: We have not invited the unions to comment on whether £100 million is the appropriate figure. We have explained broadly to the unions how that figure was arrived at. It might help if I say a word or two about that.

The total gross surplus in the schemes is likely to be of the order of £250 million. That depends on the final wind-up of the pension fund schemes when tax is payable to the Inland Revenue, probably at a rate of 40 per cent. The First Minister and the Treasury ministers agreed that £100 million was the sort of figure that would broadly equate to the amount of settlement per person that is likely to be awarded south of the border. That is our explanation of how that figure was derived.

Elsewhere, the document refers to liabilities that might fall. In the paper, the liability for the indemnity is couched in the relationship between moneys that are likely to accrue to the UK Exchequer and those that will remain with Scottish ministers.

The Convener: I am obliged to ask whether the £100 million is a net figure after tax.

Bill McQueen: It is.

Dr Simpson: I will continue on that point. If I understand paragraph 6 of your note correctly, the balance between the £100 million and the £140 million or £150 million after tax will return to the UK Exchequer.

Bill McQueen: That is correct.

Dr Simpson: Why is that?

Bill McQueen: I will step back and give the broader context. Ministers' view is that the court has established no legal basis for the distribution that ministers propose. Ministers propose such a distribution in recognition of the fact that schemes were handled properly in Scotland, compared to the situation south of the border.

The agreement that ministers have reached with the Treasury is on a broad figure that is based on the likely number of beneficiaries in Scotland compared with the likely number of beneficiaries of the settlement in England, which is discussed in the paper. That relates to the relationship of £100 million and 14,000 or so members in Scotland

compared to the relationship of about £350 million and 54,000 members in England. That relationship—approximately £7,000 per potential beneficiary—is the figure that ministers had in mind as they determined what might be an appropriate figure.

Beyond that, the expectation when the bus companies were privatised was that surplus assets would return to the UK Exchequer. Therefore, the balance—by tax to the Inland Revenue or by transmission to the UK consolidated fund—would leave the position in some equity with the situation arising south of the border.

Dr Simpson: So, the equity is between ourselves and what is proposed south of the border, and is not absolute. Those in the Treasury or in negotiations south of the border have reached some conclusions that ministers are minded to follow. Ministers are not treating the issue as separate.

Bill McQueen: That is how I would—

Dr Simpson: If you are asking us to approve a contingent liability, why are we not retaining the £46 million in our reserve account against possible future liabilities? Why are we handing all that money back to the UK Exchequer?

Bill McQueen: If the contingent liability is called, it will be in proportion to the sums that are going to the UK Exchequer and those remaining with the Scottish ministers.

Dr Simpson: I do not follow that. One hundred million pounds will be paid out to members. You are asking us to approve a contingent liability, but we are passing any residual sums back to the UK Treasury. Why should not the contingent liability go with the surpluses that are being passed back? I do not understand why the Scottish Exchequer and the Scottish ministers should retain the liability. If the surpluses are being passed, surely the liability should be passed to the UK ministers.

Bill McQueen: Our agreement with Treasury ministers is that the liability will fall in proportion to where the assets fall on conclusion of the business. As we have £100 million from a broad figure of £250 million, 40 per cent will fall to the Scottish ministers and the balance will fall to the UK ministers.

David Reid (Scottish Executive Finance and Central Services Department): I agree with Mr McQueen's analysis. We are discussing the proceeds from a privatisation. The matter is being handled in line with the statement of funding policy for the countries with devolved powers and with how that describes that the proceeds from privatisations might be treated between the devolved Administrations and the UK Exchequer.

The agreement is consistent with the funding policy statement.

Dr Simpson: I accept that, but I am asking a slightly different question. We hand out £100 million and £46 million—or whatever the balance is—together with the tax, goes to the UK Exchequer. If some people then came along and successfully sued the trustees in respect of substantial sums—let us say, the remaining £46 million, at the most—where would that money come from? Would we have to go cap in hand to the UK Exchequer to ask, “Please can we have back the money that we gave you because of funding policy?” or will we have to meet any contingent liability from the Scottish consolidated fund?

David Reid: We should not have to go cap in hand, because, as Mr McQueen said, it is agreed that where the benefits fall, the beneficiaries will cover any liabilities that might subsequently crystallise.

