

## **The fiduciary responsibility of asset consultants and its influence on the practice of responsible investment in the South African pension fund industry.**

### **Abstract**

Despite the publication of the Freshfields Report in 2005, fiduciary responsibility continues to be advanced as an important barrier to the practice of responsible investment (RI) within the pension fund industry in South Africa (SA). In this paper, we set out to investigate the origins of this from the specific perspective of asset consultants. Asset consultants were chosen because of the high level of influence that they exercise over both pension fund trustees, and asset managers. At the outset, we recognize that RI has at least two forms: an *ethical egoist form* in which ESG issues are considered only in so far as they are financially material; and a *social form* in which ESG issues are considered before financial return maximization is considered. Besides this ambiguity in terms of RI, fiduciary barriers might emerge from at least two other sources. Firstly, a real fiduciary barrier based on an unambiguous but narrow definition of fiduciary responsibility contained in the SA legal system might exist. Alternatively, a barrier may emerge as a result of interpretations of any ambiguity in the SA legal system's definition. Our comprehensive review of the concept of fiduciary responsibility within the SA legal system revealed a range of possible interpretations. It is hardly surprising then that qualitative interviews with asset consultants also unearthed a range of interpretations of fiduciary responsibility. When considering the range of interpretations of fiduciary responsibility against the two forms of RI that we recognize, it is clear that, under certain perfectly valid interpretations of these concepts, fiduciary responsibility is indeed a barrier, while under other interpretations it is not. Our findings point to the desperate need to clarify the definitions of these concepts so that this debate may be resolved.

**Keywords:** Responsible investment; fiduciary responsibility; asset consultants; South Africa.

## **Introduction**

Fiduciary responsibility continues to be advanced as an important barrier to the practice of responsible investment in South Africa (Eccles et al, 2007) and elsewhere (Richardson, 2009). In other quarters and under certain assumptions, it is vehemently argued that there is no barrier (Freshfields, 2005). Our basic idea at the outset of this study was that at least part of the reason for these apparently diametric views might lie in the heterogeneity in the interpretation of the two underlying concepts: fiduciary responsibility and responsible investment. Our view is that confusion at the interface between two heterogeneous topics is almost inevitable. With this in mind, we set out to describe some of the heterogeneity associated with these concepts as a basis for having a more informed discussion of the specific interpretations under which fiduciary responsibility might indeed present a barrier to the practice of responsible investment.

Because of the jurisdictional character of fiduciary responsibility, we restricted our attention in terms of this concept to a very specific context, namely asset consultants in the South African pension fund industry. Our focus on the South African context was motivated by the fact that: a) this is where we are based, b) South Africa is the largest market in Africa; and c) neither South Africa, nor any other African market was covered by the Freshfields (2005) evaluation.

Our focus on the pension fund industry was driven by the massive scale of this industry. Since their creation in Europe in the seventeenth century, pension funds have grown to become one of the main sources of capital in the world. According to Richardson (2008, p. 64), the assets of the eleven largest, national pensions markets in the world, totalled about US\$ 23 trillion in 2006. This massive scale of pension assets on a global level is not unexpectedly mirrored in the South African context. One pension fund alone (the Government Employee Pension Fund), holds assets of around US\$ 100 billion.

Given the amount of capital involved it is hardly surprising that a complex industry with a number of specialist role players has emerged. Detail aside, this investment chain consists of the following role players: The pension fund members who contribute to a pension fund; the pension fund which is represented by a principal officer and a board of trustees; and service providers including pension fund administrators or employee benefit consultants, asset managers and importantly asset consultants. Our focus on asset consultants specifically was based on the particularly crucial roles attributed to this group in the pension fund investment chain (UNEP FI, 2009). Asset consultants provide input into the rules of funds, the investment strategies of funds and the investment policy statements of funds. They draw up the actual mandates between funds and asset managers in which the execution of the strategy is stipulated. And more often than not, they are responsible for recommending the asset managers and administrator the pension fund will use. In short asset consultants have the power to influence almost every major decision of pension fund trustees (who are defined as the principal custodians of pension funds in the South African context - the Pension Funds Act 24 of 1956).

