

**Fiduciary Responsibility and Responsible Investment:
Definitions, Interpretations and Implications for the Key
Role Players in the Pension Fund Investment Chain**

by

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Dedicated to my Lord and saviour, Jesus Christ, who makes all things possible, and to my husband and dearest friend, Cillié

SUMMARY

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. A number of role players ultimately manage the pension money of members on their behalf. Accordingly, the focus of this study is on the role players involved in the actual investment of pension fund money. For the purposes of the study, the key role players in the pension fund investment chain are identified as pension fund trustees, asset managers and asset consultants. These role players have a specific responsibility in terms of the service that they ought to provide. One of the key aspects of this dissertation is therefore determining whether their responsibility is a fiduciary responsibility.

The main purpose of the study is, however, to answer one overarching research question:

Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?

Clearly, there are two key terms in this research question, *fiduciary responsibility* and *responsible investment*. It is suggested that responsible investment takes at least two forms: a “business case” form¹ in which environmental, social and governance (ESG) issues are considered only in so far as they are financially material; and a social form in which ESG issues are considered over maximising risk adjusted financial returns.

Three key questions were asked in order to find qualitative descriptions and interpretations of fiduciary responsibility:

Question 1: Are the key role players in the pension fund investment chain fiduciaries?

Question 2: If so, to whom do the key role players owe their fiduciary duty?

Question 3: What are the fiduciary duties of the key role players in the pension fund investment chain?

It is also suggested that the duty to act in the best interests of beneficiaries could be described as the all-encompassing fiduciary duty. Two main interpretations of the

¹ Richardson “Keeping Ethical Investment Ethical” 555.

“best interests” of beneficiaries (as the focus of fiduciary duty) are used in interpretation matrices, which correlate with the two suggested interpretations of responsible investment that will be used to address the overall research question. It is shown that, for the key role players in the pension fund industry in South Africa, fiduciary responsibility can in some instances be a barrier to the implementation of responsible investment.

Some recommendations arising from this study are that the members and beneficiaries of pension funds may benefit from a restatement of the different role players’ fiduciary duties in legislation. The following research questions could also be clarified: What are the “best interests” of pension fund members and how can they be determined?

KEY TERMS

Fiduciary responsibility; responsible investment; key role players; pension fund investment chain; defined benefit funds; defined contribution funds; fiduciary duties; beneficiaries; best interests; good faith; pension fund trustees; asset managers; asset consultants

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CHAPTER 1: INTRODUCTION

Fiduciary responsibility continues to be advanced as an important barrier to the practice of responsible investment in South Africa² and elsewhere.³ In other quarters and under certain assumptions, it is fervently argued that there is no barrier.⁴ The suspicion at the outset of this study was that at least part of the reason for these apparently opposing views might lie in the heterogeneity in the interpretation of the two underlying concepts, fiduciary responsibility and responsible investment. Confusion at the interface between two heterogeneous topics is almost inevitable. With this in mind, the dissertation sets out to provide extensive descriptions of the two key concepts. This qualitative study specifically aimed to address the following research question:

Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?

This research question echoes the basic question that was addressed in the seminal Freshfields report in 2005,⁵ which explored the scope of fiduciary responsibility in nine jurisdictions (i.e. Australia, Canada, France, Germany, Italy, Japan, Spain, the UK and the US). This was followed by a United Nations publication entitled, “Fiduciary Responsibility”⁶ in 2009. This latter publication built on the Freshfields report and comprised three key parts. The first part was a legal commentary on fiduciary duty and the integration of environmental, social and governance (ESG) issues in investment mandates. The second part was a survey of asset consultants on

² Eccles et al *The State of Responsible Investment in South Africa* 42.

³ Richardson “Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?” 145.

⁴ Freshfields *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*.

⁵ Idem 6. The objective of this report was to answer the following question: “Is the integration of environmental, social and governance issues into investment policy voluntarily permitted, legally required or hampered by law and regulation: primarily as regards public and private pension funds, secondarily as regards insurance company reserves and mutual funds?”

⁶ UNEP FI *Fiduciary Responsibility* 13.

the integration of ESG issues into the investment process and the third part dealt with the practical developments in the integration of ESG issues into the investment process.⁷

The work of Richardson⁸ targeted the same issues and specifically explored the question: “Do the fiduciary duties of pension funds hinder socially responsible investment?” His focus was on what he called the “main common law jurisdictions”: the United Kingdom (UK), the United States and Australia. South Africa was therefore not considered in either the Freshfields report or Richardson’s study.

This, together with one of the main conclusions in Eccles et al.,⁹ created the perfect rationale for the research question at hand:

[O]ne of the most striking themes to emerge out of this survey was the fiduciary responsibility paradox. On the one hand, the majority of principal officers for pension funds interviewed indicated that a wide range of ESG issues were at least somewhat important in “evaluating the likely performance of investments”. On the other hand, most principal officers indicated that their general approach to RI was either to do nothing, or to put a limited proportion of assets in RI. In addition, the majority of principal officers (63%) indicated that fiduciary responsibility was at least somewhat a barrier to participating in RI.

1.1 THE PENSION FUND INDUSTRY

Pension funds ease the burden of the State in providing for retired persons and assist individuals in saving for retirement.¹⁰ A pension fund can be described as an “association of persons” or a “business carried on under a scheme” with the purpose of “providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependents of such

⁷ UNEP FI “Fiduciary Responsibility” 13–15.

⁸ Richardson “Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?” 145.

⁹ Eccles et al *The State of Responsible Investment in South Africa* 49.

¹⁰ National Treasury “Retirement Fund Reform” 4.

members or former members upon the death of such members”.¹¹ 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,¹² the assets of the eleven largest national pensions markets in the world totalled approximately US\$ 23 trillion in 2006. This massive scale of pension assets on a global level is not unexpectedly mirrored in the South African context. In 2011, one pension fund alone (the Government Employee Pension Fund) had more than 2.3 million active members and held assets of around USD 100 billion.¹³

There are many different classifications of pension funds. Two of the more commonly described types are defined benefit (DB) and defined contribution (DC) funds. DB funds are funds where members get a guaranteed lump sum pay-out or series of payments at retirement that is independent of market movements. In DC funds, the members’ contributions are defined but pay-outs are subject to a number of factors, including market performance.¹⁴ Because of the risk involved in providing guaranteed lump sum pay-outs DB funds are mostly restricted to government funds. Companies are not willing or able to carry the risk inherent in having to pay members fixed amounts at resignation, retrenchment or retirement. In the 1990s this started a major shift from DB to DC funds.

Irrespective of the use of intermediaries to effect the actual investment transactions, in DC funds the employee (pension fund member) ultimately carries the investment risk. Moreover, the cost for the employer is reduced, because the employee indirectly takes on the risk of the investment as well as the risk of rising costs.¹⁵ Clark¹⁶ states that the

¹¹ See s 1 of the Pension Funds Act 24 of 1956, where definitions are provided for a pension fund and a pension fund organisation.

¹² Richardson *Regulating the Unseen Polluters* 64.

¹³ GEPF <http://www.gepf.gov.za/Pages/Home.aspx> Date accessed: 12 August 2011.

¹⁴ S 1 of the Pension Funds Act 24 of 1956 also defines a defined benefit category of a fund and a defined contribution category of a fund. Also see *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C) 541–542.

¹⁵ National Treasury “Retirement Fund Reform” 6–7.

¹⁶ Clark “The Functional and Spatial Structure of the Investment Management Industry” 71.

majority of pension funds make use of specialist role players in order to administer the fund and invest and manage the fund's assets. This is true of both DB and DC funds. The role players involved in a pension fund are illustrated in the following figure taken from Clark:¹⁷

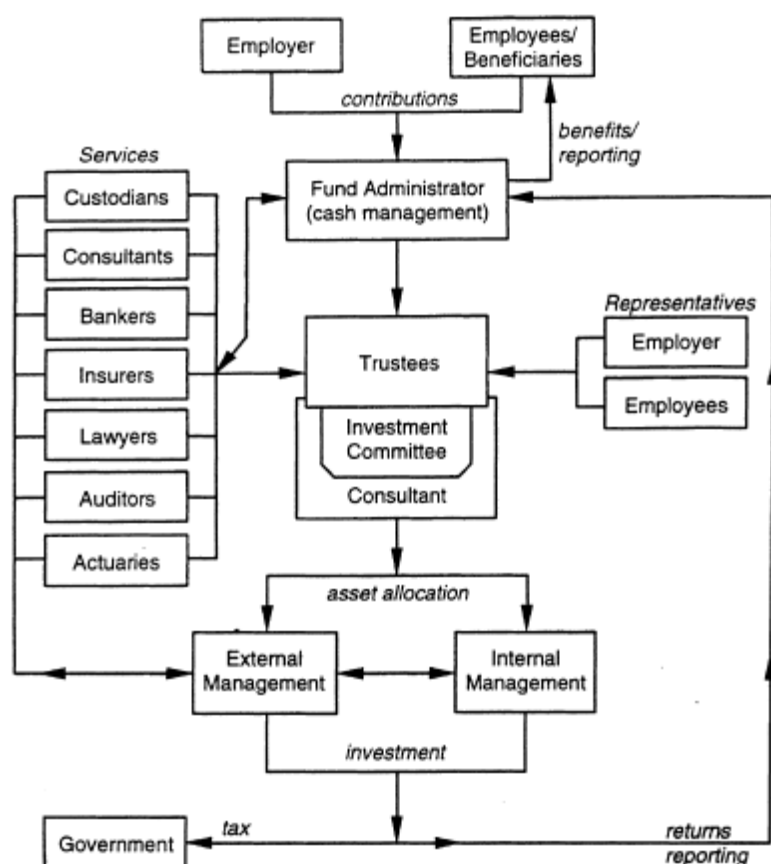


Figure 1.1: Pension fund investment management: institutions and services (Clark, see fn 17)

As indicated in Figure 1.1, pension fund money usually comes from two sources – contributions by the employer and those by the employee, regardless of whether it is a DB or DC fund. These contributions are administered by a pension fund administrator (sometimes referred to as an employee benefits consultant). The function of administrators is purely clerical:¹⁸ they ensure that the right amounts come in and that

¹⁷ Clark “The Functional and Spatial Structure of the Investment Management Industry” 73.

¹⁸ See s 13B of the Pension Funds Act 24 of 1956 with regard to the duties of a pension fund administrator. At first glance it seems as if this section includes role players involved with the investment of pension funds. (See s 13B(1) “No person shall administer on behalf of a pension

benefits are paid out, but have no involvement in the actual investment of the assets. The pension fund trustees then represent the fund, but some of the trustees are nominated by employees and others by the employer. The consultants (or asset consultants as they are popularly referred to) clearly form the link between the trustees and the asset managers (presented in Figure 1.1 as internal and external management). Subsequently, the asset managers are responsible for the actual investment of the assets and therefore act as agents on behalf of the pension fund.

