RETHINKING FIDUCIARY DUTIES IN RETIREMENT FUNDS

Address to PLA on 29 February 2016

(Jonathan Mort)

Although the SCA stated clearly in the *Tek Corp Provident Fund v Lorenz [2002] 3 BPLR 227(SCA)*[1] and *Meyer v Iscor Pension Fund [2003] 3 BPLR 4427 (SCA)*[2] that retirement fund trustees owed a fiduciary duty to members and beneficiaries, whether this was so had been the subject of many debates. It has now been clarified in South African law that retirement fund trustees owe a fiduciary duty to members by an amendment to the Pension Funds Act ("the Act"), effective 28 February 2014, in which it is stated in section 7C(2)(f) that the board of a retirement fund shall

> *"have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act;"*

This has put into sharp focus what the content is of fiduciary duties in relation to retirement funds, and by whom those duties are owed. In the light of the growth in umbrella funds which are sponsored by a commercial entity for profit (such as a life insurer), it is particularly relevant both for the employers participating in, and trustees of, such funds to understand what the consequences are of this development. It is also a very relevant issue for other types of retirement funds – standalone ocupational funds, preservation funds, beneficiary funds and retirement annuity funds.

This is especially so when some umbrella funds have been mismanaged resulting in losses being suffered by members, either through very high costs to remedy data errors or to make good losses arising from maladministration. In a recent incident some commercially sponsored umbrella defined contibution (DC) funds were found to be underfunded (thus in deficit) as a result of maladministration from data errors and poor processing of investment returns, the consequence of which was that benefits had been overpaid and current member liabilities were greater than the assets backing them.

From a regulatory aspect the growth of such umbrella funds will reduce the number of funds to be supervised, and is therefore to be welcomed. From the aspect of employers the promotion of these funds by financial intermediaries (for whom this is lucrative work) and the sponsors of such funds, on the basis of having the advantage of relieving the employer of the responsibilities it would otherwise have in a standalone fund is very attractive.

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[1] "*The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries (section 2(a) and (b) of the Financial Institutions (Investment of Funds) Act 39 of 1984)*" (p 235 B-C)

[2] "*The general proposition that the trustees of the [Iscor Pension] Fund are under a fiduciary duty to act in the best interests of the members appears to be supported by authority (see eg Tek supra). I accept that the trustees' fiduciary duty towards its members includes a duty of impartiality, that is, an obligation not to discriminate between members unfairly.*"(at p 4434 at H)

Issues Covered

So what I want to look at in this presentation is the nature generally of the fiduciary duty in the retirement fund context, with specific reference to whether

- there is a difference in fiduciary duty between occupational retirement funds that are stand alone or umbrella funds, retail funds and beneficiary funds;
- there is a possibility that employers may have a fiducuary duty to their employees in respect of occupational retirement fund arrangements;
- specifically, the consequence of this in the umbrella fund context; and,
- the trustees of umbrella funds who are in the employment of the sponsor are in any way conflicted.

Before I look at what the content is generally of the fiduciary duty, it is worth noting that

- It is now settled law in South Africa that all trustees, however appointed
  - are required to exercise the same level of independence and expertise[3], and
  - owe the same duty as trustees, so that the board of a fund is not a bargaining forum to resolve employment related issues, such as the rate of contributions in respect of a defined contribution fund[4]

Nature of Fiduciary Duty

What is the nature of the fiduciary duty? The *Tek* case referred (at p 239 F) to "*the fiduciary duty [of trustees] to act in the best interests of the members and the beneficiaries of the fund*".

But that is not very helpful. As we shall see, the courts have in fact given clear guidance on this, and have defined the fiduciary duty narrowly but very strictly.

A clearer understanding is informed, it is submitted, by the circumstances which determine when the fiduciary duty arises. In the seminal case of *Phillips v Fieldstone African (Pty) Limited* (2004) 1 All SA 150 (SCA), which concerned an employee acting in breach of his fiduciary duty to his employer by obtaining a secret profit, the Supreme Court of Appeal stated that there is no specific list of those who owe a fiduciary duty (citing with approval the observation to the same effect in *New Zealand Netherlands Society "Orange Inc v Kuys* [1973] 1 WLR 1126 (PC)).

