The London Transport case[1]: judicial review of local body spending

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The subject of this paper is judicial control of local government spending. The writer focuses on the controversial House of Lords decision which held that local councils owe a fiduciary duty to their ratepayers, and considers the basis of that duty, as well as some of the more general questions raised by the courts' control of social policy.

I. INTRODUCTION

A. The Facts

1. *The election*

In May 1981 there was an election for the Greater London Council (the G.L.C.), the chief local government authority in London. One of the main campaign promises of the Labour Party was to cut the fares on London Transport's buses and tubes by 25 percent overall and make up the loss of income from the rates. There was also a proposal to simplify the fare structure. The Party won the election and subsequently sought to implement their policy. However, after the election it became clear that if the Council went ahead with the cuts it would incur a loss in the rate support grant from the central government.[2] This loss also would have to be met from the rates. Nevertheless the majority of the G.L.C. felt themselves bound[3] to carry out their election promise and the decision was made to cut the fares. As the G.L.C. had no direct power to levy a rate, it issued a compulsory precept to all the London boroughs for the latter

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1 *Bromley London Borough Council* v. *Greater London Council* [1982] 2 W.L.R. 62, C.A. and H.L.

2 In fact there had been an indication from the Secretary of State for Transport during the election campaign that a Labour G.L.C. might be punished through lower government grants if it proceeded with the rate-supported fare cuts: *The Times,* London, 30 April 1981, p.4. This was not, it seems, raised in the case.

3 Of the judges who considered the point (the Court of Appeal, Lord Diplock and Lord Brandon) all found that the "inevitable inference" from the evidence was that the G.L.C. majority had regarded themselves as irrevocably bound by the promise: supra n.1, 69, 87, 88, 109, 129.

to raise the amount to pay for the transport loss from their ratepayers. The borough councils were also advised to impose an additional rate to cover the loss of the government grant.

2. *Bromley's challenge*

The council of the London Borough of Bromley objected to the rate which it was obliged to order. It challenged the precept in the Queen's Bench Division as ultra vires and sought an order of certiorari to quash it. It also applied for an injunction to restrain the G.L.C. and the London Transport Executive (the L.T.E.), which ran London Transport under the control of the G.L.C., from continuing to implement the fare reductions.

Bromley put its case in two main ways. First, that as a matter of construction of the Transport (London) Act 1969 it was ultra vires the G.L.C. and the L.T.E. to implement the scheme. Alternatively, assuming that the power to introduce the reductions existed, Bromley argued that the G.L.C.'s decision was an invalid exercise of that discretion.

3. *The decision*

Bromley failed in the High Court.[4] However, the appeal was unanimously upheld, first by the Court of Appeal and then by the House of Lords. The Lords' decision provoked a very strong public reaction, not least because of the publicity given to the Labour fares policy during the campaign and the fact of Labour's subsequent victory. Their Lordships were concerned to point out that, in their view, the decision judged only the legality and not the merits of the fare reduction scheme.[5]

B. The Issues and Conclusions

The questions to be answered and the approaches that the judges took to them are complex and interrelated. Not all members of the House of Lords accepted Bromley's formulation of the issues. Two of the opinions proceeded on the basis that the question of construction of the statute and the question of discretion were inseparable.[6]

In spite of these differences in approach, several broad features emerged from the decision which may be summarised as follows.

1. *Construction of the statute*

Their Lordships held that on its true interpretation the 1969 Act required the G.L.C. and the L.T.E. to operate London Transport so far as practicable on "economic lines".[7] This concept was also expressed as "ordinary business principles"[8] and "a break-even"[9] basis. Lord Diplock's analysis differed from the

4 *The Times*, London, 4 November 1981.
5 See e.g. Lord Diplock, supra n.1, 99.
6 Lord Diplock, ibid. 100; Lord Scarman, 114. Lord Scarman added that there would be cases where this would not be true.
7 Ibid. 98, per Lord Wilberforce.
8 Ibid. 109, per Lord Keith.
9 Ibid. 123, per Lord Scarman.

other judges; though he ultimately based his approval of Bromley's claim on the statute, he ascribed to certain important sections of it a meaning which would have given the G.L.C. a wider freedom to decide on fare levels.

2. *Fiduciary duty*

All the judges recognised a fiduciary duty owed by local authorities to their ratepayers.[10] But beyond this acknowledgement of its existence, there was a diversity, both between and within the opinions, in the precise way it was to be used in resolving the issues. For instance, it was seen by Lord Scarman both as a "principle of law" and as an interpretative presumption. Viewed as the latter it would go to the strict question of ultra vires. Seen as the former, its status relative to the legislation is uncertain. However regarded, all the judges agreed that the Council was in breach of this duty in putting into force the fare cuts scheme in the circumstances.

3. *Abuse of discretion*

As noted, it was not easy to sever the issue of the use of statutory powers from that of the existence and extent of the powers themselves. But there was a further reason, not based expressly on the statute,[11] for invalidating the decision. This related to the policy in the Labour Party manifesto and the election mandate claimed by the G.L.C. majority. The inference drawn by the judges[12] from the G.L.C.'s commitment to this promise even after becoming aware of the extra loss it would face by implementing it, led to the conclusion that the Council had failed to exercise its discretion.[13]

It was recognised that the wishes of the electors were a factor to which the G.L.C. was entitled to give great weight when making its decision.[14] But it was not entitled to consider that it was irrevocably bound by the promise, even if it had been approved by the electors. Such a rigid commitment would fetter the discretion and was thus erroneous in law.[15] Consequently, although it will be referred to, it is not proposed to discuss this aspect of the case separately.

4. *Procedural requirements*

It appeared from the evidence that the G.L.C. had not substantially complied with the procedures laid down in the 1969 Act relating to changes in the level

10 See Lord Wilberforce, ibid. 94; Lord Diplock, 108; Lord Keith, 109-110; Lord Scarman, 115-116; Lord Brandon, 130, although Lord Brandon did not use the adjective "fiduciary".

11 Although Lord Diplock regarded it as implicit in the word "duty" when it referred to an elected local authority: ibid., 107.

12 Supra n.3.

13 See e.g. Oliver L.J., supra n.1, 87.

14 See e.g. Lord Wilberforce, ibid. 93; Lord Diplock, 107. However, it is submitted that Lord Denning M.R. went too far in stating that (69), "when the party gets into power it should consider any proposal or promise afresh — on its merits — without any feeling of being obliged to honour it . . ." Among the reasons for this conclusion was the assertion that "[v]ery few of the electorate read the manifesto in full . . . When they come to the polling booth, none of them vote for the manifesto".

15 *Roberts* v. *Hopwood* [1925] A.C. 578, 597; *Asher* v. *Environment Secretary* [1974] Ch. 208, 218, C.A.; *Isitt* v. *Quill* (1893) 11 N.Z.L.R. 224, 257, C.A.

and structure of fares. This question received extensive treatment in the judgment of Oliver L.J. (with whom Watkins L.J. concurred on this point). Lord Wilberforce also broadly agreed with Oliver L.J.'s examination of the Act.

C. The Approach

This note will discuss these issues in turn. In doing so it is proposed to examine the judges' methods of construing the statute; to discuss the origin and contemporary usefulness of the fiduciary duty and its relationship to the legislation; and to raise some questions about the role of the courts in reviewing decisions which involve contentious matters of policy.

II. CONSTRUCTION OF THE ACT — "BUSINESS PRINCIPLES"

A. Introduction

Though all members of the House of Lords concurred in the result of the appeal, there was a division of opinion over the construction to be given the Transport (London) Act under which the G.L.C. purported to make its decision. The provisions of this statute are complex; their interpretation was not aided by the poor quality of the drafting.[16] The sections, to the extent that they are material, are set out here.

> 1 . . . . [I]t shall be the general duty of the Greater London Council . . . to develop policies, and to encourage, organise and, where appropriate, carry out measures, which will promote the provision of integrated, efficient and economic transport facilities and services for Greater London.
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> 3(1) . . .[T]he Council shall have power to make grants — (a) to the Executive for any purpose; . . .
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> . . . .
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> 5 1) Subject always to the requirements of section 7(3) of this Act, it shall be the general duty of the Executive to exercise and perform their functions, in accordance with principles . . . laid down or approved by the Council, in such manner as, in conjunction with the Railways Board and the Bus Company, and with due regard to efficiency, economy and safety of operation, to provide or secure the provision of such public passenger transport services as best meet the needs for the time being of Greater London . . . .
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> . . . .
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> 7 . . . . (3) The Executive shall so perform their functions as to ensure so far as practicable —
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> (a) that at the end of each such period as may . . . be agreed for the purpose of this paragraph between the Executive and the Council the aggregate of the net balance of the consolidated revenue account of the Executive . . . and the net balance of the general reserve . . . is such (not being a deficit) as may be approved by the Council with respect to that period, and
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> (b) that, if at the end of any accounting period of the Executive the said aggregate shows a deficit, the amount properly available, to meet charges to revenue account of the Executive and their subsidiaries in the next following accounting period exceeds those charges by at least the amount of that deficit . . . .
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> (6) The Council, in exercising or performing their functions under this Act, shall have regard — (a) to the duty imposed on the Executive by subsection (3) of this section; . . . and where the requirements of . . . subsection (3) fail to be complied with by

16 This aroused some comment: e.g. Lord Diplock: "the opaque and elliptical language", supra n.1, 101; Lord Scarman raised the possibility of "a lapse by an overtaxed draftsman": ibid. 121.