Our paper is structured as follows. In the first section we briefly discuss the origins of the concept of responsible investment, and present what we believe are the two crucial “forms” of responsible investment from the perspective of considering fiduciary barriers. The second and third sections focus on interpretations of fiduciary responsibilities. As a basic starting point to these investigations, we hold that a fiduciary can be defined as a “person who undertakes or assumes responsibility, or is required by law to act on or [on] behalf of and in the interests of another person” (Blackman et al, 2002). Emerging out of this are three key questions: a) are asset consultants actually fiduciaries? Assuming they are fiduciaries; b) who are the beneficiaries of their duties? c) what are their fiduciary duties in the specific context of this study? In the second section of the paper we consider what the South African legal literature says about these questions. In the third section, we present the array of interpretations from asset consultants themselves on these questions, and compare these interpretations to the interpretations indicated by the legal literature. Finally, in the fourth section we present a set of matrices in which we specify the precise interpretations of both responsible investment and fiduciary

responsibility and consider under which interpretations the latter may present a barrier to the former.

## **Responsible investment**

Broadly speaking, responsible investment falls into the genre of investment practices that integrate a consideration of environmental, social and governance (ESG) issues into decision making and ownership activities (Eccles et al, 2007). Early modern forms of this genre were generally associated with religious groups such as the Quakers (Richardson, 2008). These ethical or religious investors were willing to make potentially financially detrimental decisions in order to pursue a specified moral position (Sparkes, 2001). The anti-apartheid activism of the late 1970's, 1980's and early 1990's in particular went some way towards disconnecting such investment practices from specific religious movements. By the mid 1990's the dominant name applied to investment activities in this genre, in the academic literature at least, was socially responsible investment (SRI) (Eccles et al, unpublished draft). From the very late 1990's onwards, massive efforts were made to take this genre of investment from a small niche approach into the mainstream of investment. This drive appears to have been associated with the emergence of the name "responsible investment" as championed by the UN Principles for Responsible Investment (PRI, 2006).

This drive towards the mainstream also appears to have been associated with a tangible shift in terms of ethical posture of such investment practices (Richardson, 2009a). Earlier forms were explicitly about constraining investment activities on the basis of some notion of what was ethically right and wrong. More recent versions have focused on the financial materiality of ESG issues and the idea that their inclusion into investment analysis and ownership activities is a prudent extension of fundamental analysis and value driven shareholder activities. While some authors (Eccles, 2008; Welker et al, unpublished draft) have suggested that this egoist "ethical" position might be a defining characteristic of responsible investment compared with other forms in the genre, this is far from a consensus position. For the purpose of this paper we therefore suggest that

there are in fact two basic forms of responsible investment: a *social*<sup>1</sup> form and an *egoist* form. These correspond to what is van Braeckel et al (2005) referred to as the “sustainability approach” and the “materiality approach” respectively, and what Richardson (2009a) calls the “ethical” form and the “business case” form. The basic distinction is that, while the social form implies the distinct possibility (although not absolute certainty) that financial return may be sacrificed in pursuit of some sort of social returns, the egoist form explicitly disavows this possibility.

### **Fiduciary responsibility, asset consultants and South African law**

In attempting to form a complete picture of interpretations of fiduciary responsibility of asset consultants to the pension industry in South African law we conducted a desktop review of relevant pieces of South African legislation, government circulars and case law. As already noted, we structured our interrogation of this literature around three questions:

1. Are asset consultants’ fiduciaries in the pension fund investment chain?
2. To whom do they owe their fiduciary responsibility?
3. What are their fiduciary duties?

The results from this interrogation are summarized in Table 1.

**Table 1: Summary of interpretations of fiduciary responsibility of asset consultants to the pension fund industry in key South African legal literature**

<b>Question 1 - Are asset consultants’ fiduciaries?</b>	
Pension Funds Act 24 of 1956 (PFA)	Silent.
The General Pensions Act 29 of 1979	Silent
Government Employees Pension Law, 1996	Silent

<sup>1</sup> Social in the broadest sense of the word, taken to include environmental returns.