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[3] See PPWAWU National Provident Fund v CEPPWAWU 2008 (2) SA 351(W) at para 30: "***None of the trustees represent the party which appointed them when they take decisions regarding the fund's affairs, nor may they place the views or interests of such party above the interests of the fund or its members***."

[4] It is to be noted that in the SCA decision in **Tellumat** (Tellumat (Pty) Ltd v FSB Appeeal Board and others, case no 221/2015, as yet unreported, there are two references in the surplus apportionment decision to trustees representing the members and pensioners on the one hand, and trustees representing the employer on the other hand, and negotiating an agreement about the distribution of the surplus. These comments do not form part of the ratio decidendi, and with resppect I am not sure they are the correct construction of the function of a board of trustees even when deciding how to apportion surplus.
Cf PF 130 para 16.3, The Pension Funds Act: A Commentary, Hunter et al, 2010 p150 -151

Whether or not a fiduciary duty is owed depends, in terms of *Fieldstone* case (citing support from the *Kuys* case (supra) and *Frame v Smith* [1987] 2 SCR 99(SCC)), on the nature of the relationship between the parties. More specifically, a fiduciary duty exists where the following three characteristics are apparent:-

- There is scope for the exercise of some discretion or power;

- The power or discretion can be used unilaterally so as to affect the beneficiary's legal or practical interests; and

- There is a peculiar vulnerability on the part of such a beneficiary to the exercise of that discretion or power.

(see paragraph 33 of the *Fieldstone* judgment)

It is apparent from these factors which determine the existence of the fiduciary duty that from the aspect of the person to whom the duty is owed (the beneficiary) there is necessarily trust in the fiduciary that he or she will exercise the discretion or powers concerned in such a way as will protect the vulnerability of the beneficiary. By extension, the greater the vulnerability of the beneficiary, the greater the trust by the beneficiary in the fiduciary, and the more extensive the fiduciary duty. As will be apparent from what is set out below, the courts place much emphasis on this trust.

In the context of a retirement fund, which is fundamentally a savings vehicle to provide benefits (principally for retirement, but also on death, disability and termination of employment), the exercise of the trustees' discretion or power would be either

- where it affects directly how a benefit is dealt with (such as where there is a discretion regarding whom to benefit in the distribution of a death benefit), or
- where the power or discretion has a financial consequence on the quantum of the ultimate benefit payable (for example where the power or discretion relates to the investment of fund assets or the costs incurred in the operation of the fund).

It follows therefore that at common law, in terms of the *Fieldstone* case, trustees of a retirement fund owe a fiduciary duty to the members. Although this has now been confirmed by the amendment to the Act (see above), the significance of the *Fieldstone* case is that it gives an indication of what the content is of the fiduciary duty. This content, it is submitted, is to protect the financial vulnerability of the members and beneficiaries, insofar as the quantum of their benefits in the fund is concerned.

This protective purpose is consistent with the original concept of the fiduciary duty as developed in South African law (which has its common law based on Roman Dutch law), derived originally from Roman law, which required the fiduciary to hold property for the benefit of another (the fideicommissary) and to account to that other in respect of that property. In the context of a retirement

fund, this "property" is the right of a member or beneficiary, which has a financial value, to receive a benefit at some point in the future.

Once a fiduciary duty is owed the main consequences in general terms, in South African law, are that:-

- The fiduciary owes a duty of loyalty to the beneficiary and thus may not permit his personal or other interests to conflict with his duty as fiduciary. See *Fieldstone*, *supra*. This has important consequences for the right to receive secret profits, where the law clearly defines the circumstances in which the fiduciary may and may not benefit from his office.
- The fiduciary must account to the beneficiary about the property in respect of which the fiduciary duty exists. This applies prior to and when the benefit is due.
- The duty of care of the fiduciary towards the beneficiary is established automatically as a matter of law in the event that the beneficiary suffers a loss as result of the actions of the fiduciary. In terms of the law of delict (tort), a person may sue another for loss suffered if that other owes him a duty of care and it can be shown that the loss was caused by that other.

All of this is consistent with the broad protective purpose of the fiduciary duty.