> the Executive, the Council shall take such action in the exercise and performance of their functions under this Act as appears to the Council to be necessary and appropriate in order to enable the Executive to comply with those requirements.
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> . . . .
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> 11 . . . . (2) . . . [T]he Executive shall submit to the Council and obtain the Council's approval of — . . . . (d) the general level and structure of fares to be charged . . . . (3) . . . and the Council may direct the Executive to submit proposals for an alteration in the Executive's fare arrangements to achieve any object of general policy specified by the Council in the direction.

Lords Wilberforce, Keith, Scarman and Brandon considered that in its totality, and having regard especially to section 7, the legislation imposed a duty on London Transport to attempt to break even on its operations, so far as it could, without attracting subvention from the rates. Lord Diplock, on the other hand, found no such duty in section 7; but he concurred in the result by interpreting section 1 in the light of the wider context of the legislation, in particular the G.L.C.'s status as a local authority.

B. Section 7

1. *Court of Appeal*

It is useful to consider the judgment of Oliver L.J. on this section,[17] as it differed in an important respect from most of the speeches in the House of Lords.

Taking a somewhat unusual step in the construction of a statute, Oliver L.J. prefaced his investigation of the Act with a discussion of a 1954 decision, *Prescott* v. *Birmingham Corporation*.[18] In that case the Corporation operated a transport undertaking under various local Acts and the Road Traffic Act 1930. The latter authorised a local authority to "demand and take for passengers . . . carried on such vehicles such fares and charges as they may think fit . . . ."[19] This power was subject to the imposition of statutory maximum fares. Until 1953 there were three categories of fares charged: ordinary, and reduced charges for workmen and children. In that year the Council of the Corporation resolved to grant free travel on its vehicles to certain classes of old people. This scheme would cost, according to the judgment, about £90,000 while, at the time, the transport operation was in debt by £700,000. The subsidy had therefore to be paid from the general rate fund. A ratepayer brought an action[20] for a declaration that the free travel scheme was ultra vires.

The Court of Appeal allowed the claim and held the scheme illegal. Jenkins L.J. for the court said:[21]

17 Watkins L.J.'s judgment was in substantial agreement with Oliver L.J.'s on the effect of the provisions: ibid. 89-90; Lord Denning M.R.'s judgment, though less fully stated, was to the same effect: ibid. 67-68.

18 [1955] Ch. 210, H.C. and C.A. This case is further discussed, infra, in the text accompanying n.94.

19 Road Traffic Act 1930, s.104.

20 The standing of a ratepayer to bring such an action was assumed sub silentio. This aspect of the case was discussed in *Barrs* v. *Bethell* [1981] 3 W.L.R. 874, where Warner J. declined to follow *Prescott* and denied locus standi to ratepayers.

21 Supra n.18, 236. Emphasis added.

> We think *it is clearly implicit in the legislation,* that while it was left to the defendants to decide what fares should be charged within any prescribed statutory maxima . . . the undertaking was to be run as a business venture, or, in other words, that fares fixed by the defendants at their discretion, in accordance with ordinary business principles were to be charged. This is not to say that in operating their transport undertaking the defendants should be guided by considerations of profit to the exclusion of all other considerations.

Oliver L.J. in the *G.L.C.* case thought that this ratio was directly applicable to the facts before him, unless there was something in the 1969 Act which led "compulsively" to another conclusion.[22]

With regard to section 7 itself, the Lord Justice remarked that it was aptly described by the marginal note, "Financial duty of the Executive".[23] He held that the respective duties of the L.T.E. and the G.L.C. under the section were distinct. The L.T.E. were obliged by section 7(3) to ensure that their income from fares would meet all their outgoings, over two accounting periods. But the duty was not absolute, being subject to the statutory qualification "so far as practicable". Oliver L.J. thought that only when this duty could not practicably be performed was the G.L.C. entitled under section 7(6) to step in and make up the deficit. Thus the L.T.E. was statutorily barred from making a loss at a time when the market was able to bear fare increases which would avoid that loss. The G.L.C.'s obligation, contingent on the L.T.E.'s failure to break even on fare income alone, did not permit it to take action to encourage a loss.

Implicit in his analysis was the interpretation of "revenue account" as a fund of receipts from fares and ancillary trading activities[24] only. For if "revenue account" could include grants from the G.L.C., and there being no restriction on the amount of such grants, it would be within the L.T.E.'s powers to request a grant rather than raise fares in order to meet a prospective loss. But Oliver L.J. observed:[25]

> There is nothing whatever in the Act which entitles the Executive . . . to demand subvention from the Council or to assume that it will be forthcoming. Such a subvention is to be forthcoming, as I read [section 7(6)], only after the Executive has fulfilled its statutory duty and there remains still a deficit to cover.

2. *Constructions in the House of Lords*

The opinions in the House resolved themselves into three different interpretations of section 7. Lord Brandon saw the section in the same terms as did Oliver L.J., accepting that it excluded grants. He based this conclusion upon the natural and ordinary meaning of the phrase "consolidated revenue" in the context.[26] However,

22 Supra n.1, 73.
23 Ibid. 74. Lord Brandon made a similar comment: ibid. 125. As to whether marginal notes are a permissible aid in statutory interpretation, the weight of authority is against their use: 36 *Halsbury's Laws* (3 ed.) para. 548; *Chandler* v. *D.P.P.* [1964] A.C. 763, 789, per Lord Reid. There is no reference to their use in the Interpretation Act 1978.
24 The L.T.E. was empowered to operate auxiliary services, such as vehicle hire and repairs, by s.6 of the 1969 Act.
25 Supra n.1, 79.
26 Ibid. 126-127.

the breadth of the power of the G.L.C. to grant ("for any purpose") is surely relevant; it was not suggested that grants could be made only for capital costs. And the G.L.C.'s power to direct changes in fare arrangements to achieve objects of general policy[27] underlines the wide discretion given to the Council in regard to fares.

The majority[28] of their Lordships held that "revenue account" was wide enough to encompass both self-generated revenue and income from G.L.C. grants. As Lord Scarman said:[29]

> [T]here is nothing in section 3 [the power to grant] to suggest that grants in support of revenue may be made only to make good deficits which have already arisen.

Only Lord Scarman in the majority articulated the reasons for accepting grants as a legitimate factor in balancing the accounts. Lord Wilberforce was "willing to accept" the proposition,[30] as was Lord Keith,[31] without elaboration. Lord Scarman's justification for his view was that, although he felt it contrary to "the spirit of the section",[32] to hold otherwise would be inconsistent with "advance budgeting". This meant that the L.T.E. was obliged under section 7(3) to make financial plans which "may well envisage the possibility, or probability, of loss . . . having to be made good by grant".[33] Thus it was "sensible" that the L.T.E. could anticipate revenue grants.

But having accepted that the section permits subsidies to the L.T.E., the majority decided that there were limits to the amount of those subsidies. It is difficult to see the limitations in the provision itself; for, if revenue account could include grants, and charges (including deficits) were to be met from revenue account, deficits could properly be met from grant income. Their Lordships held that the whole scheme of the statute had to be looked at.

Lord Diplock alone held that section 7 contemplated that the L.T.E. would be financed both from fares and from grants; and because section 3 provided for grants "for any purpose" the discretion to allot the shares of the financial burden rested with the G.L.C.[34]

His Lordship emphasised the requirement in section 7(2) for the Executive to maintain a general reserve. This, coupled with the different periods laid down in each paragraph of section 7(3), suggested that the limits being placed on the G.L.C.'s discretion directed a fair balance between those paying and those benefiting.

The equitable division arose as follows: paragraph (a) stated that the aggregate of the reserve and the revenue account was to be approved by the G.L.C. Thus

27 Section 11 (3).
28 This term is used to denote the division in the House over the construction of the section; it comprised Lord Wilberforce, Lord Keith and Lord Scarman.
29 Supra n.1, 122.
30 Ibid. 97.
31 Ibid. 112.
32 Ibid. 122.
33 Idem.
34 Ibid. 105.

the Council could control the amount of the fund which would be called on to offset future deficits, and consequently could prevent future ratepayers benefiting disproportionately over present ones. Paragraph (b) was a corresponding protection for future ratepayers, since it discouraged an accumulation of deficit, which would have in the end to be borne by those ratepayers.