The Financial Services Board Act 97 of 1990	Silent
The Financial Institutions (Protection of Funds) Act 28 of 2001	Explicitly silent although some of the duties specified in Section 2 resemble common law fiduciary duties
The Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS)	Explicitly silent although some of the duties specified in Section 16 resemble common law fiduciary duties
Circular PF No. 130	Yes
Case law	Silent
<b>Question 2 – To whom do they owe their fiduciary responsibility?</b>	
PFA	Silent
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions Act	Silent
FAIS	Explicitly silent although it is stated that they owe a duty to act in the interests of their clients and the integrity of the industry
Circular PF No. 130	Silent
Case law	Silent
<b>Question 3 - What are their fiduciary duties?</b>	
PFA	Silent

General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions Act	Section 2 Duties <ul style="list-style-type: none"> <li>• good faith</li> <li>• care and skill</li> <li>• no secret profit</li> <li>• conflicts of interest</li> </ul>
FAIS	Section 16 (1) Duties <ul style="list-style-type: none"> <li>• honestly, fairly</li> <li>• care and skill</li> <li>• interests of clients</li> <li>• proper purpose</li> <li>• seek info</li> <li>• conflicts of interests</li> <li>• other legal requirements</li> </ul>
Circular PF No. 130	Silent
Case law	Silent

South African legislation is remarkably silent on the subject of fiduciary responsibility in relation to asset consultants. This is not altogether surprising given that fiduciary responsibility is generally viewed as a common law concept. This explanation is reinforced by the fact that nowhere in the legislation reviewed is the term “fiduciary” defined. Furthermore nowhere are specific “fiduciary duties” codified for any role player in the pension fund investment chain. Certainly in terms of our first question, nowhere in the legislation reviewed does it explicitly state that “asset consultants are fiduciaries”.

In addition to formal legislation, the Financial Services Board (FSB), a statutory body tasked with oversight of the entire financial services industry, publishes documents called Circulars. These are published in the Government Gazette and are designed to give

guidance to the financial services industry on how to interpret legislation. Circulars PF Nos. 3 – 131 specifically deal with matters relating to pension funds. Circular PF No. 130 (p.1) in particular states that “as fiduciaries, the boards, its alternates and other persons duly appointed by the board to act on its behalf, have to deal with assets or affairs of the fund in terms of pensions law, common law, customary law, regulations, the (registered) rules of the fund, codes of conduct and policies that apply to the fund”. Assuming that asset consultants fall into the category of “other persons duly appointed by the board to act on its behalf”, this is a reasonably strong indication that asset consultants are indeed considered fiduciaries.

What is much more surprising than the silence of formal legislation on fiduciary responsibility of asset consultants is the absolute silence of South African case law on this matter. Based on a search for “fiduciary duty” in the law reports of the LexisNexis Butterworths search engine, a total of 693 cases were identified. Of these, 12 were applicable to the pension context. A careful examination of all of these revealed not a single reference to asset consultants. If, as Kleyn et al (2002) assert, case law is the window to common law, and given the common law nature of fiduciary responsibility, then one might be inclined to infer from this silence that asset consultants are not viewed as fiduciaries. However there are logical problems with making such an inference. While silence on the matter does not indicate that they are fiduciaries, it also does not necessarily indicate that they are not fiduciaries. The alternative is simply that, to date, no action has been brought against an asset consultant for breach of his or her fiduciary duties in the South African pension fund context. Given the degree of influence that asset consultants have on the activities of pension funds, this must be considered surprising.

In summary then, much of the South African legal literature (both legislation and case law) is silent on the question of whether asset consultants are indeed fiduciaries. The only reasonably strong indication that they are fiduciaries was found in FSB Circular No. 130. Thus, in the absence of any explicit indication that asset consultants are not fiduciaries (other than the absolute silence of case law), and on the basis of FSB Circular No. 130 it

seems reasonable to conclude that according to South African law, they are indeed fiduciaries.

Based on this conclusion, it is appropriate to ask the second question of who the legal literature sees as the beneficiaries of this fiduciary relationship. The literature is even more silent on this question than on the preceding question (Table 1). The Financial Advisory and Intermediary Services Act 37 of 2002 generally states that financial advisors and intermediaries must act in the “interest of clients”. Assuming that the contracting client of asset consultants is likely to be the fund itself, this suggests that whatever responsibility exists (fiduciary or otherwise) is towards the fund. This seems perfectly adequate in the case of defined benefit pension funds where it is the fund that bears all of the risk associated with its investment activities. However, it may not be explicit enough in the case of defined contribution funds where it is the members who bear all the risk associated with the investment activities and the fund itself can in fact be considered a technical intermediary.