But we should look further at the *Tek* and *Meyer* cases for further important clues about the content of the fiduciary duty. The *Tek* case concerned two issues: firstly, the right of the employer to take a contribution holiday in a defined benefit fund where it (the employer) owed a balance of cost obligation and which fund is in surplus; and secondly, the right of members to benefit from that surplus. It is important to note that this case was decided before the promulgation of the surplus provisions in the Act in 2001 (through the Pension Funds Second Amendment Act, No 39 of 2001).

With regard to the second issue (the right of members to benefit from surplus), it was squarely in issue whether the fiduciary duty owed by the trustees required them to distribute the surplus to the members. Thus the following statement by the court on this issue at p 239 at E - F, which was an extension of the statement quoted in 3 above:

> "*[The trustees] have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund.*"

The issue of whether members have a right to benefit from surplus and may require the trustees to apportion such surplus to them was dependent on whether a fiduciary duty was owed by the trustees to them. The finding of the court, as stated above, was that a fiduciary duty was owed by the trustees

to the members, but that it did not extend to apportioning surplus to the members if the fund rules did not provide for that.

Nor did the fiduciary duty extend to amending the rules to enable this even if the trustees had the power to amend the rules (see p 239 F- G), notwithstanding that "*defined benefit funds do not exist to generate surpluses*" (p 235 E).

As will be seen in the *Meyer* case, the content of the fiduciary duty owed by the trustees to the members is not an open ended obligation to do all such acts to advance the interests of the persons to whom that duty is owed; but there is nevertheless unquestionably a fiduciary duty owed by the trustees to the members in terms of the essential point of law decided (the *ratio decidendi*) in *Tek*.

In the *Meyer* case the appellant (Meyer) had sued the trustees because when he retired early a penalty was applied in terms of the rules, which penalty was removed two months later in a rule amendment: he contended that the trustees, because of their fiduciary duty to him, ought to have structured the rule amendment so as to include him.

In support of this contention Meyer claimed that he had a right not to be discriminated against, and that he had a legitimate expectation to the removal of the penalty because it had been promised to all employees of which he was one. As in *Tek* it was thus squarely in point whether a fiduciary duty was owed to him as member, and if so what the content was of that duty.

The finding in *Meyer* was that, as in *Tek*, there was a fiduciary duty owed by the trustees to the members, but that this did not extend to amending the fund rules to benefit members even if this was within the power of the trustees; that even if the trustees did amend the rules they were not obliged, by virtue of their fiduciary duty, to do so retrospectively; and that the notion of legitimate expectation did not extend to a benefit which might be received were the rules to be changed in a way that benefitted a member.

In short, the fiduciary duty applied only within the framework of the rules as they were at any given time, not as they might be amended to be. But this finding was clearly predicated on the existence of a fiduciary duty owed by the trustees to the members, and was thus a component of the essential point of law decided in this case. Were this not so, the court would have said "There is no fiduciary duty owed by the trustees to the members, and therefore the appellant has no case"; but instead, as in *Tek*, the court said, "There is such a fiduciary duty, but it does not include what you are claiming".

To summarise-

- The fiduciary duty is understood by its purpose, which is to protect against the vulnerability of the persons who may suffer a loss through the exercise of a power or discretion of the fiduciary;

- This purpose is determined by the circumstances of each case, in particular the nature of the relationships involved;
- The fiduciary duty is to a large extent defined by the benefit promise contained in the rules – the duty to act in the best interests of the members and beneficiaries does not go further than that, at least as far as the benefits are concerned.

But, as we shall see, the fiduciary duty also entails other responsibilities and obligations, especially in respect of preventing improper benefits from the trust assets.

How does the Fiduciary Duty Differ according to Type of Fund?

It must be that the freedom to join and change retirement funds is a particularly important protection for a member; and so there must be a lesser duty on the trustees of retail funds than on trustees of occupational funds where there is no such freedom. But this lesser duty requires the average member to be capable of asking the right questions prior to applying for membership and being, effectively, able to conduct an adequate due diligence.