Such an interpretation was reinforced by the contrast between the periods set out in the two paragraphs. The former stipulated a period to be agreed between the L.T.E. and G.L.C.; the latter referred to "any accounting period of the Executive". So in the first case the L.T.E. had a longer time in which to build up a reserve, while in the second the deficit could be accumulated for only two years.

It might also be added that, as fares contributed to both funds, the balance was more just as between current and future farepayers. If the Council failed to maintain the balance it was subject to electoral displeasure.

C. The Wider Context

Section 7, though considered vital, was not the only provision relevant to the issues. All the judges looked at the scheme of the statute, and beyond that to other interpretative material.

1. *The statute as a whole*

A great deal of argument centred on the meaning of the words "economic" (in section 1) and "economy" (in section 5). Bromley claimed that they supported its case. In the end, however, of the eight appellate judges only Lord Denning M.R.[35] and, perhaps, Watkins L.J.[36] advanced the words as decisive grounds.

On the one hand Bromley argued that they implied an operation run on business principles. On the other the G.L.C. contended that they meant no more than "cost-effective" or "not wasteful". In the House of Lords, two members leaned towards the former interpretation,[37] and two the latter.[38] Lord Scarman considered that they encompassed both contentions. In the face of such a division it would be of minimal assistance to rely on natural and ordinary meaning. But even when read in context there was disagreement over their significance. For instance, is "economy" in the phrase "with due regard to efficiency, economy and safety of operation" to be read linked to "of operation"? Bromley argued in the negative, that "economy" pointed to business lines and this excluded grants as a primary source of income. But as Lord Diplock pointed out,[39] the identical phrase had appeared in a previous transport statute, in a quite separate part of the Act from that dealing with methods of financing the operation.

35 Ibid. 68.
36 Ibid. 89-90.
37 Lord Wilberforce, ibid. 95; Lord Keith, 110.
38 Lord Diplock, ibid. 104; Lord Brandon, 128-129.
39 Ibid. 104.

Lord Diplock and Lord Scarman both noted that the L.T.E. were required by section 5 to operate "in conjunction with the Railways Board."[40] Lord Scarman pointed out that, as the Board was bound to break even taking one year with another, it would be inconsistent with their cooperation that the L.T.E. and the Board should be set financial targets of varying stringency. But it might also be said that the G.L.C. has under section 3(1)(b) a power, albeit limited, to grant to the Board "in respect of passenger . . . services . . . which appear to the Council to be required to meet the needs of Greater London." Moreover, the central government has extensive grant powers in relation to running unprofitable rail-lines for social reasons.[41]

2. *Statutory history*

The majority emphasised the argument that as, under the legislation relating to London Transport before the 1969 Act, the predecessor of the L.T.E. had been required to break even, Parliament would surely not radically have relaxed this control except in the clearest terms.[42] The previous enactment had read:[43]

> [The London Transport Board] shall so conduct their business as to secure that their revenue is not less than sufficient for making provision for the meeting of charges properly chargeable to revenue, taking one year with another.

Under the Act the G.L.C. had had no part in the running of London Transport, and no funding had come from the rates. In fact there was no arrangement for subsidising urban transport until 1966 when Parliament provided for the Minister to make grants to the Board and validated such grants previously made.[44] Thus the change to locally-funded transport in 1968 and 1969 was significant. Local bodies were given responsibility for controlling their own systems, together with the responsibility for paying for them. Under the Transport Act 1968 (which did not apply to London) transport executives were entitled to take prospective grants into account in preparing their budgets,[45] while transport authorities (equivalent to the G.L.C.) had to notify the executives of the amount of such grants.[46]

It may be seen, then, that one year before passing the Transport (London) Act Parliament had enacted provisions for urban transport which appear to allow discretionary grants for revenue.[47] This is not, of course, determinative of the meaning of the 1969 Act; but it tends to weaken the argument that a change to discretionary deficits was radical at the time.

40 Ibid. 103; 117, 121.
41 Railways Act 1974, s.3.
42 E.g. Lord Keith, supra n.1, 112; Lord Scarman, 120.
43 Transport Act 1962, s.18(1). The section was repealed by the Transport Act 1968 but its effect in regard to London continued by virtue of s.41(2) of that Act until 1969.
44 Transport Finances Act 1966.
45 Transport Act 1968, s.11(1).
46 Ibid. s.13(3).
47 It has been decided since the *G.L.C.* case that the Transport Act 1968 does permit a cheap fares scheme similar to that introduced in London: *R.* v. *Merseyside C.C., Ex p. Great Universal Stores Ltd., The Times,* London, 18 February 1982.

Moreover the form of the 1962 "break-even" section and that of section 7(3) are somewhat different. "Revenue" in the earlier section has become "revenue account" in the 1969 Act, while the Board's "business" is now the L.T.E.'s "functions". The qualification "so far as practicable" has been introduced. The sum of the changes indicates a less stringent attitude toward the finances of the operation.

3. *Political context*

In the search for Parliament's intention the Law Lords were prepared to have regard to the political context. Lord Wilberforce said:[48]

> There . . . has been for some years, discussion, on the political level, as to whether, and to what extent, public transport, particularly in capital cities, should be regarded, and financed, as a social service . . . . We cannot take any position in this argument: we must recognise that it exists. But I am unable to see however carefully I re-read the Act of 1969, that Parliament had in that year taken any clear stance on it.

It would seem, however, that the House was forced to take a position in the debate since both sides of the case were presented to it for decision.

Lord Diplock too adverted to the political context. Dealing with the alleged ban placed on discretionary grants, he noted the political composition of Parliament in 1969 and decided that it was unlikely that the legislature would have prohibited such grants.[49] Moreover the existence of the controversy merely served to underline that a range of options were available in dealing with the transport problem.

Thus, confronted with a difficult statute their Lordships were willing to have recourse to the broader political context. The possibility of examining the direct evidence of the Government's intention in 1969 was not, however, raised.[50]

D. "Business Principles"

It is difficult to avoid the conclusion that, while in part the Law Lords subjected the Transport (London) Act to minute analysis, in the background there was the omnipresent concept of "ordinary business principles". The phrase was taken directly from the *Prescott* decision in which business principles were said to be "implicit in the legislation". This legislation consisted of both local and public Acts passed between 1903 and 1930, employing quite different language and formulae. For instance, one of the applicable sections provided that any deficit "should be made good out of the borough rate of the city made next after such deficiency was ascertained".[51] The successful plaintiff in the case argued that to advance the amount needed for the free fares was not authorised by that provision because the Corporation was prohibited by it from subsidising

48 Supra n.1, 97.

49 Ibid. 106.

50 The rule against citing *Hansard* has recently been reaffirmed by the House in *Hadmor Productions* v. *Hamilton* [1982] 2 W.L.R. 322, 336-337.

51 Birmingham Corporation Act 1903, s.52(2).

the undertaking before a deficit had arisen. The House of Lords in the *G.L.C.* case held that a subsidy in advance was authorised by the legislation. It is submitted that little assistance is to be derived from considering cases decided under dissimilar statutes.[52]

Furthermore the decision in *Prescott* was later described as producing "a very awkward position in municipal finance",[53] and its effect was quickly reversed by Parliament.[54] Lord Scarman who, like Lord Keith and Oliver L.J., discussed *Prescott* before examining the 1969 Act said of the case:[55]

> The legislation, the facts and the era were very different from the Act of 1969 and Greater London in 1981. Moreover Parliament has subsequently intervened to permit fare concessions. But a principle was declared by the Court of Appeal.

However, the "principle" declared was "implicit" in the statutes, and those statutes were impliedly revised later by Parliament. The possible implications of the existence of the revising statute were ignored by the House of Lords while that which founded the *Prescott* decision was approved. Lord Brandon even went so far as to declare that[56]

> . . . the general principle governing statutory transport undertakings, in the absence in the relevant statute of any provisions to the contrary, is that they should be operated on ordinary business lines.

And whilst the judges conceded that the two cases were quite unalike on their facts and legislation, no credible attempt was made to inquire into the dissimilarities whether or not the *Prescott* dictum should be applied. In the earlier case the scheme involved giving free travel to particular classes of old people, whereas in *G.L.C.* the Council was offering subsidised travel to all passengers. So in *Prescott* there was a greater likelihood of ratepayers suffering loss, since the presumed increase in the number of travellers would produce no extra fare revenue. The Birmingham Corporation might even have had to provide additional services. However, in the Greater London situation the probable upturn in patronage would result in more revenue, and possibly enough to compensate for the initial losses.[57] If the L.T.E. implemented a fare increase, there was liable to be a fall-off in usage of public transport which itself would need to be subsidised.

The economics of urban passenger transport is a specialised field which is beyond the scope of this note. Nevertheless the judgments in the case appear to take a simplistic and generalised view of the workings of the transport system.

52 See P. StJ. J. Langan *Maxwell on the Interpretation of Statutes* (12 ed., Sweet & Maxwell, London, 1969) 72.

53 *Litherland Urban District Council* v. *Liverpool Corporation* [1958] 2 All E.R. 489, 490 per Harman J.