Dr Simpson: I have still not got that clear, but if other members are clear about that, I am happy to desist. Are you saying that under the liability that you ask us to take on, if the trustees are sued, the money will be paid in its entirety from the UK Exchequer and no money will be taken out of the Scottish consolidated fund?

David Reid: The exact arrangements will depend on the outcome of the litigation. If the Scottish Executive or Scottish ministers have paid £100 million and the court has taken that into account, we would expect the additional sum to fall to the UK Exchequer to fund by increasing the Executive's block grant.

We have a sort of back-to-back arrangement. The Scottish ministers carry the full liability, because they are the ministers who are responsible for the function. Behind that lies our agreement with the Treasury that if the liability crystallised, the cost of the liability would be shared in proportion to the respective shares of the gross surplus that had been received.

Dr Simpson: I find that last little bit difficult.

The Convener: I must say that I am not clear on that either.

Dr Simpson: Is the share 100:146 or 100:250?

David Reid: It is 40 per cent. It is 100 two-hundred-and-fiftieths against 150 two-hundred-and-fiftieths, or thereabouts. We still do not know the precise size of the surplus. We must await the conclusion—

The Convener: Is the ratio approximately two thirds to one third?

David Reid: Yes.

The Convener: I think that that is now clear.

10:30

Donald Gorrie (Central Scotland) (LD): I would like clarification on the risk that we are endorsing. First, could an individual or group of individuals challenge the total pay-out and say that they should get all—or more of—the money that is available? Secondly, as an MP, I tried to help the former Ferranti workers with their tangled pension arrangements. That situation was somewhat similar to this. Conflicts can arise between the different categories of pension fund members, some of whom may claim that their category is not getting its fair share. Am I right in thinking that either of those groups could challenge the settlement? Is that the risk that we are being asked to underwrite? In light of today's conversation, we seem to be underwriting some share of the risk, which we do not fully understand.

Bill McQueen: Mr Gorrie refers to the two possible sorts of claim. Recipients of the ex gratia payment that will be made by ministers might conclude that the ex gratia payment was unsatisfactory for their circumstances. The recipients might then take action against the trustees. However, they would need to show that the trustees acted perversely or erroneously; they would need to persuade a court that the actions that were taken—which at the time were properly documented and minuted, had the approval of members and had secured members' benefits—were in some way flawed. We are mostly providing the trustees with that sort of indemnity.

Our view, which is implicit in the note from the Minister for Transport and Planning, is that the chance of that happening is very low. There are a number of differences between what has happened in Scotland and what has happened in England. Although cases have been raised with the pensions ombudsman against the STG pension fund trustees, no judgment has been made against the trustees—no successful court action has been brought against the Scottish trustees. Given the passage of time, a number of factors mean that the risk is low. However, the sort of claims that Mr Gorrie has suggested are the ones against which the indemnity is meant to satisfy the trustees.

Donald Gorrie: I want to press my question about the different categories. Human nature being what it is, if everyone gets £8,000, people may grumble, but they will be happy. However, if David Davidson, for example, gets £10,000 and I get £6,000, I might be seriously unhappy because I am still working and he is not—or whatever the case may be. Is there a risk that jealousy between different factions might cause problems?

Murray Sinclair (Scottish Executive Finance and Central Services Department): Let me make a point of clarification. We must bear in mind the fact that, by asking for the indemnities to be approved, we are not asking for cover against the risk of a challenge against the ex gratia scheme. The ex gratia payments will be made by Scottish ministers. Ultimately, Scottish ministers will be responsible for those.

The indemnities are against the risk of legal action based on the former actings of the trustees, on the basis that those actings were in breach of trust, because the trustees had wrongly construed the trust deeds or had been guilty of maladministration.

Our position is perfectly reasonable. There was wide consultation on the arrangements; those arrangements were agreed to and have been in place for some time without any hint that it could successfully be argued that the trustees had acted improperly and might therefore be subject to any claim. Given that history, the indemnity for which provision is being made is highly unlikely to be called on. Strictly speaking, that should not be affected by the separate ex gratia scheme, which we will bring forward later in the summer.

The Convener: On Donald Gorrie's point, we should refer to the final sentence of the minute, which says:

"It is likely that the amount of the ex gratia payments to former scheme members will be broadly related to the value of their benefit entitlements."

In other words, the payments are likely to be pro rata.