But we really need -

- Special provisions in the Act regarding retail funds, especially in respect of governance and investment choice
- Standard fact sheets reflecting information prescribed by the Registrar regarding, inter alia
    - Adequacy of administration platforms
    - Separately, investment, administration and governance charges
    - PI cover
    - Details of trustees, specifically who are independent and who are not
    - Relevant information about sponsor

Beneficiary funds – even greater fiduciary responsibility because they are minors.

Does the Employer have a Fiduciary Duty?

What are the implications of this for the employer in occupational funds?

It is the employer which determines of which pension funds its employees must be members. In some situations, usually where there are union sponsored umbrella funds, the members may enjoy some choice of fund; but the largest umbrella funds are those sponsored by commercial entities. This paper is specifically in respect of these funds, almost all of which are defined contribution funds. Similarly, the employer usually always retains the right to withdraw its participation in a fund unless such participation has been agreed with a union in which case the union's agreement would be required to withdraw. Typically there is no such agreement in respect of commercially sponsored multi employer funds.

As it is the employer which decides in which fund to participate, there must be a measure of vulnerability by the employees that such a decision will not expose them to a loss in respect of their retirement savings; and it would seem that there is thus in this respect a fiduciary duty owed by an employer to its employees. This would certainly appear to be so in respect of accrued retirement savings which are transferred from one fund to another as a result of such a decision by an employer to change the funds in which it participates. But this would only apply if the fund to which retirement savings were being transferred was in deficit at the time, or about to go into deficit, and this could have been ascertained by the employer had it taken reasonable care to do so.

The only way for an employer to manage such a fiduciary duty is ensure that there is an appropriate due diligence of the fund carried out before a decision is made to participate in that fund. What such a due diligence should entail is beyond the scope of this paper.

Whether an employer has a fiduciary duty in repect of a loss which its employees may suffer in respect of future contributions to such a fund is an interesting issue, especially as ordinarily the fiduciary duty only extends to the current property over which the fiduciary is able to exercise a discretion or power. But this is not an issue which requires to be answered, because as it is the employer which retains the power to terminate its participation in a fund, its employees are dependent on the employer exercising that power responsibly. The employees do not have the right, typically, to move from one fund to another (in the absence of an agreement between the employer and the employees or their union).

It must follow that there is an ongoing fiduciary duty, or at least a duty of care, by employers to ensure that their employees are not exposed to loss through their (the employer's) participation in occupational pension funds, and specifically where the employees have no choice in belonging to or being able to transfer from such funds. This means that employers need to monitor the administration of such funds more, rather than less, contrary to the promotional material of financial intermediaries and the sponsors of such funds.

Of course, if a fund member suffered a loss his first recourse would be against the trustees if they are responsible for that loss, but in the absence of being able to recover from those trustees (as appears may be the case in the incident referred at the beginning of this paper) or any other responsible party, there is basis to hold the employer liable for the loss suffered on the grounds above.

Sponsor Appointed Umbrella Fund Trustees

Before we consider the implications of the above understanding of the fiduciary duty for those employees of the sponsor of an umbrella fund who act as trustees of such funds, we should recap the distinct aspect of umbrella funds.

In terms of context, the following are relevant to this discussion:

- Firstly, under South African law pension funds are independent legal entities, separate from employers participating in them. Pension funds are governed by a board of management in terms of the Act (which governs all pension funds other than those few separately established

by statute). However, the members of such boards are commonly called "trustees", the term which is used in this paper, although this is not a term found in the Act. All retirement funds are not for profit entities.

- Secondly, as stated above, South African occupational pension fund arrangements require fund membership to be compulsory in terms of tax legislation for all employees if the employer provides, as a condition of employment, for this benefit. It is not mandatory that employers do provide for this, although ordinarily most employers do.
- Thirdly, it is commonplace for at least half (and often the majority) of the trustees of a commercially sponsored umbrella fund to be in the employment of its sponsor, and who therefore also owe a fiduciary duty to the sponsor as their employer.
- Fourthly, the primary object of a sponsor of is to make a profit out of the fund it sponsors (unlike an employer which sponsors its own fund), through the services and products it provides the fund.