54 Public Service Vehicles (Travel Concessions) Act 1955; Travel Concessions Act 1964.

55 Supra n.1, 115.

56 Ibid. 128.

57 In the first three months of the operation of the scheme an increase in patronage of 7 percent on the Underground and 11 percent on the buses was recorded: *Transport* (January-February 1982 issue) p.3.

In addition, the opinions ignore[58] the less immediately obvious effects of an upturn in public travel, namely, an influx of custom into the inner city where the large commercial ratepayers are based; the reduction in traffic in the area, with a consequent gain in parking space and cutback of fuel consumption, pollution, accidents and travelling delays; and the improvement in morale of London Transport employees resulting from having jobs in a thriving rather than declining industry. In sum, it cannot be categorically stated either that the G.L.C. scheme was infringing "ordinary business principles" or that a net detriment to the ratepayers would ensue.

There are yet further questions: even if it could not be proved to the court that the fares plan would result in the long term in a break-even position, is it properly the court's role to balance the benefits and disadvantages and conclude that the former did not outweigh the latter? It was not argued that the project was manifestly absurd. Oliver L.J., for instance, could not say that a reasonable council could never have come to the decision reached by the G.L.C.[59] Moreover it is a little difficult to see that the court did engage in a process of balancing the competing advantages. Observations such as that of Lord Brandon quoted above suggest that the "business principles" approach was being given preference before considering the "transport need" arguments of the G.L.C.

III. FIDUCIARY DUTY

A. Introduction

The House of Lords unanimously approved the concept of a fiduciary duty owed by local authorities to the ratepayers.[60] Although such a duty is usually formulated in very general terms[61] it is somewhat unusual to find it applied in the area of public law. It is also surprising then, that the House did not elaborate on the reasons for applying it to this area. On the other hand, although they do not appear in the opinions, there are cases dating back to the last century which use the notion of trust in relation to local government.

B. Origin and Development

1. *The early law*

Before 1835 municipal corporations in England were private organisations. They owed their existence to prerogative charters which accorded them legal personality. They were thus capable of suing and being sued, and of owning and dealing with

58 However Lord Diplock's formulation of the intention behind s.7(3) is that "the burden shall be borne equitably by those persons who are ratepayers at the time that the benefit of any reduction of fare . . . is available to them": supra n.1, 105; there is no suggestion that "benefit" refers to direct benefits only.

59 Ibid. 83.

60 Supra n.10.

61 "The fiduciary relation . . . does not depend on any particular circumstances . . . It exists, of course, notoriously in the case of trustee and cestui que trust . . ." *Plowright* v. *Lambert* (1885) 52 L.T. 646, 652.

their property as they wished, except where they held it on a specific charitable trust.[62] The corruption and mismanagement which this rule invited, coupled with the lack of a systematic organisation of local affairs,[63] led to the passing of the Municipal Corporations Act 1835.[64]

This statute introduced new controls on the range of purposes for which borough property could be used. Section 92 provided for the establishment of a Borough Fund to hold all the corporate revenue (dues, interest, fines), from which money was to be applied for specific objects enumerated in the section. These included the salaries of borough officers and the administration of justice, with priority being given to the servicing of debts. The section further provided:

> [I]n case the Borough Fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the Council, for the public benefit of the inhabitants and improvements of the Borough . . . .

This statute was reviewed in the case of *Attorney-General* v. *Aspinall*[65] where it was deemed to create a trust of the entire corporate property of the borough. The facts in *Aspinall's* case were as follows. Between the passage and commencement of the 1835 Act, the Council of the Liverpool Corporation had resolved to raise over £100,000 on the security of some of the borough property. This sum was intended to produce income for the endowment of several churches in the borough. The income would be in substitution for the provision already made for the clergy in section 68. The Corporation was heavily in debt at the time. Two citizens of Liverpool were granted an injunction to prevent the borrowing, but this was subsequently discharged.[66] The sum having been raised and vested in trustees for investment, the old Council went out of existence by virtue of the Act. When the new Council declined to institute proceedings to recover the money, the Attorney-General brought a relator action for this purpose. Lord Cottenham L.C. granted the motion. He said:[67]

> I cannot doubt that a clear trust was created by this Act, for public, and, therefore, in the legal sense of the term, for charitable purposes, of all the property belonging to the Corporation at the time of the passing of the Act; and the Corporation in its former state, holding, as it did, the corporate property until the election of the new council and treasurer, were in the the situation of trustees for these purposes . . . .

It may be noted that the statute did not explicitly recognise this trust. In fact section 97 referred to corporate property possessed by the old council "whether in their own right or as trustees for charitable or other purposes". It is arguable

62 "Corporations were situated precisely the same as individuals, they held some property in trust, as individuals held property in trust . . . They also held property not in trust, and over such property the Corporation exercised the same right as individuals over their own property. There was no difference known to the law". Lord Eldon, H.L. Debs. vol. 19 (1828) 1745, quoted in Robson *The Development of Local Government* (2 ed., Geo. Allen & Unwin, London, 1948) 239. See also *Sutton's Hospital Case* (1612) 10 Co. Rep 1 a; 77 E.R. 937.

63 See e.g. Holdsworth *A History of English Law* (Methuen, Sweet & Maxwell, London, 1964) vol. 14, p.230 et seq.

64 5 & 6 Will. IV, c.76.

65 (1837) 2 My. & Cr. 613; 40 E.R. 773.

66 *A-G.* v. *Liverpool Corporation* (1835) 1 My. & Cr. 171; 40 E.R. 342.

67 Supra n.65, 622-623; 777.

that, had the legislature wished to create a trust of the borough property, it would have done so expressly.[66] As it was, it laid down a priority of objects of lawful expenditure. The question in *Aspinall's* case turned on the fact that there was no surplus in the Borough Fund and therefore no statutory authority for any payment "for the public benefit of the inhabitants or improvement of the Borough".

The early cases following *Aspinall* adopted Lord Cottenham's analysis of the Municipal Corporations Act. Thus in *Attorney-General* v. *Wilson*,[69] on facts similar to *Aspinall's* case, Shadwell V.-C. held that the courts could enforce "an ordinary trust". In *Attorney-General* v. *Lichfield Corporation*[70] it was decided that the council could be restrained from making a rate in breach of their trust.

It may be that the equitable remedy for breach of trust was the most effective relief to seek. *Attorney-General* v. *Compton*[71] concerned local Acts for the poor rate; there, the district guardians were restrained from using the money under their control to pay for legal costs in an action against one of their employees. Knight-Bruce V.-C. said:[72]

> These sums were part of a public fund in the hands of certain public officers, devoted to certain public purposes within a certain district, to which purposes it was the duty of those officers to apply them. They were in a sense trustees for that purpose; and if it were held that, upon a misapplication of the monies so circumstanced, it was not competent for a Court of Equity to intervene, I am not aware what civil remedy there would be in such a case.

As far as borough councils were concerned, the 1835 Act did provide a remedy, albeit a limited one. By section 97, certain dispositions of borough property made before the commencement of the Act could be called into question. If any such disposition had been effected collusively for inadequate, or no, consideration, the contract could be, inter alia, rescinded. But in *Aspinall* Lord Cottenham could not say that this section applied to give the relators their remedy. Nevertheless, he considered that in any event section 97 did not oust the court's inherent jurisdiction. The operation of the section was limited to a period of six months after the election of the new council.

This explanation of the invocation of an equitable remedy gains some support from the fact that an amendment[73] to the 1835 Act, allowing for a writ of certiorari to remove a borough council order for payment into the Court of Queen's Bench for review, was not passed until after the appeal had been argued before Lord Cottenham. It may thus have been thought advisable to sue in equity. Further, by impeaching the actions of the councillors qua trustees, they could be rendered personally liable to account for the sums misapplied.

68 Other local officers were expressly constituted trustees by statute, e.g. trustees of turnpike roads.

69 (1837) 9 Sim. 30; 59 E.R. 267.

70 (1848) 11 Beav. 120; 50 E.R. 762.

71 (1842) 1 Y. & C.C.C. 417; 62 E.R. 951.

72 Ibid. 426; 955.

73 Municipal Corporations Act 1837 (7 Will. IV & 1 Vict., c.78) s.44.

Moreover, it is likely that the breach of trust model was the obvious one for a court of the day to adopt in those circumstances. The 1835 Act had revolutionised the legal nature of the municipal corporations; their property was made subject by statute to strict limitations, and could no longer be enjoyed privately by the corporators. It is not surprising then that it should be considered trust property, vested as it was in one body for the use of a larger group. The alternative, ultra vires, was not prominently mentioned until some years later in cases dealing with another type of corporation, the statutory railway companies.[74] Thus on one view the difference between a municipal breach of trust and an ultra vires action was merely one of terminology.[75] But even accepting a true trust which would place constraints on borough councils beyond those imposed by statute, its existence is probably attributable to the sorts of concept with which the Court of Chancery was used to dealing.[76]

2. *Later developments*

The 1835 Act was repealed by the Municipal Corporations Act 1882.[77] Section 92 of the original statute was replaced, using similar language, by sections 140 to 143. However, a new provision enacted that:

> 140 . . . . (3) No other payment shall be made out of the borough fund except — (a) under the authority of an Act of Parliament; or (b) by order of the [borough] council; . . .