Bill McQueen: Ministers will weigh up those matters over the summer, as they observe the outcome of the English case. Length of service and final salary will impact on pensions and we expect that to be reflected in the level of ex gratia benefits.

The Convener: That would be a sensible way in which to proceed. We will wait and see what the ministers decide.

David Reid: Allow me to supplement what Mr Sinclair said about our assessment of the risk of the liability materialising. We have had to convince not only ourselves, but the Treasury about the risk that would be involved. The Treasury has indicated that it is prepared to take on a substantial element of the possible liability; we understand that it would not have offered to do so if it had not been satisfied that the likelihood of that liability's arising was very remote.

Andrew Wilson (Central Scotland) (SNP): I would rather trust our civil servants than the Treasury's.

There is a fund of roughly £250 million, including a surplus of £146 million, of which £100 million goes back to the members and £46 million is passed to the UK Treasury. What happens to the remaining £100 million?

Bill McQueen: That is paid in tax to the Inland Revenue when the pension fund schemes are wound up.

Andrew Wilson: So the net gain to the Scottish consolidated fund is nil.

The Convener: The gross gain would be £100 million, but the net gain would be nil.

Bill McQueen: The £100 million would come to the Scottish consolidated fund but would then be paid to scheme members in ex gratia payments.

Andrew Wilson: That is what I am confused about. We understood that the Scottish fund and the Treasury would receive shares of £100 million and £46 million. However, we are told that the Scottish fund will receive nil and that the Treasury will receive £46 million. I do not understand that.

The Convener: The fund will receive the £100 million, but the decision has been made to pay that money out. It could have been retained in the Scottish consolidated fund, but ministers are likely to decide to pay it out.

Andrew Wilson: Ministers could decide to pay out £146 million, could they not?

Bill McQueen: Ministers have agreed that the appropriate level of payment is broadly £100 million, on the basis of the level of the settlement south of the border. The agreement with Treasury ministers was that the proceeds of the privatisation and its follow-up would go to the UK Exchequer. David Reid can confirm or elaborate on the fact that that was taken into account at the time of the devolution settlement. What is new is the fact that Scottish ministers have agreed with Treasury ministers that a payment of £100 million or so is a reasonable use of the surplus resources from the privatisation.

Andrew Wilson: I understand that the ministers are responsible to the Parliament for that discussion and that decision. My question is, therefore, whether it is within their gift to put back a total of £146 million or whether that decision is regulated by the Treasury.

David Reid: Under the statement of funding policy, the proceeds from any privatisation of a public asset in Scotland would normally be expected to be returned to the UK Exchequer. However, the statement of funding policy allows Treasury ministers to take the level of proceeds into account in setting the block grant. After receipt of the surplus from STG by Scottish ministers, the full sum will stay in the Scottish consolidated fund

and, in line with the statement of funding policy, there will be a variation in the size of the block grant. No large sum of money will be paid out of the Scottish consolidated fund to the Exchequer; that outcome will be achieved through an adjustment in the size of the block grant in the year in which the receipt is received. We expect that to happen in the latter part of this year.

Andrew Wilson: I understand that. The basic point that you are making is that our ministers' hands are tied by the Treasury in this matter. Is that correct?

David Reid: The processes are in line with the devolution settlement and the way in which it is implemented through the statement of funding policy.

Andrew Wilson: However, could the ministers decide to give that £46 million to the people who paid into the fund rather than to the Treasury? Would that be within their competence?

David Reid: The transfer of that money must be agreed between Scottish ministers and Treasury ministers.

Andrew Wilson: Would it be within their competence to do that, subject to agreement?

David Reid: Subject to agreement.

Andrew Wilson: So the decision is for the Treasury ministers.

Murray Sinclair: It is within the competence of Scottish ministers but, as always, they must act in accordance with the relevant financial agreements that underpin the devolution settlement, in which the Treasury has a big part to play. There is nothing different about these circumstances.

Mr David Davidson (North-East Scotland) (Con): I take it from paragraph 4 of your paper that you have dealt with the issue of low risk, as the Treasury actuary has been involved and has agreed a level of risk.

Bill McQueen: The Government actuary was involved during the National Audit Office investigation into the privatisation of the bus companies; the pension outcome was reviewed then. I am unable to say whether the agreement with Treasury ministers is underpinned by the Government auditor's taking a view on the chance of the indemnity's being called.