The description above serves as an explanation for the focus on pension fund trustees, asset managers and asset consultants in this study. They are clearly the three key role players in a pension fund *investment* chain. The responsibilities of the different role players vary, however, in terms of the service that they ought to provide. One of the key aspects of this dissertation is about determining whether their responsibility or a part of this responsibility is indeed a fiduciary responsibility.

Before attempting to answer the overall research question, it is essential to come to some kind of understanding of what the terms *fiduciary responsibility* and *responsible investment* actually mean. While defining these terms is at best difficult and at worst completely arbitrary, history and literature provide some clues to how one should think about these concepts in the context of the South African pension fund industry.

1.2 FIDUCIARY RESPONSIBILITY

Payette¹⁹ claims that there is no definition as such for the term *fiduciary responsibility*. It is nonetheless suggested that there are four bases for fiduciary responsibility: an ethical basis, a legal basis, a religious basis and a professional basis. The legal basis for fiduciary responsibility, which is the most relevant one for this study, apparently has its origins in English common law.²⁰ Several other academic writers,²¹ however,

fund the investments of such a pension fund ...”). However, where the duties of these administrators are outlined in s 13B(5), it becomes clear that they only involve administrative tasks.

¹⁹ Payette “Fiduciary Responsibility of Board Trustees and Officers in Universities and Colleges” 12.

²⁰ Martin “Socially Responsible Investing: Is your Fiduciary Duty at Risk?” 553.

assert that fiduciary responsibility finds its origins in the rules of equity rather than in English common law.²²

Ames²³ provides the following description of the equitable rules as they relate to fiduciaries and this is still a valid description for fiduciary responsibility today:

The equitable rules which prohibit a fiduciary, while in the performance of his fiduciary duty, from competing in any way with the interest of his beneficiary, and permit dealings between them only upon clear evidence of the good faith of the fiduciary, and of the complete disclosure of all his knowledge as to the matters entrusted to him, and in fact the whole law of equity as to fiduciaries, enforce a moral standard considerably in advance of the average business man.

This is, however, the recent history of the concept. In fact the word “fiduciary” can be traced back to the Latin words *fiducia*, which means “confidence”, “trust” or “assurance” and *fiduciarius* which means “entrusted” or “committed”.²⁴

In its original form, a *fiduciarius* (as it was known in ancient Rome) was a person who was given an asset through a process of succession or inheritance. This arrangement, known as a *fideicommissum*, was no ordinary testamentary disposition. The *fideicommissum* was associated with an explicit understanding that the conferred “ownership” involved a custodial responsibility. In other words, the inheritance imposed a very strong and concrete obligation on the *fiduciarius* to transfer his

²¹ See DeMott “Beyond Metaphor: An Analysis of Fiduciary Obligation” 880–882; Blackman *The Fiduciary Doctrine and its Application to Directors of Companies* 78; Hammond “The Stolen Generation – Finding a Fiduciary Duty” par 2; Gautreau “Fiduciary Principle” 1; Ames “Law and Morals” 97–113.

²² See Ames “Law and Morals” 97–113, where he explains that these rules of equity actually differed substantially from English common law in the sense that someone could for instance be found guilty of murder even if it was done in self-defence in terms of the common law, although the rules of equity would provide some relief for the person who acted in self-defence. These rules of equity were then extended to other areas of the law and started to influence the law of trusts from about the 1400s and developed over time to frame the duties of fiduciaries as well.

²³ Ames “Law and Morals” 108.

²⁴ Simpson *Cassell’s Latin Dictionary* 92.

inheritance to a specified third party at a specific point in the future. This was usually after his death and to his own son.²⁵

A number of definitions can be found for the modern fiduciary. “A person holding the character of a trustee, being charged to act primarily for another’s benefit with regard to specific property or affairs”;²⁶ “One who owes another the duties of good faith, trust, confidence, and candor”;²⁷ “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”;²⁸ “A fiduciary is a person who undertakes to act in the interests of another person”.²⁹ It is also stated that:

To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?³⁰

Considering these definitions and the questions that were raised around the word fiduciary, two key characteristics of a fiduciary can be highlighted:

²⁵ Long “Fideicommissum”.

http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Fideicommissum.html
Date accessed: 28 July 2008. Also see Alfaro “The Trust and the Civil Law with Special Reference to Panama” 27, where the similarities between the *fideicommissum* and the English trust have led to academic debate as to whether the *fideicommissum* of Roman Law was indeed the inspiration for the English trust and therefore the modern fiduciary.

²⁶ Richardson “From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries” 5.

²⁷ Payette “Fiduciary Responsibility of Board Trustees and Officers in Universities and Colleges” 12.

²⁸ Blackman et al *Commentary on the Companies Act* 8–31.

²⁹ Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 8.

³⁰ Both McCormack “Fiduciary Obligations in a Changing Commercial Climate” 33 and Rotman “Fiduciary Doctrine: A Concept in Need of Understanding” 824 quote Mr Justice Felix Frankfurter in *Securities & Exchange Commission v Chenery Corp* [1943] 318 US 80 at 85–60.

1. The existence of a relationship between the fiduciary and another party. The other party can be seen as the vulnerable party – handing over the responsibility to the fiduciary, who is bestowed with the responsibility.
2. The existence of legal duties that rest on the person who takes up the responsibility.

These characteristics also prompt the clarification of the terms that have been used under the banner of fiduciary responsibility so far. Fiduciary responsibility refers to the overall responsibility that fiduciaries have. This fiduciary responsibility is created because of a fiduciary relationship and includes certain fiduciary duties. The two characteristics identified above will now be discussed separately.

1.2.1 THE EXISTENCE OF A RELATIONSHIP BETWEEN TWO OR MORE PEOPLE

The fiduciary relationship has been discussed by a number of academic authors. Blackman et al³¹ state that:

Relationships in which a fiduciary obligation has been imposed are marked by three characteristics:

1. scope for the exercise of some discretion or power;
2. that power/discretion can be used unilaterally so as to affect the beneficiary's legal or practical interests; and
3. a peculiar vulnerability to the exercise of that discretion or power

Another definition, similar to Blackman's, is the following:

Broadly speaking, a fiduciary relationship is one in which a person undertakes to act on behalf of or for the benefit of another, often as an intermediary with a discretion or power which affects the interests of the other who depends on the fiduciary for information and advice.³²

This definition, however, adds the fact that the vulnerable party depends on the fiduciary for information. Nevertheless, the authors of both these definitions

³¹ Blackman et al *Commentary on the Companies Act* 8–37.

³² McCormack “Fiduciary Obligations in a Changing Commercial Climate” 33.

emphasise the fact that, while their definitions might be good working definitions, they are not exhaustive.

Havenga³³ asserts that there are only two characteristics that are vital to the existence of the fiduciary relationship, not three as stated by Blackman above. Havenga describes these characteristics as being discretion or power and states that this discretion or power will affect the beneficiary's interests. Although her views still closely reflect those of Blackman and McCormack,³⁴ she, like Blackman, does not mention the specific duties of providing advice and information.

Another theme that constantly emerges from the literature whenever fiduciary relationships are discussed is the possibility that this power or discretion can be abused. In this regard, it is said that "the courts should examine fiduciary relations separately from the legal contexts in which they arise and design the rules not by analogies to prototypical relations but by evaluating the fiduciary power and its potential abuse".³⁵

It is also evident that fiduciary relationships should not necessarily be bound to the so-called traditional "fiduciary" categories like those of the trustees of a trust.³⁶

The fiduciary nature of any relationship arises from circumstances peculiar to that relationship and the interaction of its participants and not as a result of belonging to traditional categories of fiduciary relations. Secondly, since fiduciary relationships

³³ Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* 9.

³⁴ See Blackman et al *Commentary on the Companies Act* 8–37 and McCormack "Fiduciary Obligations in a Changing Commercial Climate" 33. The differences in the way the authors describe the fiduciary relationship may be explained by the fact that these authors deal with different types of fiduciary. Blackman et al do not specifically mention that the fiduciary has a duty to share information or advice. This is probably because they describe directors of companies as fiduciaries, specifically. Information and advice are not as important to the company, as companies can only be informed and advised through those same directors. This illustrates the notion that fiduciary duties are contextual and this is discussed in Section 1.2.2.

³⁵ Frankal "Fiduciary Law" 797; 836.

³⁶ Sealy "Some Principles of Fiduciary Obligation" 119–140.

ought not to be confined to already established categories and should be determined by a more functional approach, the categories of relationships that may be described as fiduciary should be viewed as open-ended.³⁷

Weinrib³⁸ states that:

Awareness of the central importance of the element of discretion and of the law's attempt to control this discretion may also provide a clue for determining who is and who is not a fiduciary.

He criticises the tendency to think of the typical fiduciaries like trustees, agents and directors as an exhaustive list of fiduciaries. In *Volvo (Southern Africa) (Pty) Ltd v Yssel*³⁹ it was said that there is no closed list of fiduciary relationships and that the existence of a fiduciary relationship should be determined by the facts of every case. These views are important in the context of this dissertation, because they illustrate that not only pension fund trustees and agents (asset managers) are fiduciaries, but that asset consultants can also be fiduciaries.

In summary, it is helpful to refer to the universal elements of fiduciary relations as described by Rotman:⁴⁰

- The beneficiary's trust and confidence in the honesty, integrity and fidelity of the fiduciary;
- The beneficiary's reliance on the fiduciary's care of that trust;
- The fiduciary's power over the interests of the beneficiary as a result of the latter's reposing of trust;
- The beneficiary's resultant vulnerability as a result of the fiduciary's power over the beneficiary's interests.

Rotman's comments on pension plans are extremely helpful in the context of this study. He states that pension plans are hybrids of contracts and trusts and that all

³⁷ Rotman "Fiduciary Doctrine: A Concept in Need of Understanding" 828.

³⁸ Weinrib "The Fiduciary Obligation" 5.

³⁹ 2009 (6) SA 531 (SCA) 536.

⁴⁰ Rotman "Fiduciary Principles and Pensions" 1–3.

trusts are forms of fiduciary relationships. He considers the following role players in pension plans to be fiduciaries: “pension administrators; other persons with power or control over pension plan assets or their distribution and those who have significant input into the creation or maintenance of pension plans”.⁴¹ The first category, namely pension fund administrators, might have different meanings in different countries. Rotman does not provide any definition for the term *pension administrators* and it is therefore not clear exactly what kind of role player he is referring to. The second category could easily include asset managers, while the third category could clearly include role players like asset consultants. Traditionally, all trustees are fiduciaries and therefore one might assume that pension fund trustees would also obviously be fiduciaries.⁴²

1.2.2 THE EXISTENCE OF LEGAL DUTIES THAT REST ON THE PERSON WHO TAKES UP THE RESPONSIBILITY

It is also evident that the fiduciary has certain legal duties. A universally accepted and finite list of fiduciary duties could not be found in the literature; however, the following guidance from *Phillips v Fieldstone Africa (Pty) Ltd & Another*⁴³ with regard to fiduciary duty, also used by Blackman et al,⁴⁴ is helpful:

The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship.

