

The nature of the duty which service providers owe to funds and their members

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Administrators and Fiduciary Duties – Let us be conceptually accurate

AGENDA

- a. Fiduciary duties and their consequences
- b. Legal framework
- c. Do administrators owe fiduciary duties
- d. A closer look at investment and benefits administrators
- e. The USA approach



Fiduciary duties

- a. They include duty to avoid conflict of interest, not to fetter discretion not to exceed powers not to exercise power for improper purpose
- b. Historically they were owed by a guardian to his ward, a solicitor to his client, an agent to his principal
- c. Today its not a closed list whether a relationship gives rise to fiduciary duties depends on the circumstances of each case – factors include nature of power exercised and whether it can be exercised unilaterally See *Phillips v Fieldstone Africa (Pty) Ltd & Another 2004 (3) SA 465 (SCA)*



Consequences of fiduciary duties

- a. Course of action easier to prove compared to action in contract and action in delict
- b. No need to prove fault, actual loss, causation or contractual nexus
- c. Defences available are limited

Once proof of a breach of a fiduciary duty is adduced it is of no relevance that: (1) the trust has suffered no loss or damage; (2) the trust could not itself have made use of the information, opportunity or probably would not have done so; (3) the trust, although it could have used the information, opportunity has refused it or would do so; (4) there is not privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal's hands in the first instance; (5) it was no part of the fiduciary's duty to obtain the benefit for the trust; or (6) the fiduciary acted honestly and reasonably See *Phillips v Fieldstone Africa (Pty) Ltd & Another* 2004 (3) SA 465 (SCA)





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A closer look



Legal framework

- a. fund must have a board to direct, control and oversee it
- b. Board must protect member interest, avoid conflict of interest, act with due skill and dilligence, and act with impartiality
- c. Board can delegate investment and benefits administration – asset managers, insurers, collective investment schemes etc
- d. Fund must have an agreement with administrator specifying delegated functions and remuneration etc



Administrators said to owe fiduciary duties

See *Dollman v Irvin & Johnson Retirement Fund*
quoting *Robinson v Randfontein Estates Gold Mining Co Ltd*

Circular PF129 - administrators stand in a position of trust *vis a vis* the fund. Consequently, they are required to observe the utmost good faith, to exercise proper care and diligence, to refrain from gaining directly or indirectly improper advantage for themselves to the prejudice of the funds and to avoid conflict of interest

See also General Circular to Pension Fund Administrators titled *Secret Profits by Pension Fund Administrators* dated 24 March 2006



Is this conceptually and legally sound?

- a. Approach does not distinguish between investment and benefit administrators
- b. Approach does not acknowledge that Board can delegate different functions and therefore different powers
- c. Seems to summarily assume that administrator is agent of the fund See *Dollman*
- d. Are the circumstance such that administrators owe fiduciaries? Yes for some and No for others – lets have a look



Investment Administrators

- a. Long term insurer – once premiums are received insurer owns assets and owes benefits
- b. Collective investments schemes – assets are never under the direct control of the manager but are placed under the control of a custodian
- c. FAIS accredited investment managers can receive and hold financial products and can enter into binding transactions on behalf of client



Compare with USA

ERISA provides, *inter alia*, that a person is a plan fiduciary to the extent that he exercises discretionary authority or control over plan management or any authority or control over management or disposition of plan assets, or has any discretionary authority or responsibility in plan administration. The analysis of who is a fiduciary is functional and is based on the party's exercise of discretion. A contract between parties stipulating one of them as a fiduciary is not conclusive.

See *Geddes v. United Staffing Alliance Employee Med. Plan*



Benefit administrators

a. No typical services - services range from administration of membership data, contributions, benefits, expenses and financial reporting

b. In USA courts distinguish between ministerial and non-ministerial functions

c. *Baker v Big Star Division of the Grand Union Company* – not fiduciary employer, did no more than rent the claims processing department of the insurance company to review claims and determine the amount payable in accordance with the terms and conditions of the plan.



Benefit administrators cont.

d. *HealthSouth Rehabilitation Hospital v American Nat'l Red Cross* - 'given Aetna's limited role in processing claims under the plan and reading a computer screen to determine who is and who is not covered, it is clear that Aetna is not a fiduciary under the plan.'

e. *Administrative Committee v. Patricia Gauf* - expressly gives the Plan Administrator or [its] designee(s) discretionary authority to resolve all questions concerning the administration, interpretation, or application of the Plan

f. *Harold Ives Trucking Co. v. Spradley & Coker, Inc* – contract not conclusive whether fiduciary or not