Mr Davidson: All pension funds contain an employer's contribution and a member's contribution. Do we have a figure for those? Have they been assessed within the surplus? What percentage accrues to which sector?

Bill McQueen: I do not think that we have considered the matter in quite that way. At the time of the sale of the bus companies, when

members either transferred to separate schemes or remained with STG schemes that then went to Royal Life, valuations were put on the funds and members' benefits were enhanced. At that time, the Public Accounts Committee reported a surplus of approximately £75 million between the two pension funds, after additional benefits had been secured for members who were moving into Royal Life or other schemes. The growth in that figure, with the passage of time, has led to the present surplus. However, I do not think that we can easily distinguish how much of that surplus could be attributed either to the employer's contributions or to members' contributions over the years.

Mr Davidson: Will the fact that additional payments were made at that time influence the bargaining power or the settlement capability in respect of the £100 million?

Bill McQueen: I am not sure that the two are exactly related. Members who are either pensioners or deferred pensioners—those who have yet to reach retirement age—will have had their benefits enhanced on reaching pensionable age. The issue of the sum that is available to ministers to distribute as an ex gratia payment will probably lead us into discussions of whether that sum should be apportioned between the staff scheme and the transport operatives scheme in proportion to the surpluses in those two schemes in the mid-1990s, which might have grown separately. It will also lead us into discussions of whether those who transferred to other schemes should be treated in the same way as those who remained with the Royal Life scheme, in matters to do with dependants and estates, for example. Over the summer, we have commenced discussion with the trade unions on those matters. When an outcome has been reached in England, we will offer ministers choices and advice. The Executive is making an ex gratia payment, not a pensions payment.

Mr Davidson: So it would be fair to say that there is no consultation about the amount. It is an ex gratia payment. Presumably, Executive ministers are fairly firm on the figure for that payment. They will expect people to sign an agreement when the amount is settled, however that is apportioned. You are taking consultation on the apportionment. When that process is complete a clause barring further claims will presumably be included in the contractual agreement, to enable the Scottish Executive to control its risk.

10:45

Bill McQueen: That is a very acute point. Ministers will have to consider whether, when they make ex gratia payments, they require some sign from the recipient that this is a fair and final settlement. Because we are not dealing in

pensions matters but in ex gratia payments, it may not be sensible or proper to tie the two things too closely together. Murray Sinclair will say a little more about that.

Murray Sinclair: This is another issue that we have been considering and that ministers will have to consider. Normally, if someone makes a payment they have regard to whether it would be appropriate to discharge themselves from any further liability that may be thought to relate to that payment. That is something for ministers to decide. We as officials have not yet concluded that it would be appropriate, for the reason that Bill McQueen gave: strictly speaking, the ex gratia payment will be separate from the issue of whether, because of this indemnity, claims are made against the trustee for past maladministration.

Mr Davidson: I accept that the maladministration element needs to be separated out. I am concerned that this committee, representing the Parliament, is being told that there is a maximum figure of £100 million but is not being told under what rules that figure has been arrived at. That is the element of risk. If the maximum figure is not quantified at this early stage, there could be a further call on the Scottish ministers. If so, where will the money come from? I am not making quite the same point as Andrew Wilson, but I am saying that this matter has not been precisely worked out.

I accept what you say about separating out the issue of ex gratia payments from that of the indemnity and previous maladministration. The issue is whether there is risk relating to the ex gratia payments. We are particularly concerned about the routing of the money. The last part of paragraph 3 of the paper refers to

“the transfer of the surplus, eventually, to Scottish Ministers.”

The payment is coming out of that surplus. Presumably, tax is paid first, so the figure of £146 million appears in the Scottish accounts. Of that, the minister has proposed to pass on £100 million. If the Executive ends up paying more than that, but has already passed on the remaining £46 million to the Treasury, where will the extra money come from?

Bill McQueen: The figure that ministers have in mind is £100 million for the ex gratia payments. The information that is available to them suggests that that is broadly equivalent to the sum that will be paid south of the border. Ministers have determined that the figure for ex gratia payments in Scotland should be based on that. If beneficiaries of ex gratia payments were to challenge ministers, it would have to be on the basis that ministers had acted improperly. As we

believe that ministers have taken a reasonable view on how ex gratia payments may be made, we hope that there is not much risk of a challenge to them on that point.