⁴¹ Rotman “Fiduciary Principles and Pensions” 3.

⁴² See *Tek Corporation Provident Fund and Others v Lorentz*, 1999 (4) SA 884 (SCA) at 894 B–D, where Marais JA said the following: “A number of propositions are either axiomatic or not in dispute. The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the Rules of the fund, relevant legislation and the common law. The fund is a legal persona and owns its assets in the fullest sense of the word ‘owns’. (Section 5(1)(a) and (b) of the Pension Funds Act 24 of 1956.) ... The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries”.

⁴³ 2004 (3) SA 465 (SCA) 477 G–H.

⁴⁴ Blackman et al *Commentary on the Companies Act* 8–30.

This suggests that both the existence of a fiduciary relationship and the fiduciary duties are contextual. In Section 1.2.1 it was proposed that there is indeed a fiduciary relationship between the key role players in the pension fund investment chain and their beneficiaries. In order to come up with a list of generally recognised common law fiduciary duties, it is therefore essential to carefully consider the current context: fiduciary duties for the key role players in the pension fund investment chain in South Africa.

A good starting point is *Robinson v Randfontein Estates Gold Mining Co Ltd*,⁴⁵ dating back almost a hundred years. In this, Innes CJ stated that:

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 secret profit at the other's expense or place himself in a position where his interests conflict with his duty.

Judge Innes therefore suggested that there are three fiduciary duties:

- A duty to protect the interests of the beneficiary;⁴⁶
- A duty to not make any secret profit; and
- A duty to avoid conflicts of interest

However, if it is true that fiduciary duties are contextual, then it is essential to look specifically at descriptions of fiduciary duties in the pension fund context of South Africa. In *Tek Corporation Provident Fund and Others v Lorentz*,⁴⁷ the fiduciary duties of pension fund trustees were described. Marais JA stated the following:

They [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.

⁴⁵ 1921 AD 168.

⁴⁶ See also the definitions provided for a fiduciary in Section 1.2 and the descriptions of a fiduciary relationship in Section 1.2.1 by Blackman et al, McCormack and Havenga.

⁴⁷ 1999 (4) SA 884 (SCA) 898H.

In this case the duty to act in the best interests of beneficiaries is therefore recognised. In *Meyer v Iscor Pension Fund*⁴⁸ it was stated that:

The general proposition that the trustees of the fund are under a fiduciary duty to act in the best interests of the members appears to be supported by authority (see, for example, *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 898H – I). 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. It seems to me to be inherent in the proper exercise of any discretion that it should be done with impartiality.

Pension fund trustees thus have an overarching fiduciary duty to act in the best interests of the members and this duty includes a duty of impartiality. These cases specifically looked at the fiduciary duties of pension fund trustees. In *Afrisure CC and Another v Watson NO and Another*,⁴⁹ another Supreme Court of Appeal case, the court equated the content of a trustee's fiduciary duties with that generally accepted for a director of a company, as also described by Blackman elsewhere.⁵⁰ Even though this case focused on a trustee of a medical aid scheme, it would surely also be applicable to a pension fund trustee. This is because both are trustees of a "financial institution" as defined in section 1 of the Financial Services Board Act 97 of 1990.

It is said that section 7C of the Pension Funds Act 24 of 1956 (hereafter the Pension Funds Act) and section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 (hereafter the Financial Institutions Act) contain codifications of fiduciary duties.⁵¹ Section 7C of the Pension Funds Act reads:

- (1) The object of the board shall be to direct, control and oversee the operations of the fund in accordance with the applicable laws and the rules of the fund.
- (2) In pursuing its object the board shall –

⁴⁸ 2003 (2) SA 715 (SCA) 730C.

⁴⁹ 2009 (2) SA127 (SCA) 128F – G.

⁵⁰ Blackman Companies in *The Law of South Africa* Joubert (ed).

⁵¹ See Section 3.2 of this dissertation where the specific cases in which this is mentioned are described.

- (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provision of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
- (b) act with due care, diligence and good faith;
- (c) avoid conflicts of interest;
- (d) act with impartiality in respect of all members and beneficiaries.

Section 2 of the Financial Institutions Act states that:

A director; member; partner; official; employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property

- (a) Must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;
- (b) Must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency concerned has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the performance or discharge of his or her powers and duties; and
- (c) May not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person at the expense of the financial institution, trust, beneficiary or principal concerned.

The statutory formulation of the fiduciary duties of company directors in section 76(3) of the Companies Act 71 of 2008 (hereafter the Companies Act) is comparable to the codified duties in the Pension Funds Act and the Financial Institutions Act. Section 76(3) reads:

A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director –

- (a) in good faith and for a proper purpose
- (b) in the best interests of the company; and
- (c) with the degree of care and skill and diligence that may reasonably be expected of a person –
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director.

Owing to the fact that the duty of care, skill and diligence is included in these sections, the impression could be created that this duty is seen as a fiduciary duty. Some secondary legal sources on the topic of fiduciary duties in the pension fund context also create this impression. Sigwadi⁵² describes the personal liability of pension fund trustees for breach of fiduciary duties. He states that the “duties of pension fund trustees are determined by the particular pension fund, by statutes and, in so far as it may be necessary, by the common law relating to trusts in a broad sense”.⁵³ Under the relevant statutes he then specifically mentions section 7C of the Pension Funds Act and section 2 of the Financial Institutions Act. It is not, however, clear if it is the author’s intent to create the impression that the duty of care, skill and diligence is a fiduciary duty, but the fact that the term *fiduciary duties* is used loosely, as well as the fact that all these duties are grouped together in codifications, leads to confusion.

In section 77(2)(a) and (b) of the Companies Act it is, however, stated that:

- (2) A director of a company may be held liable –
 - (a) in accordance with the principles of the common law relating to breach of fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in 75, 76(2) or 76(3)(a) or (b); or

⁵² Sigwadi “The Personal Liability of Pension Fund Trustees for Breach of Fiduciary Duties” 331–346.

⁵³ Sigwadi “The Personal Liability of Pension Fund Trustees for Breach of Fiduciary Duties” 334.

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of –

(i) a duty contemplated in section 76(3)(c);

The Companies Act therefore makes a clear distinction between the duty to act with care, skill and diligence,⁵⁴ on the one hand, and the duty to act in good faith and for a proper purpose and the duty to act in the best interests of the company, on the other.⁵⁵ The duty to act with care, skill and diligence is explicitly excluded from the list of fiduciary duties and is seen as a separate duty.

Rotman⁵⁶ specifically addresses “Fiduciary Principles and Pensions” and uses words like “honesty, integrity, fidelity, selflessness and utmost good faith” when he describes the standard of conduct of a fiduciary. These words could easily be replaced with some of the duties that have already been mentioned. Honesty and integrity could refer to the duty to act in good faith or not to make a secret profit; fidelity could refer to the duty to act in the best interests of the beneficiary; and selflessness could refer to the duty not to make any secret profit or perhaps also the duty to act in the best interests of the beneficiary. Rotman’s views on fiduciary duties could apply to all the fiduciaries in the pension fund industry and not just to pension fund trustees, but they are not specific to the South African context.

Although several fiduciary duties for pension fund trustees have been described so far, little has been said about the fiduciary duties of asset managers and asset consultants. In Sections 1.1 and 1.2.1 it was noted that asset managers act as agents of the pension fund. An agent owes his duties to a principal. In the context of this study, asset managers are agents who owe their duties to a principal – in this case, the pension

⁵⁴ See s 76(3)(c) of the Companies Act.

⁵⁵ See s 76(3)(a) and (b) of the Companies Act.

⁵⁶ Rotman “Fiduciary Principles and Pensions” 1–3.

fund. In a decision of the Cape High Court⁵⁷ the fiduciary duties of an agent were described as follows:

- A duty to act honestly;
- A duty to act in good faith;
- A duty to act in the best interests of the principal;
- A duty to avoid conflicts of interest; and
- A duty to properly account to the principal (this duty could also refer to a duty to disclose).

It is, however, unclear whether asset consultants would also qualify as agents, because technically they do not act on behalf of the trustees or the fund; rather, they provide the trustees with advice in order for them to act. If this is true, no fiduciary duties that could specifically be attached to asset consultants have been described so far. This does not necessarily mean that they do not have fiduciary duties, because it has been suggested already that the nature and extent of these duties depend on the context of the relationship. It has also been suggested that there is indeed a fiduciary relationship between the asset consultants and the pension fund trustees, at least, and indirectly, with the pension fund members.

Still, a generally recognised list of fiduciary duties would assist in moving forward with this study. In order to compile such a list, three main issues that can be identified from the descriptions above should be addressed first. Firstly, it is evident that, for fiduciaries in the pension fund context in South Africa, there are several duties that are described as fiduciary duties. Secondly, it is evident that these duties are closely related and could be categorised into main duties and sub-duties. Thirdly, there may be confusion around whether the duty to act with due care and diligence is indeed a fiduciary duty. The three issues are described separately below:

⁵⁷ *SDR Investment Holdings CO (Pty) Ltd and Another v Nedcor Bank Ltd and Another* 2007 (4) SA 190 (C) 198 C.

There are several duties that are described as fiduciary duties for fiduciaries in the pension fund context.

A number of duties could be identified in the preceding descriptions of fiduciary duties. Every single duty that was mentioned is not, however, listed separately, because many of them overlap and were therefore reduced to one duty. This was done in cases where the wording of the descriptions differed, but the meaning remained the same. In the case of the duty to protect the interests of beneficiaries, for instance, only the duty to act in the best interests of beneficiaries was noted. Nine duties are therefore noted:

- A duty to act in the best interests of beneficiaries⁵⁸
- A duty to act in good faith⁵⁹
- A duty to avoid conflicts of interest⁶⁰
- A duty to act with impartiality⁶¹
- A duty to not make any secret profit (or gain any improper advantage)⁶²

⁵⁸ See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD168; *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) 898 H; *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) 730 C; *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA); *SDR Investment Holdings Co (Pty) Ltd and Others v Nedcor Bank Ltd and Another* 2007 (4) SA 190 (C); s 76(3) of the Companies Act; s 7C of the Pension Funds Act; s 2 of the Financial Institutions Act; Rotman “Fiduciary Principles and Pensions” 1–3.

⁵⁹ See *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA); s 76(3) of the Companies Act; s 7C of the Pension Funds Act; s 2 of the Financial Institutions Act; Sigwadi “The Personal Liability of Pension Fund Trustees for Breach of Fiduciary Duties” 335.

⁶⁰ See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD168; *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA); *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA); *SDR Investment Holdings Co (Pty) Ltd and Others v Nedcor Bank Ltd and Another* 2007 (4) SA 190 (C); s 7C of the Pension Funds Act; s 2 of the Financial Institutions Act.