We now come to the question of what the legal literature says about the specific fiduciary duties of asset consultants. As already noted, nowhere in the literature reviewed is a list of general “fiduciary duties” for asset consultants (or anyone else) explicitly presented. However, based on the suggestion that asset consultants are indeed fiduciaries, and notwithstanding the complete absence of case law relating to fiduciary responsibility in the specific context of asset consultants, it is reasonable to look to general common law for a list of likely fiduciary duties. Although South African common law derives mainly from the seventeenth- and eighteenth-century Roman-Dutch law (Kleyn et al, 2002), South African common law interpretations of fiduciary duties appear to have their origins in the rules of equity in English law (Ames, 1908). According to Ames (1908), the original fiduciary duties could be summarized as: a) A duty to act in the best interest of the beneficiary; b) A duty to avoid conflicts of interest; c) A duty to act in good faith; d) A duty of loyalty/fidelity; e) A duty not to make any secret profit. Some authors (not necessarily in the South African context) have added to this basic list a sixth duty: f) a duty of care and diligence (Freshfields, 2005; Richardson, 2009; Sigwadi, 2008) This

idea is frequently evident when fiduciary duties are discussed in the context of investment and is often referred to as *the prudent investor rule* (Richardson, 2008). Not everyone subscribes to this extension (e.g. Havenga, 1996; Rotman, 1996); preferring to regard this as a separate duty with a different legal basis. Under the extended list of fiduciary duties, fiduciaries' could potentially be found in breach of their fiduciary duties not only by actively pursuing bad intentions, but also if they are simply negligent or careless in their actions.

Comparing the six commonly recognised common law fiduciary duties with the lists of statutory duties attached to asset consultants in Section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 and Section 16 (1) of the Financial Advisory and Intermediary Services Act 37 of 2002, it is clear that all six are represented. Working backwards this observation could be taken as further evidence to substantiate the suggestion contained in the FSB Circular No. 130 that asset consultants are indeed fiduciaries.

Of these six duties, the duty to act in the best interests of the beneficiary is arguably the most interesting in terms of considering whether fiduciary duties might present a barrier to the pursuit of responsible investment. Traditionally, the "best interests" part of fiduciary responsibility has been substituted with maximum financial return for a specified level of risk. A key question is whether these are in fact the same thing. Theoretically, "best interests" might well imply pursuing other forms of return (e.g. a healthy physical environment and society) and sacrificing financial return. On the surface, "best interests" is never explicitly defined, either generally or in the specific context of asset consultants in any of the literature reviewed. The only case that could be found on the best interests of the member was *Browne v South African Retirement Annuity Fund and Others*, 2006. The trustees were found to be in breach of their duty to act in members' best interests by not allowing a certain transfer. This transfer was between approved retirement annuity funds, prior to the retirement age. This case was obviously judged on a very specific set of facts and it is therefore difficult to make any generalizations from this decision with regards to a possible definition for acting in the

best interests of the client. The ‘bottom line’ of this case would however be that the member would have been in a better financial position if the trustees had allowed the transfer. This might imply another purely financial connotation to the words “best interests”.

This idea that best interests might be purely financial is reinforced if one considers the legislated object of pension funds. Circular PF No.130 states that “the assets of a retirement fund are administered for the main purpose of providing the benefits promised - in terms of the registered rules of that fund”. This is further supported in the same Circular which states later on that “the purpose of good governance in a fund is to ensure that benefits are optimized and the associated investment risks are minimized”. Furthermore, the word “benefit” is defined in the Pension Funds Act and in the General Pension Act as “any amount payable to a member or beneficiary in terms of the rules of that fund” and “an amount of money”. Once again, in both instances, the connotation is that the word has a purely financial implication. Thus although theoretically possible to extend the notion of best interests beyond the traditional financial interpretation, this would require disconnecting “best interest” from the object of pension funds.

In conclusion, pension law in South Africa is almost entirely silent on all three key questions. There is thin, but undisputed (explicitly at least) evidence in the Circular PF No. 130 to suggest that asset consultants are fiduciaries. It can be inferred that they generally owe their duties to the fund. Finally, it is clear that statutory duties defined include all commonly recognized common-law fiduciary duties. This in itself supports the thin evidence that asset consultants are indeed fiduciaries.

