

PAPER FOR THE PLA CONFERENCE, MARCH 2006: EXPERIENCES OF A S15K TRIBUNAL

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A: Introduction

I was asked to do this session given EN's role as lawyers for the Fund and the Tribunal in the Shell matter, which many of you might be aware of, but the views expressed here are not the views of EN, the Fund or the Tribunal. They are purely my own.

The Tribunal for the Shell SA Pension Fund was the first such tribunal appointed by the Registrar. Once established, however, we soon realised that the Pension Funds Act ("the Act") actually does not give much guidance as to how the Tribunal must perform its functions. There are no "Tribunal rules" like one would have "court rules" and there was no one to advise, and at times warn us, of the practical, logistical and legal issues that would arise.

The purpose of this talk is to share some of our experiences with the Tribunal's investigation in the hope that it would alert lawyers, administrators and stakeholders involved in the process to some of the issues that are likely to arise.

B: The S15K Tribunal

I am sure that most of you are familiar with the surplus apportionment process required by the Act. The important question for purposes of this session is where in this process does the s15K tribunal fit in?

The Registrar will establish a tribunal:

- if the board fails to submit a scheme within the prescribed period (18 months from the SAD)
- if the Registrar is not satisfied that the scheme is reasonable and equitable
- if the Registrar considers that unresolved complaints require investigation
- if the board or FMR requests that a tribunal be established

Once appointed, s15B(10) tells us that the Tribunal then performs the functions of the board set out in s15B, which all relate to the surplus apportionment process, and that any reference to the "board" in the section is to be construed as a reference to the tribunal.

I've been asked to talk specifically about some of the legal issues that have arisen so far in the Tribunal process. There are also a number of practical considerations that parties engaged in a Tribunal process ought to bear in mind, which I will leave to the end if we have some time.

C: Nature of the Tribunal Process

One of the first tasks for a tribunal is to design the process by which its investigation is to take place, and the Act gives the tribunal much leeway in doing so. It states that the tribunal may follow any process it considers appropriate including procedures in an inquisitorial manner, and affording any stakeholder the right to a hearing. It may also summon persons to produce documents or give evidence.

A tribunal, therefore, has options: it can investigate the matter purely on the basis of written submissions and replies, or it can hold a hearing. The circumstances of the case would also dictate whether it will be necessary for evidence to be led at the hearing, which would naturally lengthen the hearing and the costs, or whether the parties could reach agreement on the essential factual issues on the papers.

There are usually two main parts to a surplus apportionment process.

- (a) The first is determining the amount of surplus – which may involve issues around the fund's valuation, investigating improper use and the application of the proviso.
- (b) The second part of the process is deciding who gets what: doing minimum benefit calculations, establishing the amount of the residual surplus, and deciding on how this is to be apportioned.

These two parts can often be done together in one process. So stakeholders can make submissions on the issues in part 1 and part 2 at the same time, the hearing could deal with all these issues, and a single determination could be issued by the tribunal.

However, the circumstances of the particular investigation might make it better for the process to be conducted in two stages. The first stage being to investigate and make findings on, the valuation, the improper use and application of the proviso. Once this stage is completed, a determination can be issued and thereafter the second stage can begin – which is deciding how the surplus ought to be apportioned.

How would a tribunal decide whether to conduct the investigation as a single process or to do so in two stages?

In the Shell matter, the Tribunal began running the investigation as if it would all happen in a single process. However, as time went on, it became clear that the investigation would be better conducted in two stages. This is because the amount of the improper use alleged at that stage was high. The Company was also arguing that the proviso applied and that part of the improper use (if it was found to exist) should be excluded from the surplus. The Tribunal also felt that its finding on the proviso would have to be referred to the Registrar for his approval, and was concerned about having to alter or redo the scheme if the Registrar

disagreed with the tribunal's finding - and if the amount of surplus available for distribution was then materially different to what the tribunal had thought, and designed the scheme around. A further consideration was that without knowing the amount of surplus available for distribution it would be difficult for stakeholders and the tribunal to properly and meaningfully address how the residual surplus should be apportioned. For this reason, the Tribunal made a decision to split the process into two phases. Written submissions and replies, as well as a hearing were held during the first stage and an interim determination has been issued.

Not all funds will require a tribunal to investigate improper use and so it may not be necessary to split the process. But even where there is improper use, if the potential value thereof is not substantial, and if the proviso (if found to apply) would not materially impact the amount of surplus available for distribution, it might not be necessary to split the process.