⁶¹ See s 7C of the Pension Funds Act and *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) 730 C.

- A duty to disclose⁶³
- A duty to act for a proper purpose/not to act for an improper purpose⁶⁴
- A duty to not exceed powers⁶⁵
- A duty to maintain an unfettered discretion⁶⁶

It is evident that these duties are closely related and can be categorised into main duties and sub-duties.

Based on the previous descriptions provided for fiduciary duties and the fact that fiduciary duties are contextual, it is suggested that the two main duties for the key role players in the pension fund investment chain are the duty to act in the best interests of beneficiaries and the duty to act in good faith. It is possible to argue that all the other duties noted could form part of these two broader duties. This prompts questions around the actual meanings of these duties and how they differ, if they differ at all. It would therefore be constructive to provide short descriptions for the meanings of these duties.

A duty to act in the best interests of beneficiaries

In explicating the meaning of the words, the word “interests” can simply be replaced with benefit or advantage. This would mean that the fiduciary should act so that the beneficiaries are not disadvantaged in any way. This is not only a very difficult task but seems to be an extremely wide duty. This is probably why this one duty can include so many of the other duties mentioned. It is possible to argue that in order to act in another’s best interests one must a) apply due care and skill; b) not make a

⁶² See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD168; *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA); Rotman “Fiduciary Principles and Pensions” 1–3.

⁶³ See *SDR Investment Holdings Co (Pty) Ltd and Others v Nedcor Bank Ltd and Another* 2007 (4) SA 190 (C) and Sigwadi “The Personal Liability of Pension Fund Trustees for Breach of Fiduciary Duties” 335.

⁶⁴ See *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) and s 76(3) of the Companies Act.

⁶⁵ See *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA).

⁶⁶ *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA).

secret profit; c) not have interests that conflict with one's duty; d) disclose relevant information; e) act with impartiality toward all beneficiaries; f) act for a proper purpose; g) not exceed one's powers; and h) maintain an unfettered discretion.

In order to narrow down this wide meaning of "best interests", it is again essential to look at the specific context. In *Browne v South African Retirement Annuity Fund and Others*,⁶⁷ 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 generalisations from this decision with regard to a possible definition for acting in the best interests of beneficiaries. 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 also imply that "best interests" means that risk-adjusted financial returns should be maximised.

This idea that best interests might be a reference to maximising risk-adjusted financial returns is reinforced by the legislated object of pension funds, provided in the Pension Funds Act as part of the definition of the term *pension fund organisation*. A pension fund organisation is defined and it is stated that the object of such an organisation is "providing annuities or lump sum payments for members or former members ...".⁶⁸

Circular PF 130⁶⁹ 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 further 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

⁶⁷ 2006 (4) BPLR 311 (PFA).

⁶⁸ See s 1, the definitions section in the Pension Funds Act.

⁶⁹ 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 to 131 deal specifically with matters relating to pension funds.

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 word would seem to have a purely financial connotation. Thus, although it is theoretically possible to extend the notion of best interests beyond the traditional financial interpretation, this would require disconnecting best interests from the object of pension funds.

Blackman et al discuss the meaning of “the interests of the company” as part of their discussion of the fiduciary duties of company directors.⁷⁰ They also acknowledge that the concept is not clearly defined but nonetheless describe what the current legal position is in their view. They state that “the general rule is that the interest of the company are the interests of the shareholders *qua* shareholders, as a general body”.⁷¹ They add that directors should also consider the interests of future shareholders. If this is applied to the current context it would mean that the interest of the pension fund is the interests of the members and the future members of the fund. They also explain that this duty entails that the fiduciary must act in what he genuinely believes⁷² to be the best interests of his beneficiaries.⁷³ They say that the word “interest” can mean different things, but emphasise that it depends on the context.

In the context of a pension fund, the meaning of best interests can, then, essentially mean either achieving the best possible financial position for the beneficiary, or it can include other benefits like a healthy physical environment.

⁷⁰ See Blackman et al *Commentary on the Companies Act* 8–67, 76. They do not, however, discuss the duty to act in good faith and the duty to act in the best interests of the company as separate fiduciary duties, but describe “a duty to act bona fide in the interests of the company” as a sub-duty of the duty to exercise powers for a proper purpose.

⁷¹ *Idem* 8–67.

⁷² This is clearly a reference to the duty to act in good faith and also why Blackman et al do not discuss the duty to act in good faith separately but present it as an inherent part of the duty to act in the best interests of beneficiaries.

⁷³ *Idem* 8–70.

A duty to act in good faith

Good faith in a legal context would refer to bona fides⁷⁴ – the opposite of mala fides. This can be roughly translated as good intentions. In other words the fiduciary should not have bad intentions or hidden agendas. Good faith also refers to the fact that the fiduciary must act honestly. This duty of honesty includes a duty to not do anything that is illegal or fraudulent and points to the notion of transparency and accountability.⁷⁵ Furthermore, it has been established through case law⁷⁶ in the pension fund context that the duty to act in good faith includes a duty to disclose adequate, relevant information.

It also seems impossible to separate this duty from the duty to act in the best interests of beneficiaries.⁷⁷ In this sense, it can be argued that good faith refers to the “how” it should be done while “best interests” refers to what should be achieved. The one therefore refers to the attitude of the fiduciary and the other refers to the outcome of the fiduciary’s actions. Blackman et al describe this as a test that is “subjective as to means”⁷⁸ and “objective as to ends”.⁷⁹ This simply entails that the fiduciary must subjectively believe that he is acting in the best interests of the beneficiary, but this is qualified in the sense that it only applies if the fiduciary has correctly identified the interests of the beneficiary as they stand in law. In the South African pension fund context this is problematic as the law does not explicitly outline the interests of the beneficiaries.

⁷⁴ Simpson *Cassell’s Latin Dictionary* 92.

⁷⁵ See Blackman et al *Commentary on the Companies Act* 8–77.

⁷⁶ See *Skinner v De Beers Pension Fund and Another* [2005] 5 BPLR 453 (PFA).

⁷⁷ It was already noted in the description of the duty to act in the best interests of beneficiaries that Blackman et al do not describe these two duties as two separate duties, but as “a duty to act bona fide in the interests of the company”.

⁷⁸ Blackman et al *Commentary on the Companies Act* 8–64.

⁷⁹ *Idem* 8–67.

A duty to avoid conflicts of interest

It is plain to see that this duty forms part of the broader duty to act in the best interests of beneficiaries.⁸⁰ Nonetheless, in the pension fund context this duty would mean that the fiduciary “may not place himself in a position in which he has, or can have, a personal interest, or a duty to another, conflicting, or which may possibly conflict, with his duties”⁸¹ to the pension fund. Thus, this duty not only forbids actual conflicts but also potential conflicts.

It has also been said that one should not only acknowledge breach of this duty where the fiduciary has an interest conflicting with the interests of the beneficiary, but also where the fiduciary has a duty to another that conflicts with his duty to the beneficiaries. There can, however, be an exception to this “no-conflict rule”, where the fiduciary has informed the beneficiaries about his interest and consent is given that he may still proceed with the action – also referred to as informed consent.⁸²

Blackman et al⁸³ identify six sub-duties under the so called “no-conflict rule” where the fiduciary duties of company directors are described. These sub-duties are: the self-dealing rule; the fair-dealing rule; a duty to account for all profits obtained; a duty not to take corporate opportunities; a duty not to compete with the company; and a duty not to misuse confidential information. The self-dealing rule refers to situations where the fiduciary has an interest that conflicts or may possibly conflict with his duty to act in the best interests of the beneficiaries. This rule does not, however, state that the fiduciary may not have a personal interest in the situation; it is just that his interest may not clash with his duty.

⁸⁰ Blackman et al *Commentary on the Companies Act* 8–118. “The duty imposed by the no-conflict rule is essentially a prophylactic second-order duty (a duty about duties) the purpose of which is to ensure that the fiduciary does not breach his primary duties, in particular, his duty to act in the interests of his beneficiary.”

⁸¹ *Idem* 8–111.

⁸² *Idem* 8–111, 112.

⁸³ *Idem* 8–111, 142.

The fair-dealing rule in the pension fund context would amount to the following: where the fiduciary has an interest that conflicts with the interest of the pension fund, the fiduciary must with regard to that specific contract or situation remove himself from the decision-making process or may not take part in that action. It is said that the primary duty here is that the fiduciary must disclose his interest.

The duty to account for all profits obtained is discussed separately below under the duty not to make any secret profit. A discussion of a duty not to take corporate opportunities and a duty not to compete with the pension fund is not included here as it is not deemed essential for the purposes of this study. It might, however, be technically possible for the role players in the pension fund investment chain to take corporate opportunities and to compete with the fund. A duty to not misuse confidential information refers to a scenario where the fiduciary might be in possession of confidential information because of his position or office and the rule is that he may not then use this information for his own benefit.

A duty to act with impartiality

This duty is seen as part of the duty to act in the best interests of beneficiaries but refers to the fact that the fiduciary should not discriminate against any of the beneficiaries and should treat all beneficiaries fairly.⁸⁴ This duty also illustrates how fiduciary duties can be contextual. It will not, for instance, be applicable to fiduciaries that have to act only in the interest of one beneficiary, but will only be relevant where the fiduciaries have to act in the interests of more than one beneficiary, as is the case with pension funds.

A duty to not make a secret profit (or gain any improper advantage)

As already described, this duty is closely related to the duties to act in the best interests of the beneficiaries and the duty to act in good faith. This duty simply entails that the fiduciary is not allowed to use his position to make a profit that is not disclosed and is also referred to as the “no-profit rule”.⁸⁵ It is also clearly related to the

⁸⁴ See Blackman et al *Commentary on the Companies Act* 8–70.

⁸⁵ *Idem* 8–145.

duty to avoid conflicts of interest and some argue that this duty flows naturally from the duty to avoid conflicts of interests. Furthermore, it is said that the “no-profit rule” constitutes two sub-duties: firstly, the fiduciary may not keep a profit that he made by use of his position and secondly, a fiduciary may not keep a profit that he made from circumstances where there was a conflict of interest and duty.⁸⁶

A duty to disclose

This duty is self-explanatory in the sense that disclosure means to make known or reveal. This duty essentially refers to the notion of accountability and would therefore include a duty to communicate relevant information. In the pension context specifically, it would for instance include the communication of benefit statements. As has already been explained, this duty is seen as part of the duty to act in good faith which is described in case law.⁸⁷ This duty could certainly also be part of the duty to act in the best interests of beneficiaries.

A duty to disclose can also be seen as one of the sub-duties of the duty to avoid conflicts of interests. It was mentioned that a fiduciary has a duty to disclose the interest he has in situations where he has an interest that conflicts with his duty. On the question of to whom the disclosure must be made, it has been said that the disclosure must be made to the members in a general meeting, but this is in the context of companies.⁸⁸ It is not certain what the position in the context of a pension fund is. It has however been said that this duty will depend on the facts of each case,⁸⁹ therefore highlighting the fact that these duties are contextual.