I have tried to convey the difficulty of putting a precise figure on the liability because of the indemnity. The risk of it being called is low, for the reasons that we have explained, but because the indemnity is unlimited and of unlimited duration, it is not possible to put a figure upon it. Claimants against the trustees may take the approach of securing some of the surplus from the time of privatisation, taking into account how it has grown. Those are the figures that we have explained. We have tried to give some parameters, but it is not possible to say with precision what the ceiling on the liability is, because the indemnities offer unlimited indemnity.

The Convener: We come up against that every time. In effect, the ceiling on the liability is £20 billion, which is the total moneys that are available to the Scottish Executive in any one particular year, but that figure is hardly likely to be reached in this case. The bottom line, which David Davidson raised and Mr Sinclair explained, is that we are talking about contingent liabilities based on a case that was brought because of something that the fund did in years gone by.

As David Davidson said, what if someone says, “I am not happy about my share of the ex gratia payment. I should have had more than him or her” and then takes action and wins their case? Would the Scottish Executive be able to go to the Treasury—in the same way that it could if the liability was the sort of liability that you have defined—and say, “As a result of the split-up of the funds and the way that we did it, and based on the National Bus Co settlement, we have been landed with this payment. We think that you should make it on our behalf”? What is your assessment of the likely response of the Treasury? I am asking you to guess, but it would be helpful to have an indication to the best of your ability.

Bill McQueen: I will answer in terms of what we have said already. If a beneficiary is unhappy with a ministers’ decision about the amount of the ex gratia payment, the beneficiary’s case is with ministers, not the trustees, unless he seeks to prove in a different arena that the trustees acted perversely or wrongly in their former actions. If he does the latter, and if he has a successful claim, ministers would accept the obligation that is implied by the indemnity, and would share that claim with the Treasury in the ratio 40:60.

If ministers are persuaded by a beneficiary that we have got the ex gratia payment wrong, they will have to decide whether to deal with the beneficiary in a way that is helpful to him, but that would be a case between the beneficiary and ministers. We

think that the beneficiary would only seek a judicial review of the way in which ministers went about making the ex gratia payments if he could show that ministers acted unreasonably.

The Convener: So we are talking primarily about decisions made by the trustees of the schemes, whereas David Davidson is talking about decisions made by Scottish ministers, quite separate from the trustees.

Bill McQueen: That is it exactly.

Murray Sinclair: That is the key point. It is a different decision. It is a decision that ministers have still to take, a decision that no doubt will be discussed by the Parliament and a decision which, at the end of the day, will be tested by the courts on totally different grounds from those on which a trustees' decision would be tested. It would be tested on customary judicial review grounds, as Bill McQueen said, which, strictly speaking, involves satisfying the court that no reasonable set of Scottish ministers could have decided to make the ex gratia payments.

The Convener: That is clear now. I am keen not to prolong this, but Richard Simpson and Andrew Wilson have indicated that they wish to speak.

Dr Simpson: Once the ministers reached their decision about the £100 million, the trustees no longer had any say, and they are not involved in the negotiations. Is that correct?

Bill McQueen: That is absolutely right. It is a matter for ministers, not for the trustees, how the ex gratia payments are determined. As a matter of practical administration, the Scottish Executive needs the records from the trustees to identify beneficiaries and make payments. However, the composition of the ex gratia payments is entirely a matter for Scottish ministers and the Scottish Parliament.

Dr Simpson: You said that ministers are minded to follow roughly the distribution to the 54,000 individuals in England of the £350 million. Do you know what the surplus was in relation to the English fund? Is the Treasury receiving £175 million plus tax from that fund?

Bill McQueen: The sums are different and this answer must be prefaced by saying that the English situation is predicated on a court determining that the trustees acted incorrectly south of the border and telling the trustees and the Government to put the trustees back in funds. My understanding is that the £350 million was the total surplus when the ombudsman ruled that the trustees had acted incorrectly.

Dr Simpson: Was that the surplus before tax?

Bill McQueen: Yes.

Dr Simpson: That means that no surplus or tax

will be passed back to the Treasury.

Bill McQueen: I think that that is the case south of the border.

Dr Simpson: In effect, that means that as our affairs have been managed rather better than they have been managed in the south, we will have to pay £146 million to the Treasury.

