

Pension Lawyers Association Conference 2005

Funds facing financial hardships

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Funds facing financial hardships

- Funds in difficult circumstances can result from various events - negligence, absence of proper controls, bad advice, non-compliance with legislation, maladministration, theft, fraud, – the seriousness of the cause does not necessarily determine the extent of the loss
- How are members protected?



Registrar's powers – on-site visits and investigations

- On-site visits – used to test compliance and sufficient systems for proper controls - preemptive attempt to ensure funds protected and remove margins of error
- Inspections of financial institutions by FSB inspectorate division in terms of the Inspection of Financial Institutions Act - financial institutions include all retirement funds, administrators, asset manager's and other service providers



Registrar's powers – on-site visits and investigations cont.

- Registrar has the power to at any time instruct an inspection – costs can be recovered from fund or person requesting inspection



Powers of inspectors (Section 4: Inspection of Financial Institutions Act)

- Powers of investigators extensive:
- Administer an oath or examine any person connected to financial institution
- Search any premises at any time without prior notice and open any strongroom or container in which he or she suspects documents are kept



Powers of inspectors (Section 4: Inspection of Financial Institutions Act) cont.

- Make copies of or remove documents if in his or her opinion may afford evidence of an offence or irregularity
- Investigators required to observe secrecy, limited disclosure allowed
- Cost of inspections can be recovered from fund or person requesting investigation



Powers of inspectors cont.

- From FSB annual reports appears about 110 investigations have been conducted into funds and administrators over the last 4 years
- Very effective mechanism if FSB is advised or alerted to transgressions timeously - rely on whistleblowers
- Important evidence can be obtained in respect to unlawful conduct



Curatorships (Section 5, Financial Institutions Protection of Funds Act 28 of 2001)

- Registrar may on good cause apply to Court for the appointment of a curator
- Court determines powers of curator and he or she operates under control of Registrar from whom can get instructions on any matter



Curatorships cont.

- Protection for members or other interested parties – any person can on good cause shown apply to Court to set aside or alter any decision of curator or Registrar
- What constitutes ‘good cause’ for the purposes of obtaining a order for curatorship?
- *Ex parte Executive Officer of the Financial Services Board In re Joint Municipal Pension Fund* [2004] BPLR 5411 (SCA) (but actually a decision of the TPD)



Curatorships cont.

- fund lost R1.4bn through investments in agricultural futures
- Registrar sought to remove trustees and place fund under curatorship and argued good cause established
- the fund opposed the application and argued good cause could only be satisfied by same standard of proof as common law
- at common law a trustee can only be removed if real risk that funds will be dissipated or investments lost



Curatorships cont.

- referred to *Sackville West v Nourse and Another 1925 AD 516* – although there was negligence in the investment of trust funds, for which trustees could be held personally liable, concluded no grounds for removal of trustees
- Court held wording of section 5 does not suggest a test more lenient than common law and concluded that apart from concern over conflict of interest trustees were doing utmost to remedy situation



- Test onerous and may be difficult to meet. Registrar appealed judgment but then withdrew application when subsequent events made the issue academic



Applications in terms of section 26 of the PFA

- If Registrar of the view that a fund is not in sound financial condition and has failed to act in accordance with s18 or if such action is necessary as a result of an investigation may apply to court for order directing that the rules of the fund relating to the appointment, powers remuneration and removal from office of the board be altered
- Court required to consider the equitable interests of the members of the fund and make order most advantages to members
- Again costs may be paid by fund



Liquidations

If funds are not able to recover from financial difficulties then court may order, or the trustees or a curator face a decision on whether to liquidate the fund

- Section 29 of PFA provides the procedure for winding up a fund not in a sound financial position and section 28 which deal with voluntary winding up - decision must be in best interest of members



Liquidations cont.

- s30(3) creates obligations on employer to fund shortfall to pay minimum benefits
- In calculating extent of liabilities the cost of annuity policies to provide equivalent pensions for pensioners must be taken into account
- What constitutes “equivalent pensions” not defined and method of determining can make a significant impact on extent of employer liability



Proposals for new Legislation National Treasury discussion document

- **Improve regulatory powers of Registrar**
- **Licensed practitioners with “whistle blowing” rights and obligations**
- **Fine, suspend, disqualify trustees who do not fulfil duties and comply with codes of good practice**



Proposals for new Legislation National Treasury discussion document cont.

- **Suspend/withdraw licences for service providers who do not comply with statutory obligations**
- **Guidelines on adequate fidelity cover**
- **In certain circumstances members be treated as preferred creditors in liquidations**



Insurance

- **Funds obliged to obtain cover**
- **Bargaining power of funds limited – costs extremely high**
- **Regulatory framework creates business for insurance industry with no regulation of content of policies and cover**



Insurance cont.

- **Insurers avoid policies and repudiate claims in majority of cases**
- **Industry requires a national fidelity fund which covers all losses**