A duty to act for a proper purpose/not to act for an improper purpose

This duty refers to the fact that the fiduciary has power and he must “exercise it bona fide for the end designed”.⁹⁰ This duty is therefore clearly linked to the two duties (a duty to act in good faith and a duty to act in the best interests of beneficiaries) that are

⁸⁶ See Blackman et al *Commentary on the Companies Act* 8–70.

⁸⁷ See *Skinner v De Beers Pension Fund and Another* [2005] 5 BPLR 453 (PFA).

⁸⁸ Blackman et al *Commentary on the Companies Act* 8–131.

⁸⁹ *Idem* 8–126.

⁹⁰ *Idem* 8–57.

suggested to be the main fiduciary duties for the key role players in the pension fund investment chain. Blackman et al⁹¹ discuss this duty and its application to company directors at length and assert that this duty also comprises certain sub-duties. They discuss these sub-duties under the headings “categories of improper purpose” and “unauthorised or collateral purposes”. Under “categories of improper purpose” the following duty is mentioned: a duty to act bona fide in the interests of the company. This is, therefore, a combination of the two main duties as identified for this dissertation. It is argued that the fiduciaries’ purpose is to act in the interests of their beneficiaries and if they don’t do that, they are acting for an improper purpose.⁹² Then it is said that unauthorised or collateral purposes are purposes not authorised by the memorandum of the company, or where it comprises unauthorised business purposes, or purposes not authorised by the articles of association of the company. In the pension fund context this would translate to purposes not authorised by the rules of the fund.

A duty to not exceed powers

This duty requires that the fiduciary may not go beyond the scope of his authority. The generally recognised term used in this context is that fiduciaries are not allowed to act *ultra vires*. It also means that the fiduciary may not act beyond any limitation placed on him by legislation or the common law⁹³ or the rules of the fund in the pension fund context. Again, it is clear that this duty and the duty to act for a proper purpose are very closely related and could probably fall under the duty to act in the best interests of beneficiaries.

In *Tek Corporation Provident Fund and Others v Lorentz*⁹⁴ a recommendation was made by the trustees that a surplus should be retained to balance the possible risks of future volatility in the investment environment. Although the duty to not exceed one’s powers was not explicitly identified as a fiduciary duty, it was said that the trustees

⁹¹ Blackman et al *Commentary on the Companies Act* 8–57, 111.

⁹² *Idem* 8–62.

⁹³ *Idem* 8–57.

⁹⁴ 1999 (4) SA 884 (SCA) 898.

would be acting *ultra vires* if they are not given the powers to do so in the rules of the fund. It is also implied that acting within one's powers forms part of the duty to act in the best interests of beneficiaries.

A duty to maintain an unfettered discretion

This duty was discussed in *PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU)*,⁹⁵ where it was said that:

The trustee's obligation to exercise an independent judgment, regardless of the views of the trade union (or employer) which appointed him, is analogous to the director's obligation to exercise an independent judgment, regardless of the views of any party which may have procured his or her appointment as a director.

This “independent judgment” the court refers to is probably the best way of describing this duty. It is also said that this duty requires the fiduciary to not just follow instructions without considering them first and that the fiduciary may not be a “puppet”.⁹⁶ In the current context this duty would specifically require that a trustee, for instance, is not influenced by the employer to represent only the interest of that employer just because he was appointed by them.

In *Mashazi v African Products Retirement Benefit Provident Fund and Another*⁹⁷ it was said that the trustees of the pension fund had a duty to “exercise an equitable discretion”. In this case the issue under discussion was the interpretation of section 37C of the Pension Fund Act and the fact that the trustees have the power to decide how benefits will be paid to dependents upon a member's death. In the context of this case this reference to an equitable discretion is therefore a reference to the fact that the trustees should not be persuaded only by the will or the nomination form of the deceased member but that they should retain their independent judgement.

Confusion on whether the duty to act with due care and diligence is a fiduciary duty

⁹⁵ 2008 (2) SA 351 (W) 360.

⁹⁶ Blackman et al *Commentary on the Companies Act* 8–106.

⁹⁷ 2003 (1) SA 629 (W) 632.

Firstly, it is submitted that this possible confusion over whether the duty to act with due care and diligence is a fiduciary duty is created by the loose manner in which the term *fiduciary duty* is often used.⁹⁸ Secondly, it might be difficult for the lay person to differentiate between a fiduciary duty as opposed to a duty owed by a fiduciary. This is clearly illustrated in Frankal:

First the law vests in entrustors the legal right to receive quality fiduciary services. It imposes on fiduciaries a duty to exercise care and skill, akin to the tort of negligence. Second, the rules vest in entrustors the legal right to rely on the honesty of their fiduciaries by imposing on fiduciaries a duty of loyalty, as well as other specific duties, in order to deter fiduciaries from misappropriating the entrusted property or interests. This part of fiduciary law is akin to the crime of embezzlement and the tort of conversion.⁹⁹

Thirdly, it is clear that the real difference between a duty of care on the one hand and fiduciary duties on the other is in the test for breach of these duties. This notion is also implied in the quote by Frankal above and discussed in great detail by Havenga.¹⁰⁰ She specifically comments on the suggestion made by Du Plessis¹⁰¹ that there is no need for a distinction between the duty of care and other fiduciary duties and that the basis for breach of both can be delictual. She furthermore explains that if the Aquilian action would be accepted as a valid basis for breach of fiduciary duties, fiduciaries could potentially be found in breach of a fiduciary duty not only by actively pursuing bad intentions, but also by simply being negligent or careless in their actions. She then continues, saying “liability without fault is generally recognised in respect of directors who have breached their fiduciary obligation”.¹⁰² Blackman et al¹⁰³ also assert that the

⁹⁸ See the discussion in Section 1.2.2 on how Sigwadi creates the impression that he views the duty of care as a fiduciary duty, because he states that the fiduciary duties of pension fund trustees are codified in s 7C of the Pension Funds Act and s 2 of the Financial Institutions Act and that both these sections include this duty.

⁹⁹ Frankal “Fiduciary Duties as Default Rules” 1213.

¹⁰⁰ Havenga “Breach of Directors’ Fiduciary Duties: Liability on What Basis?” 367–376.

¹⁰¹ Du Plessis *Grondslae* 101–103; Du Plessis “Vertrouenspligte” 36–37.

¹⁰² Havenga “Breach of Directors’ Fiduciary Duties: Liability on What Basis?” 371.

¹⁰³ Blackman et al *Commentary on the Companies Act* 8–34.

duty of care is not a fiduciary duty and explain it as follows: “A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of breach of his fiduciary duty.”

Rotman,¹⁰⁴ in the international context, also differentiates between the duty of care and fiduciary duty and explains that the duty of care is “that of a man of ordinary prudence in managing his own affairs”, which is obviously not the case in his descriptions of fiduciary conduct. Consequently, Rotman’s views are the same as those of Havenga.

Nevertheless, on the international front in particular, there are some authors who are of the opinion that the duty of care does form part of fiduciary duties. Richardson¹⁰⁵ describes the duty of care or prudence as one of “the principal elements of the fiduciary relationship”. He further explains that “[t]hese standards coalesce to form the twin key duties of loyalty and prudence, the latter known as the prudent investor rule”. Martin¹⁰⁶ also creates the impression that the duty of care forms part of fiduciary duties because the notion of prudence and the fact that the fiduciaries have a duty of care is discussed under the heading of “Nature of fiduciary liability”. He states that a fiduciary in a financial advisory role will be in breach of his fiduciary duty if he fails to document his process of decision making.

The dichotomy around whether the duty of care is indeed a fiduciary duty is acknowledged in the literature.¹⁰⁷ It is said that some commentators differentiate between specific fiduciary duties and trust law. On this matter it is argued that there are different grounds for liability and different consequences for breach of fiduciary

¹⁰⁴ Rotman “Fiduciary Principles and Pensions” 1–3.

¹⁰⁵ Richardson “Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?” 150.

¹⁰⁶ Martin “Socially Responsible Investing: Is Your Fiduciary Duty at Risk?” 553.

¹⁰⁷ See Havenga “Breach of Directors’ Fiduciary Duties: Liability on What Basis?” 367–368 and Richardson “From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries” 5.

duties as opposed to breach of the duty to act with care (prudence) and that the duty of care should therefore be seen as a separate duty.¹⁰⁸

The fact that the duty of due care and diligence is a separate duty would recently seem to have been settled, at least within the South African context,¹⁰⁹ but there still seems to be no clarity on this matter on the international front. It is not, however, the purpose of this dissertation to determine whether the duty of care is an “original” fiduciary duty or not, although it is important to acknowledge this dichotomy in the literature. Consequently, the focus of this dissertation is rather to describe the fiduciary duties of the key role players in the pension fund investment chain, if indeed they are fiduciaries.

1.2.3 SUMMARY

In summary, as the literature indicates, many authors have discussed the notion of fiduciary responsibility at great length, but few seem to agree on an exact definition or description of fiduciary responsibility. There are nonetheless a few universal elements that can be pinned down.

Firstly, there is agreement about the fact that a relationship needs to exist between two or more people – the fiduciary and the beneficiary/beneficiaries. It is also frequently mentioned that the fiduciary has to act on behalf of the beneficiary and that the fiduciary therefore has some power and discretion and, consequently, has certain fiduciary duties.

Secondly, it was emphasised that a list of generally recognised common law fiduciary duties could not be found, but that it would aid the rest of this study if such a list could be compiled. It was then suggested that the two main duties are the duty to act in the best interests of beneficiaries and the duty to act in good faith. Furthermore, it

¹⁰⁸ Havenga “Breach of Directors’ Fiduciary Duties: Liability on What Basis?” 367–376.

¹⁰⁹ Section 76(3) of the new Companies Act 71 of 2008 contains a codification of directors’ fiduciary duties. As already described, s 77(2)(a) and (b) of the same Act then makes a clear distinction between the fiduciary duties (in this case a duty to act in good faith and for a proper purpose and a duty to act in the best interests of the company) and the duty to act with care, skill and diligence.

was established that the duty of care and diligence is a separate duty and should not form part of the list of generally recognised fiduciary duties. Consequently, the following list is proposed as presenting the generally recognised common law fiduciary duties:

- A duty to act in the best interests of beneficiaries
- A duty to act in good faith
- A duty to avoid conflicts of interest
- A duty to act with impartiality
- A duty not to make any secret profit (or gain any improper advantage)
- A duty to disclose
- A duty to act for a proper purpose/ not to act for an improper purpose
- A duty to not exceed powers
- A duty to maintain an unfettered discretion

Thirdly, an interesting notion presented in the literature is that the duty to act in the best interests of beneficiaries could include the majority of the other fiduciary duties. Richardson¹¹⁰ describes this as follows: “As such the fiduciary’s foremost duty is one of loyalty to the beneficiary – to act in their sole or best interests.” These authors and case law¹¹¹ provide different perspectives on the same issue – fiduciary duty entails, first and foremost, acting in the best interests of the beneficiary.