It was argued in *Tynemouth Corporation* v. *Attorney-General*[78] that the effect of paragraph (b) was to remove the constraints of ultra vires from municipal councils. But this proposition was rejected by the House of Lords who said that it[79]

> . . . would be contrary to the spirit and intention of the Act and would tend to place the Borough Fund very much at the mercy of an unscrupulous majority in the Borough Council.

But this was a decision on ultra vires; none of the opinions referred to any breach of trust. Although there is no decision expressly holding that the Act of 1882 dispensed with the "trust" on borough property, it is submitted that such was its effect. There are cases in England which continue to refer to councils as trustees proper for their ratepayers; however, this appears to be a lax usage of terminology

74 Brice *Ultra Vires* (2 ed., Stevens & Hughes, London, 1877) x-xi, citing *Colman* v. *Eastern Counties Ry. Co.* (1846) 10 Beav. 1; 50 E.R. 481.

75 "The character of [municipal corporations] . . . was greatly modified by the Act of 1835, which impressed a trust upon their property. Any diversion of the municipal property . . . to purposes other than those prescribed by the Act became illegal, and was later described as *ultra vires*": Street *Ultra Vires* (Sweet & Maxwell, London, 1930) 62.

76 "This period from the Reform Act [1832] to 1870 was dominated by individualist principles. Though there was a growing administrative law, it could still be fitted without too obvious deviation into Blackstone's institutional arrangement . . . The municipal corporations and some other administrative authorities could still be regarded as private law corporations": Jennings "Local Government Law" (1935) 51 L.Q.R. 180.

77 45 & 46 Vict. c.50.

78 [1899] A.C. 293.

79 Ibid. 302, per Lord MacNaghten.

as the cases are explicable in terms of ultra vires.[80] There are also a few decisions from other jurisdictions but their employment of the "trust" vocabulary has subsequently been called into doubt.[81]

3. Roberts *v.* Hopwood[82]

A passage from this well-known case is sometimes used to expound the trust or fiduciary nature of local bodies. The case concerned the Council of Poplar Borough in the East End of London. The Council was empowered to employ officers and to pay them "such wages as [the Council] may think fit".[83] In 1921 the Council, which was controlled by the Labour Party, decided that as a model employer, it should pay its adult workers of both sexes a minimum wage of four pounds per week. The district auditor, who was under a statutory duty to "dis-

80 Thus in *A-G.* v. *London County Council* [1901] 1 Ch. 781 and *A-G.* v. *De Winton* [1906] 2 Ch. 106, judges at first instance describe councils as trustees, or refer to limits on their powers apart from ultra vires. Both cases cite *A-G.* v. *Newcastle-upon-Tyne* (1889) 23 Q.B.D. 492 in support. But in that case the Court of Appeal's decision was based on excess of statutory powers; the contract made by the council was not itself ultra vires, but to perform it would involve a payment unauthorised by statute. The Court of Appeal cited *Aspinall's* case for the proposition "that a municipal corporation will be restrained from applying its borough fund to purposes not authorised by the Municipal Corporations Act or by some other Act of Parliament . . .": ibid. 497. The House of Lords affirmed the decision on this ground: [1892] A.C. 568. In the *L.C.C.* case also, the House dismissed the appeal on the ultra vires ground: [1902] A.C. 165.

81 In New Zealand there are four Supreme Court decisions. The oldest is *S-G.* v. *Dunedin Corporation* (1875) 1 N.Z. Jur. N.S.S.C.1, 16 where Williams J. said, "It has been decided in England that Municipal Corporations, since the Municipal Corporations Act [1835], are trustees of the Corporation property, and there cannot be any doubt that this Court will treat the Corporation of Dunedin as trustees of the funds in their hands". This case was followed in *Petone Borough* v. *Lower Hutt Borough* [1918] N.Z.L.R. 844 by Stout C.J., who repeated the observation that councils were trustees in *A-G.* v. *Wellington Corporation* [1924] N.Z.L.R. 818; in that case the court declined to interfere with the Corporation's action. In *Tauranga Corporation* v. *A-G.* [1927] N.Z.L.R. 875, 878, MacGregor J. observed that "the Courts have always been careful to see that municipal bodies should not be allowed to expend money of their ratepayers, for whom they are trustees, unless such expenditure can be brought strictly within the ambit of their statutory powers and duties". The decision is clearly one based on excess of statutory power.
Furthermore these earlier decisions must be read in the light of the cases of *Auckland Harbour Board* v. *C.I.R.* [1959] N.Z.L.R. 204 and *Waitemata County* v. *C.I.R.* [1971] N.Z.L.R. 151. In the latter case, Perry J., referring to the *Dunedin* and *Petone* cases supra, said (at 159):

> These expressions in my respectful opinion, do not mean that a Corporation holds its property in trust (in the absence of a specific creation) but rather that being a statutory body it must carry out the purposes for which the legislature created it.

However, Perry J. adopted the *Prescott* (infra n.94 and text) dictum that local authorities owe a fiduciary duty.

82 [1925] A.C. 578.

83 Metropolis Management Act 1855 (18 & 19 Vict., c.120) s.62.

allow any item of account contrary to law",[84] considered that in the light of the falling cost of living and of wages for comparable work the four pounds wages were excessive and thus, in his opinion, contrary to law. He consequently disallowed the payment of an amount above what he thought was a reasonable wage and surcharged that excess on the councillors. The latter applied for a writ of certiorari to quash his order. The Court of Appeal upheld the Council[85] but this decision was reversed by the House of Lords. Lord Atkinson said:[86]

> A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others. This duty is, I think, a legal duty as well as a moral one, and acts done in flagrant violation of it should, in my view, be properly held to have been done "contrary to law" . . . .

This analogy with trustees was not taken up by the other Law Lords[87] and the decision also based on grounds more familiar to modern administrative law, such as the council's failure to have regard to relevant considerations,[88] its attention to irrelevant considerations,[89] its acting for purposes outside the scope of the statute,[90] the "unreasonableness" of its decision,[91] and its misconstruing the limits of its powers.[92] Furthermore, the penalty involved was a statutory one; the councillors were liable to account for the sums not as errant trustees or fiduciaries but under the surcharge provision. Yet in another case on similar facts, in which the same judges purported to apply the *Roberts* v. *Hopwood* principles, councillors were described as "trustees for their ratepayers".[93] Such inconsistency must raise doubts as to the precision with which the concept of trust was being applied.

4. Prescott *v.* Birmingham Corporation[94]

As seen above, the Court of Appeal in this case decided that a free travel scheme was ultra vires the Corporation for the reason that the relevant legislation required the public transport undertaking to be run on "business principles". There was, however, a further ground for invalidating the scheme. The court

84 Public Health Act 1875 (38 & 39 Vict., c.55) s.247(7).
85 Sub. nom. *R.* v. *Roberts, Ex p. Scurr* [1924] 2 K.B. 695.
86 Supra n.82, 595-596.
87 Lord Sumner thought that the councillors' discretion must be exercised bona fide, which phrase meant that "they are giving their minds to the comprehension and their wills to the discharge of their duty towards the public, whose money and local business they administer": ibid. 604.
88 Ibid. 590, per Lord Buckmaster.
89 Ibid. 610, per Lord Sumner; 617-618, per Lord Carson.
90 Ibid. 606, 610, per Lord Sumner.
91 I.e. the "exorbitant . . . nature of the payments": ibid. 617, per Lord Carson.
92 I.e. by paying as "wages" what amounted to gifts: ibid. 590, per Lord Buckmaster; 612, per Lord Wrenbury.
93 *Roberts* v. *Cunningham* (1925) 134 L.T. 421; 90 J.P. 32, per Lord Buckmaster, the other judges concurring.
94 Supra n.18; the facts are set out in the accompanying text.

accepted the Corporation's contention, for which there was ample authority, that a power to charge fares included a right to discriminate between different classes of travellers. But it added that this principle was qualified when the power was exercised by someone under a duty to others. For example, in the case of a trustee operating a transport service the beneficiary had the right to object if reduced fares were charged. Likewise, shareholders could complain if the management of the company took that step.

By analogy this duty was extended by the court to the Corporation. Jenkins L.J. said:[95]

> Local authorities *are not, of course, trustees for their ratepayers,* but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter. Thus local authorities running an omnibus undertaking at the risk of their ratepayers . . . are not, in our view, entitled, merely on the strength of a general power, to charge different fares to different . . . classes of passengers, to make a gift to a particular class of persons or rights of free travel on their vehicles, simply because the local authority concerned are of opinion that the favoured class of persons ought, on benevolent or philanthropic grounds, to be accorded that benefit.