### **Asset consultants’ interpretations of their fiduciary responsibility**

Since the aim of this section of our paper was to “describe” the array of interpretations amongst asset consultants of their fiduciary responsibilities in the context of South African pensions, a qualitative research approach was indicated (Mouton, 2001). We therefore conducted seven in-depth, telephonic interviews with asset consultants in South

Africa. As was the case in the preceding section, these interviews were primarily structured around the three principal questions of:

1. Are asset consultants' fiduciaries in the pension fund investment chain?
2. To whom do they owe their fiduciary responsibility?
3. What are their fiduciary duties?

However, having identified the possible specific importance of interpretations of the duty to act in the best interests of beneficiaries, we also asked the interviewees to describe their understanding of this specific duty. This additional question was only asked after question 3 so as to prevent prompting the interviewees into listing a duty that they had not thought of themselves. Indeed, briefing of interviewees prior to the interviews was kept to the absolute minimum required in order to secure an interview. This was done to avoid obtaining "home worked" answers from interviewees.

All interviews were recorded with the permission of participants and subsequently transcribed and coded using Miles et al's (1984) matrix model for coding. In order to ensure dependability of interpretation, (Krefting, 1990) all interviews were independently coded by three researchers, where after a consensus discussion was used to converge on an interpretation.

The ranges of basic opinions of interviewees in relation to the questions asked are paraphrased in Table 2.

**Table 2: Paraphrased opinions expressed by asset consultants in terms of the five key questions put to them.**

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<b>Question 1 - Do you see yourself as a fiduciary in the pension fund investment chain?</b>	
1	Absolutely
2	Yes

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3	Yes
4	Yes
5	Yes, but not directly
6	Ambivalent
7	Yes

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**Question 2 – To whom do you owe your fiduciary responsibility?**

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1	The client, the pension fund
2	The members of the fund
3	First members, then trustees
4	First the trustees and through them the members
5	The members of the fund
6	First the trustees then the members of the fund
7	The members of the fund

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**Question 3 - What are your fiduciary duties?**

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1	Common law duties noted: <ul style="list-style-type: none"><li>- None</li></ul> Other duties: <ul style="list-style-type: none"><li>- A duty to give advice on investment strategy</li></ul>
2	Common law duties noted: <ul style="list-style-type: none"><li>- a duty to act in the interests of members</li></ul>
3	Common law duties noted: <ul style="list-style-type: none"><li>- None</li></ul> Other duties: <ul style="list-style-type: none"><li>- a duty to give advice</li><li>- a duty to communicate risk and return profile properly</li></ul>
4	Common law duties noted: <ul style="list-style-type: none"><li>- None</li></ul> Other duties: <ul style="list-style-type: none"><li>- a duty to help the trustees to do a good job</li></ul>
5	Common law duties noted:

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	- a duty to act in the interests of members
	Other duties:
	- None

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6	Common law duties noted:
	- a duty to act in the interests of members
	Other duties:
	- a duty to compile the investment strategy
	- a duty to educate the trustees

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7	Common law duties noted:
	- a duty to act in the interests of members
	- a duty to avoid conflicts of interests
	Other duties:
	- None

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**Question 4 – Describe the duty to act in the best interests of your client.**

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1	The member should be able to maintain standard of living
2	Ethical standards
3	To give the best advice with the available information and to render a high standard of service
4	To maximize the probability of the beneficiaries’ achieving their objectives, but this is not necessarily about maximizing growing assets
5	To meet the liabilities determined by the actuary
6	Doing what is best for the members as oppose to what is best for the trustees
7	Honorable intentions, like good faith; no conflicts of interests

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On the first question, the majority of interviewees believed that they were indeed fiduciaries. However, one stated that “...so while you might not be directly responsible for something I think it’s important for everybody to see their role as part of the bigger plan”. Another stated that “I think technically they are not direct fiduciaries but having said that they do bear responsibilities for the investments of the underlying managers so there is responsibility and whether it is a direct legal route in terms of fiduciary duty is

probably less clear and less direct but there probably is um a sense of responsibility there”. Both of these suggest a certain degree of ambivalence indicating that the range of interpretations expressed by asset consultants themselves included: a) Yes; b) Possibly no. As discussed in the preceding section, there appears to be no legal basis for the second of these interpretations, other than the complete absence of case law dealing with the fiduciary responsibility of asset consultants perhaps.