By contrast, standalone occupational funds engage service providers to enable them to meet their object of providing benefits[5]. So a standalone fund does not exist to enhance the commercial proposition of its sponsor or its service providers; but an umbrella fund only exists to enhance the profitability of its sponsor. Their employees who act as trustees owe not only a fiduciary duty to the fund and its members, but also to their employer whose principal object in relation to the umbrella fund is to make a profit out of the services and products it supplies the fund. Such trustees are unlikely ever to be conflicted as trustee through a personal interest, but <u>does the fiduciary duty to their employer, the sponsor, represent a conflict with their fiduciary duty to the fund</u>?

It is informative to see the strict rules developed by the courts in respect of a fiduciary duty once establsihed, as is apparent in the judgments on secret profits obtained through holding a fiduciary office. The strict prohibition on such secret profits was eloquently stated thus in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-180, and confirmed in numerous subsequent decisions:

> *"Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaikie Bros. (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilized system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property;*

[5] Such funds are typically sponsored by the principal participating employer which established the fund to meet the specific benefit promise it makes to its employees. The trustees that it appoints to the board, if it has reserved that right to itself, have no employee obligation to promote any commercial proposition that the sponsor may in relation to it. In a balance of cost fund there may be an implicit (albeit incorrect) responsibility to managing the employer's risk in that regard, but that is entirely different from a responsibility to promote a commercial proposition in relation to the fund.

if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent."

In the *Fieldstone* case the following summary was given at paragraph 31 of the international jurisprudential development of the prohibition against secret profits arising from the actions of a person owing a fiduciary duty:

"The rule [against secret profits being obtained by a person owing a fiduciary duty] is a strict one which allows little room for exceptions (Regal (Hastings) Ltd v Gulliver et al [1967] 2 AC 134 at 154F-155E, [1942] 1 All ER 378 (HL) at 392G-393C; Canadian Aero Service v O'Malley et al [1974] 40 DLR (3d) 371 (SCC) at 382; Peffers NO and another v Attorneys Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1965 (2) SA 53 (C) at 56D-57G). It extends not only to actual conflicts of interest but also to those which are a real sensible possibility (Aberdeen Railway Co v Blaikie Bros (supra) GE Smith Ltd v Smith; Smith v Solnik [1952] NZLR 470; Boardman v Phipps [1966] 3 All ER 721 (HL) at 7371, 743F-I, 748E-F, 7561; Canadian Aero Service v O'Malley (supra) at 384, 385). The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice (Robinson v Randfontein Estates GM Co Ltd (supra) loc cit; Regal (Hastings) v Gulliver (supra) at 392C, Boardman v Phipps (supra) at 737D, 744H, 747D; Warman International Ltd and another v Dwyer and others [1994-5] 182 CLR 544 (HC of A) at 559). Because the fiduciary who acquires for himself is deemed to have acquired for the trust, (Palmer's case (supra) at 20)) once proof of a breach of a fiduciary duty is adduced it is of no relevance that

(1) the trust [fund] has suffered no loss or damage (Regal (Hastings) v Gulliver (supra) at 386B, 392F; Re Reading's Petition of Right [1949] 2 All ER 68 (CA) at 70E-F, 71A; Soulos v Korkontzillas [1997] 2 SCR 217 (SCC);

(2) the trust [fund] could not itself have made use of the information, opportunity etc (Regal (Hastings) v Gulliver (supra) at 378, Reading v Attorney-General [1951] 1 All ER 617 (HL) at 619H; Boardman v Phipps (supra)at 746I; Industrial Development Consultants v Cooley [1972] 2 All ER 162 (Assizes) at 175If-j; Warman International v Dwyer (supra) at 557-8; Bhullar and others v Bhullar and another [2003] EWCA Civ 424at paragraph 41) or probably would not have done so (Furs Ltd v Tomkies et al [1936] 54 CLR 583 (HC of A) cited in Canadian Aero Service v O'Malley (supra) at 385; Boardman v Philpps (supra) at 747A-D);

(3) the trust [fund], although it could have used the information, opportunity etc has refused it or would do so (Warman International v Dwye (supra) at 558; Industrial Development Consultants v Cooley (supra);

(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 [there is no relationship, contractual or otherwise, between the fund and the entity from which the fiduciary recceived the benefit] (Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 Ch D 339 at 367);

(5) it was not part of the fiduciary's duty to obtain the benefit for the trust [fund]: Regal (Hastings) v Gulliver (supra) at 378, 386B; Jones v East Rand Extension Co Ltd 1903 TH 325; or

(6) the fiduciary acted honestly and reasonably: Regal (Hastings) v Gulliver (supra) at 386A, 392D; Boardman v Phipps (supra) at 744D, 745C-D; (although English and Australian courts make some allowance for equity in calculating the scope of the disgorgement in such cases)."

