

Goals for 2010 & beyond

.....
2010 PLA CONFERENCE - SPIER - WESTERN CAPE
.....

Speaker Karin MacKenzie

Company Herold Gie Attorneys

Topic Till Death Benefits us do part...

Disputed death benefits and a fund's obligation with regard to payment

Scheme of presentation

- The problem – disputed benefits and the dilemma of payment
- The status of preliminary decisions
- Persuading beneficiaries to renounce their claims
- To pay or not to pay?
- The legal position
- *Seymour-Smith* case
- A more pragmatic approach
- Dos and don'ts

Preliminary decisions

In principle not a bad tool but must be properly implemented

- identifies disputes prior to final decision
- elicits further information
- can facilitate exchange of information between claimants

Problems –

- trustees forget to finalise
- beneficiaries unsure of status
- complaints referred to Adjudicator on preliminary decisions

Preliminary decisions (continued)

Trustees must ensure

- Proper diary systems to convert to final decisions
- Clearly minuted and communicated to beneficiaries
- Complaints to Adjudicator prior to final decision
 - note that complaint is premature
 - undertake to make final decision
 - undertake to advise all parties and Adjudicator

Renunciation forms sent to beneficiaries

- Is this a legitimate practice?
- Is such a waiver enforceable when subsequently disputed?
- Can it amount to inappropriate pressure?
- A beneficiary's view on an allocation is probably a valid factor to consider
- Are there other less formal ways of obtaining this information?

Withholding a benefit – the legal position

Only once a final decision has been made

- No principle of law which requires or even allows the fund to withhold payment after the benefit has been allocated
- Strictly speaking requires consent of all beneficiaries or interdict from Court or Adjudicator
- Contra – High Court decision in *Seymour-Smith v Maxam Dantex South Africa (Pty) Ltd* 2008 JDR 0362 (W)
- Is this decision correct?

Withholding payment – more practical approach

- Piggy in the middle – the competing claims
- Risk to the fund if it pays out and cannot later recover
- After proceedings are instituted a beneficiary is unlikely to succeed in enforcing payment of an allocated benefit
- ‘Gap’ between decision and institution of proceedings – party has three years to institute action

Practical approach (continued)

The following suggestions are offered

- Ensure the decision is sound
- Greater faith placed in the review standard which should be deferential – polycentric decision
- More use could be made of s30P for insupportable Adjudicator rulings

Practical approach (continued)

Where complaints have already been lodged

- Usually in the fund's interests to withhold payment
- May work great hardship – consideration can be given to the merits of the complaint as well as the amount involved
- Possibility of partial payouts
- Where risk of reversal is small but benefit substantial it may be more prudent to withhold

Practical approach (continued)

Where proceedings have not yet been instituted ('the Gap')

- Trustees should undertake to withhold benefit for a limited period pending institution of action
- *interdict prohibiting payment* - seldom in the fund's interests to oppose
- *application to compel payment* - fund's interests will not usually be aligned with applicant
- will expose fund to potential loss
- interpleader?
- security to be furnished?

Thank you

QUESTIONS ARE WELCOME