¹¹⁰ Richardson “Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?” 150.

¹¹¹ See Blackman et al *Commentary on the Companies Act* 8–124: “Where a director is permitted to act in a matter in which he has an interest conflicting with his duty, he remains subject to primary duty to act in what he bona fide believes to be the best interests of his company, i.e. he must prefer his company’s interests to his own.” Case law here refers to the cases mentioned throughout Chapter 1, Section 1.2 in the discussion of fiduciary responsibility.

Nonetheless, in order to describe the universe of interpretations of fiduciary responsibility of the key role players in the pension fund investment chain, three crucial questions remain:¹¹²

1. Who assumes fiduciary responsibility in the pension fund investment chain?
2. Who are the beneficiaries of this responsibility?
3. What are the duties involved in this responsibility?¹¹³

These questions form part of the methodology in this dissertation and are used in Phase I and Phase II of the study as instruments to address the overall research question.

1.3 RESPONSIBLE INVESTMENT

As with fiduciary responsibility, the concept of responsible investment appears to be associated with a multitude of interpretations.¹¹⁴ Responsible investment is actually a relatively new and still developing term and therefore the concept may be even more

¹¹² After the completion of this study an important piece of legislation with regard to the pension fund industry in South Africa was published. On 4 March 2011, the Amendment of Regulation 28 of the Regulations made under s 36 of The Pension Funds Act 24 of 1956 was published in the *Government Gazette* 34070. For the first time, the actual words “fiduciary duty” and “fiduciary responsibility” appear in the preamble to this regulation. Consequently, the revised Regulation 28 raised more questions about practitioners’ fiduciary responsibility in the pension fund industry. Although the revised Regulation 28 was not used during this study to inform the research question, the influence it might have had on the research question at hand and the possibilities for future research in this space are considered in an epilogue to this dissertation. This epilogue follows after the concluding chapter and is entitled: Fiduciary Responsibility: New Developments in Pension Fund Legislation.

¹¹³ Rotman “Fiduciary Doctrine: A Concept in Need of Understanding” 824. Rotman uses a quote from Mr Justice Felix Frankfurter in a case *Securities and Exchange Commission v Chenery Corp.* This quote confirms the three questions triggered by Blackman’s definition of a fiduciary: “To say that a man is a fiduciary only begins analysis: it gives direction to further inquiry. To whom is he a fiduciary? What obligation does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?”

¹¹⁴ Eccles et al “The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature” 389–402.

undefined than fiduciary responsibility. Sparkes and Cowton¹¹⁵ state that “[t]he field of socially responsible investment (SRI) has been characterized by debate or lack of consensus about definitions” and that “the terminology is not settled”.

The following piece from Thornton¹¹⁶ clearly illustrates this confusion around names and terminology for responsible investment:

Quite naturally, many are concerned to try to make **responsible investment** choices; the **ethical investment** industry has itself become a multi-million pound business. Since 1984, when Friends Provident Fund launched its Stewardship Fund, the first specifically “**ethical**” unit trust, the sector of the investment market targeted at investors seeking to ensure **socially responsible** uses for their money has grown exponentially. [researcher’s emphasis]

Furthermore, Thornton¹¹⁷ uses the terms *ethical investment* and *socially responsible investment* interchangeably throughout her article, which adds to the confusion.¹¹⁸ Sparkes and Cowton¹¹⁹ also seem to cloud the terms *ethical investment* and *socially responsible investment* when they used the same definition to describe these two terms a few years apart. They also state that the two most prominent terms used in this genre are *socially responsible investment* (SRI) and *ethical investment*, and mention that ethical investment is the older of the two. In the above quotation, three terms are mentioned, *ethical investment*, *socially responsible investment* and *responsible investment*. According to Eccles et al,¹²⁰ these are also the three most popularly used

¹¹⁵ Sparkes and Cowton “The Maturing of Socially Responsible Investment: A Review of the Developing link with Corporate Social Responsibility” 46.

¹¹⁶ Thornton “Ethical Investments: A Case of Disjointed Thinking” 396.

¹¹⁷ Idem 396–422.

¹¹⁸ Also see Beal et al “Why Do We Invest Ethically?” 66–77.

¹¹⁹ See Sparkes “Ethical Investment: Whose Ethics, Which Investment?” 194–205 and Sparkes and Cowton “The Maturing of Socially Responsible Investment: A Review of the Developing link with Corporate Social Responsibility” 45–57.

¹²⁰ Eccles et al “The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature” 389–402.

terms to describe investment practices that consider environmental, social and governance (ESG) issues.¹²¹

Although it is constructive to first discuss the history and development of the concept of responsible investment, this is challenging owing to the fact that it is difficult to separate the issues of the history and development of responsible investment and the use of terminology in this genre. In this case, genre refers to

... a combination of investment strategies that integrate ethical as well as environmental, social and corporate governance considerations into investment analysis and decision making processes.¹²²

It therefore makes sense to look at the three most prominent terms separately, starting with ethical investment, as this is generally conceived to be the oldest of the terms.¹²³

1.3.1 ETHICAL INVESTMENT

The notion of ethical investment dates back to the 1700s, when churches and other religious groups like the Quakers sought to avoid investing in things that they perceived to be immoral or wrong.¹²⁴ This trend later developed into an interest in investing with the goal of achieving specific social return or for the relief of specific social dilemmas. However, there are differing opinions on the origin of this kind of investment.

In his historical analysis of ethical investment, Sparkes¹²⁵ distinguishes between the “public awareness” and the actual “activity” of ethical investment. He explains that church investors have for many years used ethical considerations to run their portfolios; in other words they have been involved in the activity of ethical

¹²¹ Eccles et al “The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature” 389–402.

¹²² Viviers et al “Is Responsible Investing Ethical?” 15.

¹²³ For an extensive review on the history of ethical investment, see Sparkes “A historical perspective on the growth of socially responsible investment” in *Responsible Investment* 39–54.

¹²⁴ Richardson “Financing Sustainability: The New Transnational Governance of Socially Responsible Investment” 73–110.

¹²⁵ Sparkes “Ethical Investment: Whose Ethics, Which Investment?” 194–205.

investment, but they did not specifically attach a name to it (public awareness). Consequently, the literature seems to present differing views on the exact details of the first instance of ethical investment.¹²⁶ Nevertheless, academic writers generally agree that, historically, ethical investment typically involved a negative screening process whereby manufacturers of certain products (usually those that were closely linked to alcohol, tobacco and firearms) were excluded from investment portfolios. They also agree that religious beliefs played an important role in the development of ethical investment.

Sparkes also mentions that during the 1970s, ethical investment became more widespread with the growing resistance to apartheid, with not only churches but also individuals wanting to take a stand against the apartheid regime by divesting from South Africa.¹²⁷ Sparkes also recognises the role that the anti-Vietnam war movement played in the increase in ethical investment and this was even before the anti-apartheid movement. In the late 1970s and 1980s, ethical investment was still primarily a niche investing stream but more and more individual ethical investment tools were introduced to the market. Nonetheless, confusion around names and terms about the subject continued into the nineties.

Sparkes, for instance, presents two specific definitions of ethical investment – one by Button and one by Cowton.¹²⁸ Button's definition is as follows:

... putting your money into investments which will yield a financial return for you, but which do not support areas of business interest that you disapprove of, such as arms, tobacco, alcohol, apartheid, violation of human rights.

Cowton's definition is the following:

¹²⁶ See Sparkes "Ethical Investment: Whose Ethics, Which Investment?" 196. Sparkes contends that the first ethical unit trusts were founded as early as 1926 with churches in the United States. Also see Eccles "Responsible Investment, Fiduciary Duty and Social Dilemmas" where it is suggested that ethical investment had existed long before that, which can be seen in the influence that the Quakers had on the ethical investment movement during the 1700 and 1800s.

¹²⁷ Sparkes "Ethical Investment: Whose Ethics, Which Investment?" 196.

¹²⁸ Ibid.

... the exercise of ethical and social criteria in the selection and management of investment portfolios, generally consisting of company shares (stocks).

Sparkes, however, goes on to say:

Ethical investment is straightforward, and simply means an investment philosophy that combines ethical or environmental goals with financial ones.¹²⁹

Mackenzie and Lewis's¹³⁰ definition of ethical investment is similar to Sparkes's definition, but it does not seem so straightforward:

Ethical investment can be used to refer to all kinds of investments that mix ethical with ordinary financial motivations or objectives. It includes green, social, and socially responsible investment.

Considering all of the above, what has been said about the confusion around definitions and terminology is highlighted rather than clarified. It is, however, suggested that, during the nineties, it became evident that people no longer wanted to use the term *ethical investment*, because it had become too loaded; thus, more and more people started to use the term *socially responsible investment* (SRI).¹³¹ This was perhaps because people were attracted to the notion of doing “good” with their money, but not everyone was comfortable with the idea that it was attached to religious views in some way.¹³²

1.3.2 SOCIALLY RESPONSIBLE INVESTMENT (SRI)

By the mid 1990s, the dominant name applied to investment activities in this genre, in the academic literature at least, was *socially responsible investment* (SRI).¹³³ Nonetheless, the confusion around names and terminology continued. In 2001

¹²⁹ Sparkes “Ethical Investment: Whose Ethics, Which Investment?” 197.

¹³⁰ Mackenzie and Lewis “Morals and Markets: The Case of Ethical Investing” 440.

¹³¹ Sparkes “Ethical Investment: Whose Ethics, Which Investment?” 194–205.

¹³² Sparkes and Cowton “The Maturing of Socially Responsible Investment: A Review of the Developing link with Corporate Social Responsibility” 46–47.

¹³³ Eccles et al “The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature” 389–402.

Sparkes¹³⁴ primarily described *ethical investment* as a synonym for the term *socially responsible investment*, although *ethical investment* is described as an older term than *socially responsible investment*. It then makes sense that Sparkes and Cowton¹³⁵ defined SRI in 2004 as “the exercise of ethical and social criteria in the selection and management of investment portfolios, generally consisting of company shares (stocks)” – the same definition used earlier¹³⁶ by Cowton to define *ethical investment*.

From the late 1990s onwards, considerable efforts were made to take this genre of investment from a small niche approach into the mainstream of investment. In describing the growth in SRI, Richardson¹³⁷ states that “[w]hile this movement is gaining more adherents, it has increasingly justified responsible financing as a path to be prosperous, rather than virtuous”. Richardson also says that “[e]thical investment, or socially responsible investment as this financing movement is more commonly known today, increasingly downplays ethics”.¹³⁸

Eccles¹³⁹ also comments on the downplaying of ethics and a move towards a more “egoist” approach to SRI. Once again, the idea of mainstreaming SRI and building a business case for SRI arose. The business case for SRI refers to the suggestion that even more money can be made if investment is done in a socially responsible manner.