D: Legal Issues

(a) Participation of the Fund

One of the first issues the Shell Tribunal faced was determining the nature and extent of the Fund's participation in the Tribunal's proceedings. Understandably, the Fund was keen to participate as it had been involved in the process for some years and was also eager to ensure that it could protect the interests of the members. The issue therefore arose as to whether, for example, the trustees should make submissions on behalf of the other members and pensioners given that the former members had a legal representative.

The Act is not clear on this issue. Section 15B(10) states that once appointed the tribunal exercises the powers of the board in relation to the surplus apportionment process. Arguably, this means that the trustees are no longer involved in the process in the sense of making decisions and making representations on behalf on any group of members. In the Shell matter individual representations were received as well as group representations from the FMR, Active Members' Working Group, Pensioner Working Group, and the trustees of the Retirement Fund which represented certain transferred members. The Fund assisted the Tribunal to the extent necessary and possible - providing information, documents, records etc but was not treated as a stakeholder who could make submissions to the tribunal.

This issue of the delineation of duties between the trustees and the tribunal is an important one to establish at the outset. The trustees actually play a very limited role in the tribunal proceedings. To the extent that the tribunal takes over the trustees' functions in the surplus apportionment process, the primary power to consider the interests of all stakeholders and design an equitable apportionment scheme lies with the tribunal and no longer with the fund.

But while the trustees' role is limited to one of providing assistance where this is required, this does not mean that the trustees' duties to members cease during this time. It is important, therefore, that the trustees

communicate with the stakeholders as to what is taking place in the fund and explain the process to the extent necessary.

If the Fund plays a fairly limited role, what of the FMR?

(b) Participation and Costs of FMR

The Act requires the board to appoint a FMR to specifically represent the interests of the former members. The tasks of the FMR are to assist the board identify the former members, communicating proposals to them, collating objections from them, and submitting a report to the board on the adequacy of the steps taken to include FM in the process and, where it was necessary for the board to exercise discretion as to the inclusion of FM, on whether that discretion was exercised reasonably.

An issue arose early on in the Shell Tribunal's process regarding the FMR's continued participation in the process after the Tribunal was appointed, and whether the FMR's legal costs should be paid from the surplus budget. The question of the FMR's participation is less contentious. The Act requires that an FMR be appointed to assist the board and, therefore, the tribunal in its place – and even to itself request the establishment of a tribunal. There seems to be nothing excluding the participation of the FMR in the process.

More contentious, however, is the issue of whether the FMR's legal costs - to participate in the tribunal process - should be paid from the surplus budget. It was argued by the Company in the Shell matter, that if the FMR's legal costs were paid for, then the Company and all stakeholders were equally entitled to have their legal expenses paid from the surplus budget.

S15K(12) allows any costs arising from the work of the tribunal, including personal allowances and compensation for the tribunal members, to be paid from the surplus budget. The Shell Tribunal sought an opinion from Senior Counsel whose view was that the FMR's costs did not fall within this provision as it was not a tribunal cost - but that the tribunal's discretion to allow these costs derived from the fact that it could exercise all the powers of the board in performing its functions. In line with the Regulations and PF 117, the board could set up a contingency reserve account hold the estimated expenses of the surplus apportionment exercise – as had been done by the Shell Fund. Whether the FMR's legal costs are a legitimate expense of the surplus apportionment process is usually a matter for the board's discretion, and therefore where a tribunal is performing the functions of the board, it is within the tribunal's discretion.

I would think that during the first stage of the process, that is investigating improper use and the application of the proviso, a tribunal could justify meeting the FMR's legal costs from the surplus budget. This, however, would only be possible to the extent that one could argue that the FMR puts forward the legal arguments to counter the Employer's arguments about improper use. In so doing the FMR represents all other stakeholders who would argue that there was improper use and that the proviso does not apply. This would increase the amount of the surplus available for distribution and therefore it is in the interests of all stakeholders (other than the employer) that these arguments be put forward.

It must be remembered that while the fund would ordinarily fulfil the function of seeking out and canvassing these alternate legal arguments if it was investigating the improper use, once the tribunal is appointed the fund plays a very limited role in the process. It cannot, therefore, itself engage legal counsel to place these arguments before the tribunal and so it is perhaps more appropriate that the FMR fulfil this function.

It must also be remembered that the FMR is appointed under statute and that appointment is compulsory. It cannot really be expected that the FMR should incur his/her own expenses in discharging the duties under the Act, and especially to engage legal counsel.