The court referred to a dictum in an old case[96] that shareholders would have standing to impeach a company decision to charge less than the full toll for a service which it provided.[97] *Roberts* v. *Hopwood* was said to afford "some support" for the court's view. No other authority was cited to reinforce the analogy.

The above passage must finally dispose of the idea that local bodies are trustees for their ratepayers.[98] But the necessity to substitute a fiduciary duty also drawn from private law concepts is equally open to question.

5. *Ultra vires, trust and fiduciary duty*

It has been argued that the original "trust" fastened upon local body property resulted from a judicial gloss upon a statute which is probably explicable in terms both of the superiority of equitable remedies and of the immaturity of administrative law principles at the time. The problem of the prevention of abuse of powers by local authorities was later comprehended under the rubric of the ultra vires doctrine; being directly concerned with the observance of statutory limitations,

95 Ibid. 235. Emphasis added.

96 *Hungerford Market Co.* v. *City Steamboat Co.* (1860) 3 E. & E. 365, 381; 121 E.R. 479, 485, per Cockburn C.J.

97 It is clear that directors cannot lawfully use their powers except for the benefit or intended benefit of the company: 7 *Halsbury's Laws* (4 ed.) para. 499.

98 The last English case which refers to councillors as trustees is *Wallasey Corporation* v. *A-G.* [1945] Ch. 166, where the fact is merely assumed. Cohen J. said that private trustees would, in the circumstances of that case, need the beneficiaries' consent to make the payment in question, and it made no difference that this was a public trust. But it is submitted that this only weakens the trust concept: must all the ratepayers consent to every payment by the council which the latter are not bound to make? De Smith notes that there is no legislation clearly reversing the effect of the Municipal Corporations Act 1835 and observes that borough property is thus still subject to a trust: *Judicial Review of Administrative Action* (4 ed., Stevens, London, 1980) 461. But in view of the *Prescott* decision, approved in *G.L.C.,* it is submitted that this proposition is no longer tenable.

it is better equipped to control bodies which are purely creatures of statute. Common Law notions of private rights may cause embarrassment in the areas of public law. It is not suggested, for instance, that central governments are subject to any sort of trust other than in the realm of political theory. In fact it has been insistently denied in constitutional law that the Crown is under any sort of trust other than a "trust in the higher sense".[99] The same opinion has been expressed in relation to a subordinate executive body, itself a creation of statute.[100]

The historical basis of the trust now having been rejected by the courts, it has been sought to justify analogically a fiduciary duty to local ratepayers. But it is difficult to see this as any more appropriate, particularly as one of the analogues suggested is, again, a trust.[101] A trustee's prime task is to conserve the trust fund[102] and dispose of it only according to the settlor's intentions.[103] In fact the first place the problem of identifying settlor and beneficiary in the local government context is patent. Over half of all local body revenue in the United Kingdom is contributed by the taxpayer through central government grants.[104] Thus, accepting the analogy, the "settlors" might correspond to the taxpayers whose intentions are divined via the ballot box, not in the courts. And can it be said that the "preservation of the fund" is a proper view to take of local government activity? Again, it is submitted that this is a political issue, subject to the will of Parliament and of the electorate.

In the company analogy the directors, although fiduciaries, are under no trust obligation to preserve the property; in fact they are entitled to take risks, and the courts will usually refrain from interfering with the directors' discretion unless their acts are ultra vires.[105]

It is suggested that the following passage from the judgment of Atkin L.J. in the *Roberts* v. *Hopwood* case places the trust-fiduciary concept in its proper perspective:[106]

> I venture to doubt the legal value of the proposition of the Court below that "the council are in a fiduciary position not merely towards a majority who have elected them but towards the whole of the ratepayers". If it is sought to impose upon the councillors the liability of trustees to their cestuis que trust, the analogy fails. That trust and confidence are bestowed upon them is true; that they may not use the

99 *Kinloch* v. *Secretary of State for India* (1882) 7 App. Cas. 619, 625 per Lord Selborne L.C.; approved in *Tito* v. *Waddell* (No. 2) [1977] Ch. 106, 211 et seq.; and *Town Investments Ltd.* v. *Dept. of the Environment* [1978] A.C. 359, 380, 397, 401. In the *Town Investments* case Lord Kilbrandon said that he did "not find the concepts of agency or trust, even as analogues, relevant in this context" (i.e. between minister and Crown).

100 In *A-G.* v. *Bunny* (1874) 2 N.Z.C.A. 419, 438 Arney C.J. denied that the funds of the Provinces in New Zealand were trust funds, and that those who administered them were trustees in the ordinary sense of the term.

101 See the passages from *Roberts* v. *Hopwood* and *Prescott,* in the text accompanying nn. 86 and 95 supra.

102 *Low* v. *Bouverie* [1891] 3 Ch. 82, 99, C.A.

103 *Re New* [1901] 2 Ch. 534, 544, C.A.

104 Figure quoted in *R.* v. *Environment Secretary, Ex p. Brent L.B.C.* [1982] 2 W.L.R. 693, 700.

105 L.S. Sealy "The Director as Trustee" [1967] C.L.J. 83, 93.

106 Supra n.85, 726.

> powers entrusted to them for their own advantage is also true.[107] But for the proposition that there are any equitable rights in the ratepayer as such, which can be enforced by the interference of a court of equity with the honest administration of affairs, I know of no authority. The duty of the council is to the local community as a whole. It must be inadvertence which suggested any fiduciary relation to the majority which elects them. Whatever the duties are, they are public duties and must be judged accordingly.

The House of Lords' decision in *Roberts* v. *Hopwood* has been argued in several cases concerning the English housing legislation which permits local councils to subsidise the rent of their tenants' accommodation. In these cases the emphasis is upon the need for authorities to exercise their discretion in a fair and considered way. The court in *Belcher* v. *Reading Corporation*[108] expressed the council's obligation as a general duty to balance the interests of tenants and ratepayers as a whole. The council had to have regard to the relevant considerations and act reasonably. In *Evans* v. *Collins*[109] the Divisional Court said that the question was "whether the difference between the rents charged and the economic rent was so great as to indicate that the council were not holding the scales fairly". However, though the courts were prepared to weigh up whether the balance had been held fairly, it was recognised that the councils were to be accorded a significant leeway in carrying out the exercise. Thus Diplock L.J. said in *Luby* v. *Newcastle-under-Lyme Corporation*:[110]

> It is not for the court to substitute its own view of what is a desirable policy . . . . It is only if it is exercised in a manner which no reasonable man could consider justifiable that the court is entitled to interfere.

Finally, some courts have placed emphasis on electoral, rather than judicial, supervision of local bodies in areas of contentious policy. In the recent case of *Pickwell* v. *Camden London Borough*[111] on facts similar to the Poplar case, the court regarded the issue as whether no reasonable council could have made the wage settlement in question, and not as whether the council had made a bad bargain for the ratepayers. These later cases manifest a more muted concern for the ratepayers' interests than that expressed by Lord Atkinson in *Roberts* v. *Hopwood*. They frame the duty as one requiring consideration of all the interests, and, unlike his Lordship, generally relate it to the purposes of the statute.

107 There are decisions which hold that municipal elected officials and employees are liable as trustees of fiduciaries for secret profits: *Bowes* v. *Toronto* (1858) 11 Moo. P.C. 463; 14 E.R. 770, P.C.; *Hawrelak* v. *Edmonton* (1972) 24 D.L.R. (3d.) 321 (reversed on facts: (1975) 54 D.L.R. (3d.) 45, S.C.C.). These decisions are explicable on a basis apart from any municipal "trust". Other decisions have held public employees to account for secret profits: e.g. *A-G.* v. *Goddard* (1929) 98 L.J.K.B. 743 (policeman); *Reading* v. *A-G.* [1951] A.C. 507, H.L. (soldier). In the latter cases the alternative bases of implied contract, quasi-contract (money had and received), and fiduciary relationship were suggested. With respect to elected officials, breach of their oaths of office might found an action.

108 [1950] Ch. 380.

109 [1964] 1 All E.R. 808, 812.

110 [1964] 2 Q.B. 64, 72, Q.B.D.

111 *The Times,* London, 30 April 1982.

C. Application in the G.L.C. Case

The role played by the fiduciary duty in resolving the issues in *G.L.C.* is a crucial feature of the case. As noted, the existence of the duty was unanimously acknowledged by the House of Lords,[112] but, in the main, its status and extent were not closely explored.