1.3.3 RESPONSIBLE INVESTMENT

Responsible investment is thought to “imply the choice of financial products or adhesion to a set of criteria bearing a certain label”.¹⁴⁰ However, this is not a

¹³⁴ Sparkes “Ethical Investment: Whose Ethics, Which Investment?” 196–197.

¹³⁵ Sparkes & Cowton “The Maturing of Socially Responsible Investment: A Review of the Developing link with Corporate Social Responsibility” 45–57.

¹³⁶ In 1994.

¹³⁷ Richardson “Keeping Ethical Investment Ethical: Regulatory issues for Investing for Sustainability” 555.

¹³⁸ Ibid.

¹³⁹ Eccles “Chapter 2: New values in responsible investment” In: *Responsible Investment in Times of Turmoil* Ed.

¹⁴⁰ Dembinski et al “The Ethical Foundations of Responsible Investment” 204.

universally accepted definition of responsible investment, since other authors use other definitions to describe similar investment activity.¹⁴¹

According to Sparkes, writing in 2001,¹⁴² SRI is often used as a synonym for responsible investment. If this is true it would imply that the social “aspect” of responsible investment is not only important but possibly dominates in the minds of those who are responsible for investment decisions. In other words, these “responsible investors” most likely want to achieve social goals with their investment strategy. Thus, even though the terminology has changed from ethical investment to SRI and, more recently, just plain responsible investment, two issues remain: the absence of a universally accepted definition for what constitutes responsible investment and issues around ethics.

This requires asking some practical questions concerning responsible investment. Eccles and Viviers¹⁴³ found that the term *responsible investment* is associated with three specific investment strategies, namely, positive screening, best-in-class and cause-based investing. This speaks about the practice of responsible investment.

Viviers et al¹⁴⁴ (2008) also explore the issue of whether responsible investing is indeed ethical. The aim of their article was to place responsible investment within an ethical framework. They therefore explored the definition of ethics and the different approaches to investment ethics. In their article, these authors describe “seven approaches to ethical reasoning”. Dembinski et al¹⁴⁵ (2003) express a similar view to Viviers et al and state that responsible investment can be expressed by way of “four types of ethical concern”.¹⁴⁶ These ethical concerns are

¹⁴¹ See Sullivan & Mackenzie “Introduction” in *Responsible Investment* 14.

¹⁴² Sparkes “Ethical Investment: Whose Ethics, Which Investment?” 196–197. The date is included here to illustrate the evolution of names over time.

¹⁴³ Eccles et al “The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature” 389–402.

¹⁴⁴ Viviers et al “Is Responsible Investing Ethical?” 15–25.

¹⁴⁵ Dembinski et al “The Ethical Foundations of Responsible Investment” 203–213.

¹⁴⁶ Idem 203.

... value-based ethics resulting in the exclusion of so-called vicious companies from the investment portfolio; fructification-oriented ethics with a view to long-term investment; consequence-based ethics aimed at initiating a behavioral change in the investment target; and ethics envisaged as a discriminating criterion in the search of the best financial performance.

In spite of the abovementioned authors' attempt to place responsible investment within an ethical framework, academic writers¹⁴⁷ contend that there is a move away from the focus on ethics as a consequence of the mainstreaming of responsible investment. It is not entirely clear whether this is because the PRI¹⁴⁸ is supposedly removing the focus from ethics to advancing risk-adjusted financial returns, or because academic writers have fuelled the idea that ESG issues are financially material.¹⁴⁹

So, whereas earlier forms (ethical investment and SRI) of this investment genre were explicitly about constraining investment activities on the basis of some notion of what was ethically right and wrong, more recent versions attached to the use of the term *responsible investment* have focused on the financial materiality of ESG issues. While some authors¹⁵⁰ have suggested that this egoist "ethical" position might be a defining characteristic of responsible investment compared with other forms of the genre, this is far from a consensus position.

¹⁴⁷ Eccles "UN Principles for Responsible Investment Signatories and the Anti-Apartheid SRI Movement: A Thought Experiment" 415–424; Richardson "Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability" 555; Viviers et al "Is Responsible Investing Ethical?" 15–25.

¹⁴⁸ UNEPFI "Principles for Responsible Investment" 4. It is stated that "[t]here is a growing view among institutional investors that environmental, social and corporate governance (ESG) issues can affect the performance of investment portfolios". And "[a]s institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social and corporate governance (ESG) issues can affect the performance of investment portfolios".

¹⁴⁹ Heese "The Development of Socially Responsible Investment in South Africa: Experience and Evolution of SRI in Global Markets" 729–739.

¹⁵⁰ Eccles et al "The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature" 389–402.

Eccles¹⁵¹ states that there is “a growing disquiet amongst academics surrounding the ascendancy of ‘responsible’ investment that is egoist or self-interested in character”. He then goes on to describe the different names that have been given to this egoistic type of responsible investment by various academics. Richardson¹⁵² calls it “business-case” responsible investment; Van Braeckel and Bontemps call it the “materiality approach”; while Viviers et al call it “a weak form of ethical investment”.

Although it is acknowledged that a number of interpretations exist for responsible investment, it is the aim of this section to reduce these different definitions and interpretations of responsible investment in order to determine whether *fiduciary responsibility* can be seen as a barrier to its implementation. Considering the description above of the history and development of responsible investment, as well as the confusion surrounding relevant names and terms, it is suggested that responsible investment could be used as an overarching term to include nuances of ethical investment and socially responsible investment. Furthermore, at least two basic forms of responsible investment can be identified: a “business case” form, where ESG issues are only considered in so far as they are considered to be financially material, and a “social” form that implies the distinct possibility (although not absolute certainty) that financial return may be sacrificed in pursuit of some sort of social or other returns.

1.4 FIDUCIARY RESPONSIBILITY AND RESPONSIBLE INVESTMENT

As mentioned right at the beginning of this dissertation, it is not surprising that uncertainty exists at the interface of two ambiguous concepts. In 2001, Payette¹⁵³ touched on the subject of the link between fiduciary responsibility and responsible investment. He commented on the focus of the maximising of financial returns by investors and quotes Nicklin (1997), who claims that it is the fiduciary responsibility

¹⁵¹ Eccles “UN Principles for Responsible Investment Signatories and the Anti-Apartheid SRI Movement: A Thought Experiment” 416.

¹⁵² Richardson “Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability” 555.

¹⁵³ Payette “Fiduciary Responsibility of Board Trustees and Officers in Universities and Colleges” 12–19.

of investment managers to maximise returns. Payette thereafter states that “... the term fiduciary responsibility is being used as a justification for achieving a high level of financial performance even though stakeholders may object to the principle of the location and social conditions surrounding investments”.¹⁵⁴ In 2005, the Freshfields report¹⁵⁵ confirmed the sentiment expressed by Payette that investment fiduciaries can act in an ethical way with regard to ESG issues if acting in such a way either improves or at least has no negative impact on financial returns.

In 2007, Richardson¹⁵⁶ addressed a very similar question to the one in this study (whether fiduciary responsibility creates barriers to the implementation of responsible investment for pension funds), but he focused on what he called the main common law jurisdictions, the United Kingdom, the United States of America and Australia, using a literature review to address the question. Richardson starts out by saying that some lawyers and investors believe that their legal duties, including their fiduciary duties, restrict them from considering “non-financial criteria”.¹⁵⁷ He also acknowledges the fact that there is some confusion among investment practitioners as to the question of how far reaching their fiduciary duties really are and if they are allowed to sacrifice financial returns in order to gain social or environmental returns. He then proposes that SRI can actually be enhanced through the legal reform of fiduciary responsibility and suggests four possible ways of achieving this reform. Nevertheless, he ultimately concludes:

This article seeks to clarify the impact of fiduciaries’ investment duties in the pension fund sector on SRI. Traditionally, those fiduciary duties are seen as antithetical to SRI, primarily because ethically-motivated investing is stereotyped as sacrificing financial returns. This article disputes this dichotomy, arguing that SRI is often financially advantageous and can be implemented by various methods that comply

¹⁵⁴ Payette “Fiduciary Responsibility of Board Trustees and Officers in Universities and Colleges” 15.

¹⁵⁵ Freshfields *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* 1–153.

¹⁵⁶ Richardson “Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?” 146–201.

¹⁵⁷ Idem 147.

with duties of prudence and loyalty. Depending on how the “best interests” of beneficiaries are defined, SRI may even allow for some diminution of financial returns in order to achieve specific ethical or social benefits mandated by governing trust instruments.

In 2009, Richardson¹⁵⁸ wrote on “Keeping ethical investment ethical” and he again suggested the reformation of fiduciary duties in order to achieve this. He concludes that “the traditional concept of benefit to investors can be ethically redefined, and thereby financiers steered towards sustainability”.

Also in 2009, Martin¹⁵⁹ commented on the relationship between SRI and fiduciary duties. Accordingly, he echoes the view presented in the Freshfields report that fiduciary duty and SRI are not inherently incompatible. He does, however, comment that profit maximisation is being challenged on a global scale and provides specific qualifications for his conclusions.

More recently, Richardson¹⁶⁰ described the ongoing debate about the legality of responsible investment. He states that the focus of responsible investment has been on the financial materiality of this investment approach and that this was a legal justification for it in terms of fiduciary duties – again affirming the views presented in the Freshfields report. However, in this article Richardson explores the issue of the will of beneficiaries and how legal reform could give effect to “a more participatory fiduciary relationship”.¹⁶¹ In other words whether the “social form” of responsible investment would be permissible if it were what the beneficiaries want.

Although these authors have addressed similar questions to the one being investigated in this dissertation, none of them have addressed them in the context of the pension

¹⁵⁸ Richardson “Keeping Ethical Investment Ethical: Regulatory issues for Investing for Sustainability” 570.

¹⁵⁹ Martin “Socially Responsible Investing: Is Your Fiduciary Duty at Risk?” 549–560.

¹⁶⁰ Richardson “From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries” 5–19.

¹⁶¹ Idem 5.

fund industry of South Africa. Consequently, it is appropriate to answer the research question at hand with reference to the pension fund industry of South Africa.

1.5 DISSERTATION STRUCTURE

In order to address the overall research question of this dissertation, the research was conducted in three distinct qualitative phases. Phases I and II were dedicated to describing fiduciary responsibility for the key role players in the pension fund investment chain in South Africa. Phase III consisted of drawing and verifying conclusions.¹⁶² In order to draw these conclusions, a systematic data reduction was performed, particularly through comparisons between Phases I and II and, finally, using special interpretation matrices.¹⁶³

The investigation into the universe of interpretations for fiduciary responsibility for the key role players in the South African pension fund investment chain is structured around three sub-questions, derived in Section 1.2:

1. Are the key role players in the pension fund investment chain actually fiduciaries?
2. Assuming they are fiduciaries, who are the beneficiaries of their duties?
3. What are the key role players' fiduciary duties in the specific context of this study?