While it might be appropriate for the FMR's cost to be paid from the surplus budget during the first stage of the process (investigating improper use and the application of the proviso), in my view it is not appropriate for FMR's legal costs to be paid from surplus at the second stage of the process. At this second stage, that is deciding who gets what, it cannot be argued that the legal arguments put forward by the FMR are the same or are necessarily in the interests of the current members, pensioners and deferred pensioners. The interests of these groups of stakeholders diverge because each is trying to put fwd the best case relating to what share of the surplus they should get. There is no reason why the FMR should get the benefit of counsel (paid for by the fund) while no other stakeholder should get that same benefit.

This gets complicated to implement if the tribunal process is taking place in one stage as opposed to two. This is a difficult issue and a different tribunal in other circumstances could adopt a different approach.

(c) Which provisions apply to the Tribunal?

S15B(9) sets out a number of requirements that must be fulfilled before the scheme can have any force and effect. These relate to the documents, certificates and reports that must be submitted to the Registrar; how the scheme must be communicated to stakeholders; and allowing for and dealing with objections. It also requires that the Registrar be satisfied that the scheme is reasonable and equitable and recognises the rights and reasonable benefit expectations of the stakeholders.

As mentioned earlier, the Act tells us that when a tribunal is appointed it exercises the powers of the board in terms of s15B. As such it would appear that the tribunal is bound by the whole of s15B, including the requirements of s15B(9) which I have just described.

However, the tribunal provisions in s15K(15) tells us that when a scheme is submitted by a tribunal, the Registrar must accept the determination as satisfying the requirements of s15B(9), unless he finds that the tribunal did not exercise its discretion properly or in good faith. In effect then, all the requirements of s15B(9) which I've just described are deemed to be fulfilled by the tribunal without them actually needing to be so. It

would seem then that all of s15B applies to the Tribunal, except 15B(9) which is replaced by 15K. (This is described as option 1 on the slide)

An alternate view that was presented before the Shell Tribunal is that s15K does not only replace s15B(9) but rather replaces the whole of s15B. Cited as an example of this was the fact that the tribunal cannot be expected to complete its process within the 18 month period set out in 15B(1) because s15K states that the tribunal must make the apportionment within the period determined by Registrar. Thus, it was argued 15K must replace 15B entirely. This is option 2 on the slide.

The problem with this approach is that if one accepts that the tribunal is not bound by s15B at all, then there is no obligation on the tribunal to appoint a FMR (if one was not appointed already by the board), or to investigate improper use, or to account for minimum benefit entitlements. It would be incongruous to have one process and one set of entitlements apply if the scheme is designed by the fund, but another if it is designed by the tribunal.

One way to explain the anomalies in the Act, such as the 18 month period described earlier, is to say that 15K replaces only 15B(9) and that the rest of 15B applies unless there is an express provision in 15K that differs from, and therefore overrides anything in the rest of 15B. This is option 3 on the slide.

(d)Registrar's powers of review irt tribunal's work

An interesting issue that was argued before the Shell Tribunal was the extent of the Registrar's powers of review regarding the Tribunal's work. The two important provisions here are s15B(9)(h) and s15K(15).

As I mentioned earlier 15B(9)(h) states that a scheme submitted by the board will not be of any force and effect unless the Registrar is satisfied, inter alia, that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of stakeholders. 15K(15) does away with this because it says that where a scheme is submitted by the tribunal, the Registrar must accept the determination as satisfying s15B(9) unless the discretion was not exercised properly or in good faith. 15K(15) then effectively replaces 15B(9). The Registrar loses the power to assess whether the scheme is reasonable and equitable etc etc. His power is now limited to a review of whether the tribunal exercised its discretion properly and in good faith.

This is a very limited power indeed. It effectively excludes from the Registrar's reach any legal finding by a tribunal. So whether or not an improper use exists for example, is a legal issue, and cannot be interfered with by the Registrar.

So what decisions can the Registrar review? The main issue around which the tribunal exercises discretion is deciding how to actually apportion the surplus. This is not to say that there will be no legal findings whatsoever involved in this stage of the process. There may well be, for example, the tribunal might be

asked to make a finding as to whether the estates or beneficiaries of former members who died before the SAD are entitled to share in the surplus.

Similarly, there may be discretionary issues that arise at the first stage of the process, for example where disputes arise regarding the valuation basis used to determine the amount of surplus in the fund; or where the tribunal decided to exclude improper use because the proviso applies.

The Registrar, in reviewing the tribunal's exercise of discretion is, therefore, limited to those areas in which one accepts that there are a range of permissible options and the Registrar's role would be to consider whether in choosing its option, the tribunal exercised this discretion in properly and in good faith.

(e) Appealing the Registrar's decision

Section 26 of the Financial Services Board Act permits any person aggrieved by the Registrar's decision to appeal that decision to the FSB Appeal Board. This is not simply a review of the Registrar's decision but a full appeal. Once the Appeal Board makes a decision, there is no further appeal of this decision to the High Court. The Appeal Board's decision can only be taken on review to the High Court in terms of the Promotion of Administrative Justice Act.