I am asking these questions because I think that the European convention on human rights has a bearing on this matter. Simply treating a situation in one way because of something that has happened in England may not satisfy the requirements of the ECHR. Someone could claim that it is not appropriate that their property be confiscated by the Scottish ministers and the Treasury, which is what is happening. I am no expert in pension law, but I believe that the ECHR may have an impact on this situation.

The Convener: It is not fair to ask any of the gentlemen before us today to comment on that—not even Mr Sinclair, who is a solicitor.

Bill McQueen: A Scottish member who was in the position that we are talking about would have to persuade a court that the trustees had acted wrongly or perversely. Given the evidence that we have seen, we do not think that that would be possible.

Dr Simpson: I have 70 such pensioners in my constituency. They are vocal and are likely to be quite litigious. From the Government's point of view, I hope that you are correct.

Murray Sinclair: You can rest assured that we will have regard to ECHR considerations.

Andrew Wilson: I am now officially bemused. At the start of the meeting, you said that the decision to send back a third of the surplus was broadly in line with the situation in England, yet you have just said that there is no surplus in England. How can both things be true?

Bill McQueen: I was trying to convey that the basis for the £100 million that ministers are thinking of distributing to beneficiaries in Scotland is in relative proportion to the number of beneficiaries receiving a total figure in England.

The Convener: That decision was the result of a court case, was it not?

Bill McQueen: Yes.

The Convener: There was an out-of-court settlement. The Scottish ministers plan to offer a settlement that is broadly in line with that. The decision was not related to surpluses but to a court action that was initiated by scheme members.

Bill McQueen: That is correct.

Andrew Wilson: I do not understand at all why that decision was taken on that basis. I can see no connection between pension fund members having the right of access to a surplus that has been managed in their fund and other fund members getting access to a payment on the basis of a court case about the mismanagement of a fund.

The Convener: What you are arguing, Andrew, is that the Executive should just have put the whole amount in the consolidated fund, which it could have done.

Andrew Wilson: They could also have given the entire amount back to the members, but that is a separate question.

The Convener: We cannot debate that here. At the end of the day, the Scottish ministers will come to the Parliament with their proposal and we will have the opportunity to comment on it.

Andrew Wilson: I know that it is not directly relevant to a contingent liability, but, as you said earlier, the ministers are responsible for the £100 million payment and are liable should someone wish to call for a judicial review. However, we have been told that the decision on what to do with the £100 million is predicated on a court case decision over which the ministers had no influence. More important, we have been told that that decision can be taken only in agreement with the Treasury. That means that the Treasury should share the burden of that liability.

The Convener: In fairness, that decision has not yet been made. Am I right in thinking that, if the Scottish Parliament were to approve a proposal from Scottish ministers for the £100 million to be distributed in the suggested way, there would have to be some form of contingent liability and we might have to revisit that issue? I say that in an attempt to separate David Davidson's point out from what we have been asked to decide on today.

Murray Sinclair: There would be no specific liability in that context. As it always does when it makes an administrative decision, the Executive would have to have regard to the potential liabilities. As ever, we would strive to ensure that the decision was not subject to the risk of any financial liability.

The Convener: And if it was, you would strive to ensure that that risk did not exceed £1 million, which would involve the sort of issue that we are discussing today.

Murray Sinclair: That is correct.

The Convener: That means, Andrew Wilson, that there can be no question of quantifying the risk at the moment. We can give our opinion only on the basis of the information that is in front of us.

That information relates to decisions that were made by the trustees of the schemes in the past.

Bill McQueen: I want to clarify something that I said earlier. I have been advised that the English figure of £350 million that I mentioned was negotiated by Westminster ministers and the trustees and was agreed by the court; it was not a figure that the court forced upon the trustees. I think I said that the figure was the total gross surplus of the NBC pension fund, but I have been advised that we are not sure whether it is. We will send a note to the committee to confirm the position.

The Convener: That would be helpful. It has been established that the funds have two different sources.

We have had a thorough discussion of the issue. Are we agreed to accept the proposal for the contingent liability on the basis of the pension funds?

Members indicated agreement.

The Convener: I thank our witnesses for responding to our questions so thoroughly.

As previously agreed, the remaining items on the agenda will be discussed in private session.

11:01

Meeting continued in private until 12:22.

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