It would appear to me that where a trustee owes conflicting fiduciary obligations, the courts will take a strict view of the fiduciary obligation and require that the conflict be removed. Thus, if the conduct of a sponsor employed trustees is such that it results in services or products being provided by the sponsor, in the promotion of its commercial proposition, to the fund

- in a way, or
- on a basis or
- at a cost,
- with a consequent financial advantage for the sponsor, and
- was detrimental to the interests of the members,

then that must be at least an indication of the sponsor employed trustee's fiduciary duty to the sponsor conflicting with the fiduciary duty owed to the fund and members.

This is especially so where sponsor employed trustees comprise half or the majority of the board, which is typically the case in commercially sponsored umbrella funds. It would seem on the face of it that the ostensible purpose of this, in the absence of any other arrangement, is for those trustees either to promote, or at least to protect, the commercial proposition of the sponsor on the basis above in relation to the fund. If so, this must be in conflict with their fiduciary duty to the fund and its members.

It is noteworthy that despite having a fairly mature umbrella fund market, it has still not been conclusively established, at least for mid size employers, that it is cheaper from the aspect of the members for their employer to participate in an umbrella fund rather than a standalone fund.

It should also be noted that the supervision obligations of the Registrar do not reduce or dilute the fiduciary duty - it is no defence of the trustees owing a fiduciary duty to say that if the Registrar had done his or her job properly the member or beneficiary would not have suffered a loss.

At the heart of the rules around secret profits is that any benefit available to the fiduciary may only be obtained for the advantage of the beneficiary. Just as as the fiduciary cannot obtain such advantage for himself without the beneficiary's free and informed consent, so too should another person (such as the commercial sponsor of the fund) obtain a benefit through the fiduciary merely because the fiduciay owes an obligation to that other person.

Under English law, there is a concept called fraud on the trust, where a non beneficiary benefits from a trust. This is analogous. As in respect of secret profits, the only exception should be the free and informed consent of the beneficiary. Such consent is patently not given by members where they involuntarily become members of a fund and have no power to transfer to another fund.

Of course it is understandable that commercial sponsors of umbrella funds should wish to protect their investment in such funds. But at the very least, it is not appropriate to expect trustees, whether employed by the sponsor or not, to have a responsibility, or perceived reasonably to have a responsibility, to promote the commercial proposition of the sponsor (or any other stakeholder) at the possible expense of those to whom they (the trustees) owe a fiduciary duty.

All this means that it is profoundly problematic in terms of the nature of the fiduciary duty for boards which have a majority of sponsor employed trustees. What compounds the issue is that it may not be apparent the extent to which the sponsor derives a financial advantage to the detriment of members and with which an independent, experienced and expert board of trustees would not have agreed. But at the very least, as stated in the extract above from the *Fieldstone* case, a conflict which is "*a real sensible possibility*" is sufficient to require that the free and informed consent of the beneficiary must be given.

Can the necessary consent be given by the employer, and should the employer give it? Or is it possible, either in the rules or by contract, to establish an appropriate relationship amongst the employer, the fund and the sponsor to mitigate appropriately this conflict?

We need a solution and as a start there should be –

- Special provisions in the Act dealing with umbrella funds, especially in respect of governance and financial soundness
- How the umbrella fund establishment costs are recouped
- Standardised disclosure both to the employer and the members, pior to and during participation by the employer, on
  - Adequacy of administration platforms
  - The investment, administration and governance charges (each separately)
  - PI cover
- Details of the service providers to the fund
- A requirement that all service provider and invetsment costs must be fixed on an arms length basis and defensible by the fund

- Disclosure of who the trustees are, specifically who are independent and who are not, and why they are independent
- All of this to involve changes in the law where the costs of implementation are assessed before promulgation

Thank you