(f) Appealing or reviewing the Tribunal's decisions

As mentioned earlier, the tribunal will make both discretionary decisions and legal findings.

With respect to **discretionary decisions**, once the Registrar accepts the tribunal's determination he will, in effect be accepting the tribunal's discretion as having being exercised properly and in good faith. This can be challenged by appealing the Registrar's decision to FSB Appeal Board, and if unsuccessful reviewing the Appeal Board's decision to the High Court in terms of PAJA.

A direct review of the tribunal's discretion, to the High Court, will not be competent because PAJA requires that all internal remedies be exhausted before a review under PAJA will be entertained. If the Registrar has not yet approved the tribunal's determination, then the internal remedy is arguably to challenge the tribunal's exercise of discretion before the Registrar and once he makes a finding thereon, to appeal his decision to the Appeal Board - and then review that decision in the High Court. If the Registrar has accepted the tribunal's determination, the registrar's acceptance of such can be appealed directly to the Appeal Board and then reviewed in the High Court. All this relates to the tribunal's exercise of discretion.

With respect to **legal findings**, there does not seem to be a mechanism whereby the tribunal's decisions can be appealed to the High Court. If one looks at the Adjudicator's office, which is also a statutory tribunal, section 30P(2) specifically creates an appeal process to the HC allowing the merits of the matter to be considered and not just the decision-making process or the Adjudicator's conduct in that process. With the

tribunal, however, the only remedy would be a review under PAJA. However, S6 sets out a number of grounds of review some of which are arguably wide enough to allow the merits of the matter to be canvassed such as:

- that the tribunal was materially influenced by an error of law;
- that irrelevant considerations were taken into account or relevant considerations ignored;
- that the decision was not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the tribunal, or the reasons given for the decision;
- that the action is otherwise unconstitutional or unlawful.

(f)Registrar's Jurisdiction to determine Application of Proviso

Linked to the Registrar's powers of review over the tribunal, but something quite specific is the Registrar's jurisdiction to determine the application of the proviso in s15B(6). The wording of the proviso is set out on the slide. Essentially it says that the board may exclude surplus utilised improperly if the Registrar is satisfied that the proviso applies. When submitting its surplus apportionment scheme, PF114 requires the board to make an application for the Registrar's approval for improper use to be excluded on the basis that the proviso applies. PF114 requires the board to set out all the details related to the negotiated use of surplus which justifies the decision to exclude the improper use.

The question that arises is what are the Registrar's powers of review with respect to the tribunal's findings on the proviso.

One view, is that any decision made by the tribunal regarding the application of the proviso must be considered by the Registrar who may confirm or reject it. In other words, if the tribunal decides that the proviso applies and that improper use is to be excluded as a result, the Registrar must approve this. Equally, if the tribunal decides that the proviso does not apply, this must be considered and confirmed.

Another view is that the proviso requires the registrar's approval only if a tribunal decides that the proviso applies and that improper use should be excluded as a result. Deciding that the proviso applies is a legal finding and not subject to the Registrar's review. If it applies, the section states that the board "may" not "must" exclude improper use. Once the tribunal decides that the proviso applies, it therefore has a discretion as to whether to exclude the surplus or not and it is only this discretion that is subject to the Registrar's review. The Registrar only really has an interest in the matter if the tribunal were to decide that the improper use should be excluded, because this would reduce the surplus available for distribution. It is in these circumstances that the Registrar would want to review the matter and be satisfied that the proviso does not apply.

The finding as to whether or not the proviso applies is a legal one, that can only be taken on review to the High Court in terms of PAJA. The decision to then exclude improper use from surplus on the basis of the

proviso is a discretionary decision which can be reviewed by the Registrar, and whose decision can then be appealed to the Appeal Board - with a review to follow to the High Court.

(h) Determination not precedent

Finally, it should be noted that the tribunal's determination is not precedent for another tribunal or for a court. It is only binding on the parties involved and it is, therefore, possible that different tribunals could come to different conclusion on certain issues.

E: Practical/Logistical Issues to consider

- Initiating the process in an inclusive way
- Clear, simple and understandable communication with stakeholders
- Managing expectations
- Dealing with queries
- The most effective way of communicating the Tribunal's findings - from the perspective of cost as well as ensuring that parties understand the determination
- Media and PFA attendance at hearing
- Distributing the determination to media and other third parties
- The Tribunal's indemnity
- Reviewing the surplus budget