Question 2 (and indeed 3 and 4) is clearly conditional on the answer to question 1 being “yes”. We nonetheless pressed the interviewees who had expressed ambivalence in question 1 to speculate. This was justified since they did not respond with an outright “no”. Three distinct interpretations emerged. The most common view was that the beneficiaries of the fiduciary responsibility were the members of the fund. A second and closely related interpretation was that the primary beneficiaries were the trustees, followed by members. The final interpretation expressed was that the fund was the beneficiary. This is a significantly richer array of possibilities than was evident in the legal literature which suggests that the responsibility is to the fund. To some extent this observation reinforces the suggested inadequacy of the present legal framework to deal with defined benefits and defined contribution fund types.

The third question provided quite a variety of responses. The duty mentioned most commonly was the duty to act in the best interests of members. The only other generally accepted common-law fiduciary duty noted by asset consultants is the duty to avoid conflicts of interests. The other duties mentioned by asset consultants do not correlate with commonly recognized common-law fiduciary duties. This could either indicate that asset consultants’ are not aware of their common law fiduciary duties or that they don’t recognize their statutory duties as being fiduciary duties.

Not one asset consultant mentioned the duty to act with care, skill or diligence. Once again, this could either indicate asset consultants’ ignorance on their statutory duties or it can point to the fact that asset consultants generally, like some academic writers (Havenga and Rotman), do not consider the duty of care as part of the list of fiduciary

duties. This result is extremely fascinating, considering that this is probably the one duty that consultants run the highest risk of breaching. This is because their entire occupation is built on the foundation of having superior knowledge and skills – it is essential for asset consultants to always prove that they applied care, skill and diligence in the execution of their tasks.

Asset consultants mentioned the duty to act in the best interests of beneficiaries most frequently. This is an interesting coincidence considering that this duty was identified as particularly important in terms of our interpretation for this study. However, when the participants were asked to describe this duty, most found it challenging to articulate the concept. This is clearly indicated by attempts to answer the question being prefixed with “It’s tricky to define” or “I mean I know what it means but it is quite difficult to explain, I mean to give a definition um...” Acting in the best interests of the beneficiary was described differently by all the participants. One participant described it as “ethical standards”. Another used the words “honorable intentions”. Two participants also described it as trying to achieve the “best possible outcome” for the member, but the one participant stated that this does not necessarily mean “maximizing growing assets”.

The abovementioned views from asset consultants on the duty to act in the best interests of the beneficiary unmistakably suggest that “best interests” need not be about maximizing financial return per se. On the other hand, the views from literature undoubtedly associated “best interests” with maximizing profit. It is therefore confirmed that there are primarily two views on “best interests” represented in this study: Maximizing financial return and ethical standards.

### **Fiduciary responsibility and responsible investment**

Having described the key aspects of heterogeneity in the concepts of responsible investment and fiduciary responsibility, it becomes a relatively simple task to visualize specific scenarios under which the latter might well present a barrier to the practice of the former using simple interpretation matrices (Table 3 - Table 6).

Table 3 considers the implications of interpretations from literature and asset consultants on the question of whether asset consultants are indeed fiduciaries. Logically speaking, fiduciary responsibility can only be a possible barrier to the implementation of responsible investment if asset consultants are indeed fiduciaries. While a limited number of asset consultants expressed some ambivalence in regards to this question, the majority view was that they are indeed fiduciaries. South African law supported this. Under this interpretation it is entirely possible that fiduciary responsibility could be a barrier to either form of responsible investment, depending on the specific duties.

**Table 3: Interpretation matrix: responsible investment forms x fiduciary responsibility question 1 scenarios (AC = asset consultant).**

	<b>Responsible Investment Form</b>	
<b>Question 1 scenarios</b>	<b>Egoist Form</b>	<b>Social Form</b>
<b>Yes (SA law and AC's)</b>	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
<b>No (Minority of AC's only)</b>	No barrier	No barrier

In terms of the question of “to whom the fiduciary responsibility is owed” (Question 2), irrespective of the interpretation, it is again entirely possible that fiduciary responsibility could be a barrier to either form of responsible investment, depending on the specific duties (Table 4).