1. *Status: presumption or principle?*

This fact may be due in some measure to the approach taken by the House to issues before it. Of the Law Lords who considered the question as one of strict ultra vires, Lord Wilberforce and Lord Keith merely refer to the *Prescott* decision, while Lord Brandon did not advert to the duty in his discussion of the legislation. This may be because if the question is framed as one of statutory construction the relevance of duties or principles which are not based on the Act in question is considerably lessened.[113] This follows from the doctrine of parliamentary sovereignty and the pre-eminence of statutes as a source of law. It is, of course, accepted that certain presumptions may legitimately be applied to interpret a statute.[114]

> Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed to have been taken for granted, by Parliament.[115]

Can a fiduciary duty of the sort adopted in *G.L.C.* be described as one of these presumptions? It has been seen that the duty has developed from being the equivalent of the vires doctrine to a factor which the courts will weigh, in the context of the statute, against other considerations. Such a development has been gradual, although occasionally, and generally in a charged political atmosphere[116], judges have re-emphasised the interests of the ratepayers.

If the question is approached, as it was by Lord Diplock and Lord Scarman, on an overall basis, combining the questions of construction and discretion, then a wider range of principles is seen as available. Lord Diplock's analysis, which he described as "purposive"[117], refers to the "legal nature and status of the G.L.C. as a local authority"[118] and contends that statutory powers, "although unqualified by any express words in the Act, may nonetheless be subject to implied limitations when . . . exercisable by a local authority . . . that would not be implied if those powers were exercisable, for instance, by a minister of the Crown".[119]

112 Supra n.10.
113 Oliver L.J. did not consider the duty in relation to the question of construction.
114 Cross *Statutory Interpretation* (Butterworths, London, 1976) 142.
115 And of criminal law: e.g., *Sweet* v. *Parsley* [1970] A.C. 132 (presumption of mens rea). For other examples see *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736, 765, per Lord Reid.
116 E.g., *Roberts* v. *Hopwood*: see Keith-Lucas "Poplarism" [1962] P.L. 52; and the *G.L.C.* case itself.
117 Supra n.1, 100, 101.
118 Ibid. 100.
119 Idem.

This statement is somewhat ambivalent; it may be read as alluding to a mere presumption, but the phrase "implied limitation" extends beyond this. The question then becomes, where are these limitations drawn from, and are they consistent with the language and aims of the statute?

Lord Scarman, it is suggested, went somewhat further. He employed the fiduciary duty as an interpretative aid ("this construction of the section . . . would make mincemeat of the fiduciary duty owed to the ratepayers"[120]), but also said[121]:

> For, as the statute must be interpreted in the light of the general law, so also must the general law be adapted and applied in a way consistent with the statute. Indeed, if there be a clash, the statute prevails as the legislative will of Parliament.

The last sentence (which seems almost to have been added as an afterthought) admits of no doubt: it is a governing principle of English constitutional law. But the weight which ought to be accorded the "general law" in the face of statute is by no means so clear. In the field of administrative law, as noted above, there are presumptions applied to statutes to ensure that the parties will receive a fair hearing and a considered decision. These are in the nature of procedural limitations. But in the case of the fiduciary duty it is submitted that the effect is to alter substantive rights, which elevates a presumption into a "principle of law". Lord Scarman appears to have treated it as such when he said, "[t]o sum up my views, *Prescott's* case was . . . correctly decided, and the principle of the decision remains in the law. It must, however, be applied in the light of relevant legislation".[122] Where the issue put is "fundamentally a question as to the true interpretation of the statute"[123], this statement suggests a confusion of priorities.

Finally it might be asked whether the House, in deciding that the G.L.C. did not hold the balance fairly, was itself not giving sufficient weight to competing interests. For instance, the fact that the majority of the G.L.C. had won an election in which their fares policy was a central issue was virtually ignored. Lord Wilberforce stated that the election victory was irrelevant to "the question of legality"[124], presumably meaning by that phrase the strict question of construction. However, in discussing "the question of legality" he did not hesitate to introduce the fiduciary duty[125]: yet neither the election nor the duty were referable to the terms of the statute itself.[126] Lord Diplock, while emphasising the importance of implementing successful election policies to the survival of democratic local government, made use of the election mandate in this case to invalidate the scheme by demonstrating that the G.L.C. in adhering rigidly to the promise, had failed to exercise its discretion.

120 Ibid. 120.
121 Ibid. 115.
122 Ibid. 116.
123 Ibid. 114.
124 Ibid. 93.
125 Ibid. 94.
126 I.e. in Lord Wilberforce's speech. Lord Diplock, on his broader view of the issues, links the duty to the word "duty" in the statute.

2. *Extent: formulation of the duty*

For the most part the attempts to formulate the fiduciary duty were vague, which in itself points to the duty being taken for granted.[127] Lord Wilberforce simply referred to *Prescott,* while Lord Keith set out the description from that case, namely that the duty meant that the Corporation was not entitled to confer a gift of free travel on certain classes at the expense of the ratepayers. Lord Scarman linked the duty directly to the concept of business principles and to the Act[128]:

> I find nothing in section 7 which cuts down or modifies the fiduciary duty of the G.L.C. to its ratepayers — a duty which requires it to see that the services of . . . the Executive are provided on business principles to ensure, so far as practicable, that no avoidable loss falls on the ratepayers.

Again, the image suggested is that of a tenacious Common Law principle at which the statute must chip away to displace. But it is implied that the two can be read harmoniously, with the result that the ratepayers are protected at the same time as the will of Parliament is given effect. The duty involved avoiding loss which was unnecessary. Yet in practical terms what does this amount to? Is the G.L.C. bound to close down services which do not make a profit and thereby avoid loss? When is a loss avoidable? It would be possible, and practicable, to withdraw services from all routes which do not pay for themselves; but while complying with Lord Scarman's formulation of the duty, it is submitted that this would breach the statutory duty of the L.T.E. under section 5 to provide services which "best meet the needs . . . of Greater London".

Lord Diplock's delineation of the duty goes even further by introducing a third interest to be considered. Basing himself on the cases cited by Lord Wilberforce, he defined the obligation as including a duty "not to expend those rate moneys thriftlessly, but to deploy the full financial resources available to it to the best advantage".[129] These resources comprised the rates and central government grants. Lord Diplock added that the G.L.C. had a discretion as to the proportions that the ratepayers and travellers respectively should have to pay. So far the formulation was less stringent than Lord Scarman's. Any exercise of the discretion which would result in loss, albeit practicably avoidable, to the ratepayers was not automatically a breach of the duty. But his Lordship continued[130]:

> [A]s the G.L.C. well knew when it took the decision to reduce the fares, it would entail a loss of rate grant from central government funds amounting to some £50 million, which would have to be made good by the ratepayers . . . So the total financial burden . . . was to be increased by an extra £50 million as a result of the decision, without any equivalent improvement in the efficiency of the system . . . That would, in my view, clearly be a thriftless use of moneys obtained . . . from ratepayers and a deliberate failure to deploy to the best advantage the full financial resources available to it *by avoiding any action that would involve forfeiting grants from central government funds.*

127 "It is no more than common justice": supra n.1, 116, per Lord Scarman.
128 Ibid. 123.
129 Ibid. 108.
130 Idem. Emphasis added.

So the G.L.C., as well as observing its statutory duty to the travelling public, was bound by its fiduciary duty to have regard both to the ratepayers and to the central government.

It is submitted that this formulation has consequences reaching far beyond the particular circumstances of the case. While local authorities cannot act outside the law, acting in opposition to the wishes of the national government is quite a different matter. A common description of local bodies is that they are creatures of statute: that is to say, they are restricted to powers given to them by legislation. But conversely, they are entitled to employ their statutory powers to the fullest extent possible. Lord Diplock's definition of the fiduciary duty would impose a non-statutory constraint on them which would be open to manipulation by the central government. For a local authority to spend, even in accordance with its constituents' wishes, in excess of amounts prescribed by ministerial regulation, would not only risk forfeiting the grants but would also be illegal expenditure.[131]

Moreover, although Lord Diplock asserted that the G.L.C. knew that by going ahead with its policy it would incur the loss of the rate support grant, the automatic nature of the penalty is now open to serious doubt. In the recent case of *R.* v. *Secretary of State for the Environment, Ex parte Brent L.B.C.*[132], the Divisional Court held that the Secretary of State had fettered his discretion to reduce government grants to local authorities by failing to consider new representations.[133] Should local bodies be prevented from using their powers by the knowledge that they might suffer a reduction in their grant income? It is submitted that if Lord Diplock's duty is applied generally the functioning of local activity would be hampered by excessive uncertainty.

IV. PROCEDURAL REQUIREMENTS

The failure of the G.L.C. to comply with formal requirements laid down by the Act was a further possibility for attacking the Council's decision. It is surprising, then, that the House of Lords barely mentioned this ground, especially as it had been dealt with by Oliver L.J. in the Court of Appeal. It may be that the procedural arguments were considered excessively technical in comparison with what were seen as the main issues.

There were two matters involved; the first related to the procedure of submitting the proposals to the G.L.C. for approval, and was swiftly disposed of in the House.[134] The second, the failure to consult other interested authorities,

131 Among the penalties for which are, as in *Roberts* v. *Hopwood* supra n.82, surcharge and disqualification from eligibility: Local Government Act 1972, s.161 (now replaced by the Local Government Finance Act 1982, s.19).