**Table 4: Interpretation matrix: responsible investment forms x fiduciary responsibility question 2 scenarios (AC = asset consultant).**

	<b>Responsible Investment Form</b>	
<b>Question 2 scenarios</b>	<b>Egoist Form</b>	<b>Social Form</b>
<b>Members</b>	Possibly a barrier – depends	Possibly a barrier – depends

<b>(AC's only)</b>	on specific duties	on specific duties
<b>Members then trustees (AC's only)</b>	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
<b>Trustees and indirectly members (AC's only)</b>	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
<b>The fund (SA law and AC's)</b>	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties

Therefore the essential matrix with regards to providing answers to the research question is found in Table 5. In this table all the individual duties are analyzed in order to determine if it presents barriers to responsible investment.

**Table 5: Interpretation matrix: responsible investment forms x fiduciary responsibility question 3 scenarios (AC = asset consultant).**

<b>Question 3 scenarios</b>	<b>Responsible Investment Form</b>	
	<b>Egoist Form</b>	<b>Social Form</b>
<b>Act in the best interest (SA law and AC's)</b>	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
<b>Avoid conflicts of interest (SA law and AC's)</b>	No barrier	No barrier
<b>Act in good faith (SA law)</b>	Possibly a barrier – depends on the definition of “good faith”	Possibly a barrier – depends on the definition of “good faith”

<b>Loyalty/fidelity (SA law)</b>	Possibly a barrier – depends on the definition of “loyalty” and “fidelity”	Possibly a barrier – depends on the definition of “loyalty” and “fidelity”
<b>No secret profit (SA law)</b>	No barrier	No barrier
<b>Care and diligence (SA law)</b>	Possibly a barrier – depends on the definition of “care” and “diligence”	Possibly a barrier – depends on the definition of “care” and “diligence”
<b>Providence of advice (AC’s only)</b>	No barrier	No barrier
<b>To educate and help trustees (AC’s only)</b>	No barrier	No barrier
<b>Communication of risk and return profile (AC’s only)</b>	No barrier	No barrier

Table 5 provides evidence that four of the mentioned duties could present barriers to either form of responsible investment, depending on the different interpretations of those duties. These duties are: the duty to act in the best interests of beneficiaries; the duty to act with good faith; the duty to act with care and diligence and the duty of loyalty/fidelity. Although we focused on the two possible interpretations of the duty to act in the best interests of beneficiaries in this study, it is important to note that the other three duties could share similar interpretations and therefore these duties could also present barriers. It also points to the need for further research and investigation to clarify the meanings of these duties in the pension fund context.

Table 6 presents the two possible interpretations on the duty to act in the best interests of beneficiaries found in this study. The first interpretation is the traditional interpretation where “best interests” is replaced with maximizing financial return for a specified level

of risk. This view was echoed in literature by the legislated object of pension funds and definitions for the word benefit. Only one of the asset consultants agreed with this view. The second interpretation came primarily from asset consultants. They described this duty as an ethical standard. As a result, when the first interpretation of “best interests” is used, there clearly exists a barrier to the pursuit of Social RI. On the other hand, if seeking the best interests of beneficiaries is all about ethical behavior there will be a barrier to the egoist form of RI.

**Table 6: Interpretation matrix: responsible investment forms x “best interest” interpretations (AC = asset consultant).**

	Responsible Investment Form	
	Egoist Form	Social Form
“Best interest” interpretation		
Maximum financial return (SA law & AC’s)	No barrier	Barrier
Ethical standards (AC’s)	Barrier	No barrier

### Conclusion

Contrary to popular rhetoric fiduciary responsibility can be a barrier to the pursuit of RI. In this study we have shown that a number of the fiduciary duties’ of asset consultants present possible barriers to the implementation of RI. In this paper we focused specifically on the barriers presented by the two possible interpretations of the duty to act in the best interests of beneficiaries. These barriers do not only come from the current South African legal framework, but barriers also exist in the minds of asset consultants.

We also illustrated that legislation in South Africa is extremely silent on the fiduciary duties of asset consultants. This observation could illustrate that pension law in South Africa is inadequate. We, for instance, would recommend that the specific duties of the

key role players in the pension fund investment chain should be outlined in pension law. Furthermore, the duties should be defined more clearly. It should also be considered to redefine the word “benefit” in pension law to include possible other benefits like a healthy physical environment and society.

This paper consequently proves that there is a need for future research in the pension law landscape of South Africa. We also recommend that the needs of average pension fund members should be determined. Asset consultants and other intermediaries can only act in the best interests of clients if their needs are known.

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