132 Supra n. 104, 728 et seq.

133 Furthermore, in the present case Dunn L.J. in the Divisional Court remarked that there were two categories of grant: "there had been no indication so far that [the second type of] grant would be withheld": supra n.4.

134 The fact that the G.L.C., as opposed to the L.T.E., had initiated the fares plan contributed to Oliver L.J.'s finding that the plan had been invalidly adopted. But the House of Lords was prepared to treat the proposals as put forward by the L.T.E. in compliance with s.11(2)(d): supra n.1, 96.

was not discussed at all by their Lordships. This objection concerned London Transport railway services outside London carrying commuters into the city, to the cost of which the county councils around London contributed. Section 11 (5) stated that:

> [T]he Council — (a) shall . . . consult with the council of any county within which any of those railways are situated as to the general level and structure of such fares on journeys within, to or from that county; and (b) before approving any proposal for a change . . . shall inform the council of that proposal and consider any offer by that council to make a financial contribution . . .

It was unclear from the documentary evidence in the Court of Appeal exactly what consultation had occurred, but some contact had been made. The county councils had been informed of the planned changes some time after 25 June[135] and were given a deadline of 3 July to make any offers of contribution.

Oliver L.J. treated the consultation requirements as mandatory, without discussion.[136] While statutory requirements of consultation have usually been held to be mandatory, it is a question for each case.[137] The factors influencing the decision include the importance of the procedural requirements in the overall scheme of the statute[138], and the amount of inconvenience which would flow from invalidation of the decision on technical grounds.[139]

In *Sinfield* v. *London Transport Executive*[140] the question was whether consultation was obligatory between the L.T.E. and local authorities before the Executive varied its bus routes in the authorities' areas. Though the case was decided on another ground, the Court of Appeal was invited to express a view on the nature of the consultation requirement.[141] Sachs L.J. said[142]:

> Any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right to be consulted an opportunity to be heard at the formative stages of the proposals — before the mind of the Executive has become unduly fixed.

In the present case consultation was not the central issue; it was used as a supporting argument in the Court of Appeal. Thus it might have been argued that as there had been literal compliance with the provisions, the statutory requirements were satisfied. But Oliver L.J. held that the opportunity given to the county councils was insufficient. The cases support the view that a reasonable

135 Ibid. 86.

136 Ibid. 85.

137 De Smith *Judicial Review of Administrative Action* (4 ed., Stevens, London, 1980) 142-145.

138 Maxwell, supra n.52, 314.

139 *Simpson* v. *A-G.* [1955] N.Z.L.R. 271. But inconvenience is not always a reason for overlooking non-compliance: see Lord Denning M.R. in *Bradbury* v. *Enfield L.B.C.* [1967] 1 W.L.R. 1311, 1324.

140 [1970] Ch. 550, C.A.

141 I.e. Transport (London) Act 1969, s.23.

142 Supra n. 140, 558.

period must be given. It was decided in *Lee* v. *Department of Education*[143] that "an opportunity to make representations" meant a real and not illusory opportunity. The four days was inadequate, and a period of four weeks was substituted.

In *G.L.C.* three of the counties complained of the lack of time allowed to consider the fares scheme. Since consultation is generally not to be treated as a mere formality, and there was a possibility that the counties would be prejudiced by not being afforded a chance to make representations, it was open to the court to hold that the Act had not been complied with in this respect and to direct a reconsideration of the matter in accordance with the requirements.

V. CONCLUSION

The decision in the *G.L.C.* case is likely to have a significant impact on local government law, provided that the courts are not minded to distinguish it.[144] Although it is true that the Act in question related only to London, it has been argued that the decision illustrates the judges' wide power to employ a broad range of considerations and approaches. There is no reason to suppose that this variety of means available to the courts is not equally applicable in other areas of administrative law.

For example, the case invites consideration of the way in which the Law Lords regarded the interplay of Common Law and statute. In recent years a greater preparedness by the courts to make use of extrinsic material in the construction of statutes has been observed, generally with approval. But this flexibility raises the questions of what wider considerations the judges should take note of, and whether such factors are related to and consistent with the statute involved. In *G.L.C.* the House felt itself free to draw on concepts, the fiduciary duty and "ordinary business principles", which, it has been suggested, are of dubious logic and pedigree. It might also be remarked that the House did not consider some of the more fundamental interests present in the case; there was no sustained argument of such factors as the constitutional and democratic rights of the electors, and the freedom of their representatives to carry out their wishes. By way of illustration, the House took pains to point out that their decision related, in their view, only to the lawfulness of the scheme. Yet Lord Wilberforce was able to include the duty to the ratepayers in his treatment of the statutory language, while the preferences of the electorate were relevant, he said, to the separate issue of discretion,[145] which he did not find necessary to discuss. Even less satisfactory, the existence of the duty was simply asserted.[146]

One consequence of the diversity of approaches available to the judges is the inconsistencies which may arise even in similar areas of law. Again the elective

143 (1967) 66 L.G.R. 211; 111 S.J. 756. See also *Port Louis Corporation* v. *A-G. of Mauritius* [1965] A.C. 1111, 1124.

144 As has already occurred: see *R.* v. *Merseyside C.C.*, supra n. 47; *Pickwell* v. *Camden L.B.C.*, supra n. 111.

145 Supra n.1, 93.

146 Ibid. 94.

nature of local government provides an example. It was said in *Secretary of State for Education* v. *Tameside M.B.C.*[147] that the elective character of the local authority concerned was "vital" in considering whether the authority had acted unreasonably, and that at least in a sense the council was "bound" to implement the policy on which it has been elected.[148] By contrast the *G.L.C.* case affirms the willingness of some courts to upset the decisions of local bodies even when the latter have been elected campaigning strongly on the impugned policy. It appears to reflect a judical perception of local government which denies it an important role in shaping policy. "[I]t cannot be too strongly emphasised that local government councillors are not legislators",[149] observed Oliver L.J. Such a remark is underlined by the imposition of the fiduciary duty and requirement of business principles on the local councils, in addition to the usual set of controls related to the vires doctrine. Yet instances of judicial concern for the independence of local bodies are to be found. As well as the *Tameside* case, the statement of Lord Denning M.R. in a recent case[150] could be noted:

> This "default power" enables the central government to interfere with a high hand over local authorities. Local government is such an important part of our constitution that, to my mind, the courts should be vigilant to see that this power of the central government is not exceeded or misused.

What freedom, then, should local representatives be accorded? It is relevant that local bodies carry much of the burden of administration in English government. They are responsible for housing, health, education, transport, social services, the police and municipal services. The major political parties take an active part, as the case itself illustrates. Moreover Parliament has not thought fit to give commercial enterprises, which contribute to the rates, a role in local elections. Given such a background it is submitted that the courts should allow the elected bodies a wide latitude in the exercise of their statutory powers, and should be slow to grant commercial ratepayers the seemingly automatic protection accorded them in *G.L.C.* Why should the courts see their role as to safeguard the interests of one particular group, in the absence of statutory indications to do so?

Finally it is possible to suggest a means of deciding the case which might have avoided much of the controversy over the Lords' judgments. It seemed reasonably clear that the G.L.C. majority, with the knowledge of their manifesto promise, had not considered afresh the proposed fare cuts scheme after their election. It is settled law that a body entrusted with a statutory discretion must not refuse to make a real exercise of the discretion or impose a rigid rule of policy such as to fetter it. Therefore, might it not have been merely held that in adhering to its manifesto promise without considering representations from interested parties or changes in the circumstances the G.L.C. had failed to exercise its discretion at all? The majority of the House of Lords did not base their

147 [1977] A.C. 1014, 1047, per Lord Wilberforce.
148 Ibid. 1051.
149 Supra n.1, 81.
150 *R.* v. *Secretary of State for the Environment, Ex p. Norwich C.C.* [1982] 2 W.L.R. 580, 590; and see *Sagnata Investments Ltd.* v. *Norwich Corporation* [1971] 2 Q.B. 614, 628.

decision on this ground. However, coupled with the failure to comply with the procedural requirements of the statute, it is submitted that the G.L.C.'s error in not truly exercising their discretion was sufficient to invalidate the decision reached. This course would have had the advantage of compelling a re-exercise of its powers by the Council, but would not have constituted a complete prohibition of the proposed scheme. Thus any perceived element of confrontation between the court and the Council would have been lacking, while further time would have been available to achieve a political solution on the issue. Lastly, certain elements of judicial doctrine which may have outlived their usefulness would not have been reaffirmed at the highest level.

POSTSCRIPT. A revised plan for a general fare reduction of approximately 25 percent was approved by the Divisional Court in 1983.[151]

151 *R.* v. *London Transport Executive, Ex p. Greater London Council, The Times,* London, 28 January 1983.