In Phase I these questions were put to South African legal sources,¹⁶⁴ while in Phase II the key role players themselves were asked to answer these questions in open-ended qualitative interviews.¹⁶⁵ These descriptions of fiduciary responsibility from South African legal sources, as well as the views of the key role players in the pension fund investment chain derived from Phases I and II, are presented in Chapter 3 of the

¹⁶² This is described from Section 2.4.1 onwards.

¹⁶³ These matrices are described in Section 2.4.2.

¹⁶⁴ The South African legal sources included primary legal sources (legislation and how it is interpreted by our courts i.e. case law) and the Financial Services Board (FSB) Circulars. The FSB Circulars have no legal effect but can be persuasive sources.

¹⁶⁵ See Section 2.3.2 in Chapter 2 with regard to the methodology applied in the qualitative interviews.

dissertation, together with the systematic reduction of these descriptions.¹⁶⁶ This process of data reduction is essential to prepare the data for Phase III.

In Phase III, the two key concepts of the study, fiduciary responsibility and responsible investment, are brought together to address the overall research question. Chapter 4 is dedicated to Phase III.

¹⁶⁶ See Section 3.4.

CHAPTER 2: METHODOLOGY

2.1 RESEARCH DESIGN

It has been said that qualitative descriptive studies should be chosen when “straight descriptions of phenomena are desired”.¹⁶⁷ It is for this reason that a qualitative research approach was chosen for this study. The typical purpose of any qualitative research study is to “describe and understand rather than explain human behavior”.¹⁶⁸ In this study, one of the aims was to describe and understand two key concepts, fiduciary responsibility and responsible investment. Descriptions of responsible investment are found in Section 1.3 of this dissertation. The descriptions of fiduciary responsibility were gathered from “interviews” with legal sources and human participants. The different descriptions of fiduciary responsibility and responsible investment were then used to achieve the main objective of the study, which was to answer the following core research question:

Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?

The research was conducted in three distinct phases. In Phase I the research considered South African legal sources¹⁶⁹ as they apply to the fiduciary responsibility of the key role players in the pension fund investment chain. Phase II involved an exploration of the different key role players’ understanding(s) of fiduciary responsibility, through in-depth qualitative interviews. After Phases I and II, the data from these two sets of results was compared with each other in order to identify correspondences and discrepancies. This was done as part of a data reduction process to organise the data for Phase III. Phase III entailed the use of interpretation matrices, portraying the different descriptions of the key concepts in the study in order to provide or describe the range of valid answers to the core research question.

¹⁶⁷ Sandelowski “Qualitative Description” 334.

¹⁶⁸ Babbie & Mouton *The Practice of Social Research*.

¹⁶⁹ For Phase I the South African legal sources included legislation, case law and FSB Circulars specifically applicable to the pension fund industry.

Sandelowski¹⁷⁰ claims that no method is just good or bad, but rather that any method must suit the specific research objectives. Although qualitative description was by far the most appropriate method to achieve the objectives of this study, certain limitations remain. These limitations and the measures taken to ensure trustworthiness form part of the discussion of the methodology in this chapter.

2.2 OPERATIONALISATION

Mouton describes operationalisation or operational definition as the process of “linking the key concepts in the problem statement to the actual phenomena to be studied”.¹⁷¹ The key concepts in this study, as noted before, are fiduciary responsibility and responsible investment. Proper descriptions, definitions and interpretations of the concept of fiduciary responsibility in the context of South African pension funds, and the bringing together of these with the descriptions of responsible investment were required before the overall research question could be answered.

In order to link Phases I and II of the research to fiduciary responsibility, a measuring instrument that suited the qualitative nature of this study was developed. This instrument structured the interrogation of the research phenomena around the following three questions:¹⁷²

1. Are pension fund trustees, asset managers and asset consultants (the key role players) fiduciaries in the pension fund investment chain?
2. If the answer to the first question is yes, to whom do they respectively owe their fiduciary responsibility?
3. What are their fiduciary duties?

In keeping with the qualitative tradition, which allows for adjustments of the instrument, these three core questions were extended during Phase II of the research with two additional questions for the role players. The interviewees were asked to

¹⁷⁰ Sandelowski “Whatever Happened to Qualitative Description?” 335.

¹⁷¹ Mouton *Understanding Social Research* 125.

¹⁷² See Section 1.5.

describe in their own words, a) the duty to act in the best interests of beneficiaries, and b) the duty to act in good faith. This was because these two duties had already been suggested in the background literature as the main fiduciary duties. The legal sources then also provided lists of fiduciary duties, and again these two duties were mentioned most frequently.¹⁷³ It was therefore justified to ask the key role players for their views on these duties specifically.

2.3 SELECTION DESIGN AND DATA COLLECTION

The focus of Phases I and II of the study was to construct an “extensive description”¹⁷⁴ of fiduciary responsibility for the three key role players in the South African pension fund context. Mouton¹⁷⁵ states that a contextual strategy should be used when “the primary aim of the investigators is to produce an extensive description of the phenomenon in the specific context”. Mouton continues, saying that contextual strategies are appropriate where the aim is “to investigate a single case in an in-depth manner”.¹⁷⁶ The “single case” in this dissertation refers to fiduciary responsibility in the very specific context of the South African pension fund industry.

One requirement for executing a contextual strategy is to go through a selection process and to identify the universe or population for the study. The universes for Phases I and II are described separately below.

2.3.1 PHASE I

In this phase of the research the “target population”¹⁷⁷ comprised specific South African legal sources. These sources include the legislation relevant to the South

¹⁷³ See the discussion of fiduciary responsibility in Section 1.2, as well as the descriptions of the “interviews” with the legal sources in Chapter 3 of this dissertation.

¹⁷⁴ Mouton *Understanding Social Research* 133.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ South African legal sources in the context of Phase I of the research include legislation, case law and pension fund circulars. These circulars are published in the *Government Gazette* and are designed to give the financial services industry guidance on the interpretation of legislation. Circulars PF Nos. 3 to 131 specifically deals with matters relating to pension funds.

African pension fund industry,¹⁷⁸ contextual case law and FSB Circulars. The applicable cases were identified by doing key word searches on the LexisNexis Butterworths (hereafter LexisNexis) database and the key words searched for were “fiduciary responsibility” and “fiduciary duty”. A total of 2613 results were found for “fiduciary duty” and only 430 for “fiduciary responsibility”. These results were interrogated for case law relevant to the pension fund industry. General mercantile law that could otherwise apply indirectly was not considered. This is justified because as stated earlier the aim was to describe a specific phenomenon comprehensively.¹⁷⁹ The legal sources that were interrogated are listed in Appendix A.

2.3.2 PHASE II

As already noted, the aim of Phase II of the study was to describe the universe of interpretations of the term *fiduciary responsibility* held by the key role players in the pension fund investment chain. In this phase of the research the target population comprised the key role players in the pension fund investment chain, which, as stated above, were identified as pension fund trustees, asset managers and asset consultants.

The descriptions of the administrative details concerning contact with the human participants that follow are included to demonstrate that the researcher adhered to generally accepted research ethics practices as outlined in the “Policy on Research Ethics”¹⁸⁰ of the institution where this study was conducted. Accordingly, before embarking on any interviews, all documentation used in the research process was submitted to the UNISA Ethics Review Committee and approval obtained.

As a starting point, the list of asset consultant and asset management companies contained in “The State of Responsible Investment in South Africa”¹⁸¹ report was used. The findings of this report were instrumental in prompting the research question

¹⁷⁸ See Appendix A.

¹⁷⁹ Mouton *Understanding Social Research* 133.

¹⁸⁰ UNISA “Policy on Research Ethics” 3–16.

¹⁸¹ Eccles et al *The State of Responsible Investment in South Africa* 55–57.

of this study, as explained in the introduction in Chapter 1.¹⁸² All the companies on the list were contacted and the researcher engaged with the pension department or principal officers of some of the pension funds of top companies, as well as pension funds in the public sector in South Africa.

All the participants were provided with a brief description of the researcher's affiliation and background. The researcher then explained the purpose of the study and what exactly would be expected of the participants on the day of the interview. However, she gave very little detail about the questions that would be asked. This was done in order to prevent the participants from preparing for the interviews and thus giving "textbook" responses. After the participants had consented to participate in the study, a confirmation letter (Appendix B) with the date and time of the interview and an assurance of anonymity was sent to the participants.

On the day of the interview, the following were explained to the respondents: the purpose of the study; the envisaged use of the results; how the results were to be disseminated; assurance of confidentiality and the structure and process of the interview.

Extensive records of the telephonic process were kept on a database. All the interviews were recorded and then transcribed. These transcriptions were then sent to the participants in order to give them an opportunity to make changes to their responses. After the transcripts had been finalised, a release form was sent to every participant. This form¹⁸³ was used to gain formal participant consent for the use of the information obtained from the interviews in one way or another.

¹⁸² One of the key findings in *The State of Responsible Investment in South Africa* was what is referred to as "the fiduciary responsibility paradox" (p 49). "On the one hand, the majority of principal officers for pension funds interviewed indicated that a wide range of ESG issues were at least somewhat important in 'evaluating the likely performance of investments'. On the other hand, most principal officers indicated that their general approach to RI was either to do nothing, or to put a limited proportion of assets in RI. In addition, the majority of principal officers (63%) indicated that fiduciary responsibility was at least somewhat a barrier to participating in RI."

¹⁸³ See Appendix B.

Prior to the study proper, a pilot interview was held with one asset manager, the purpose of which was to determine whether the instrument could be applied in a manner that was conducive to the more open-ended conversational style required for a qualitative study. The findings of the pilot interview suggested that using the three questions together with the added descriptions of the duty to act in the interests of beneficiaries and the duty to act in good faith, listed in Section 2.2 above, did indeed yield a long, almost casual, conversation as is required by a qualitative research approach. It was therefore decided to continue with the interviewing process without making any changes to the planned structure of the interviews.

The data collection process for both the phases of research continued until a point of saturation was reached. Data saturation is “when gathering fresh data no longer sparks new theoretical insights, nor reveals new properties of your core theoretical categories”.¹⁸⁴ The reason for this is to ensure the validity and reliability of the study.

2.4 DATA ANALYSIS AND INTERPRETATION

In analysing the data in this study I used the analytical framework described in Miles and Huberman,¹⁸⁵ consisting of “three concurrent flows of activity: data reduction, data display, and conclusion-drawing/verification”. These “flows of activity” can be illustrated graphically using a simple flow chart (Figure 2.1). This process of analysing qualitative data was used for this study because it contributes to its trustworthiness. All three activities and the way in which they were applied in this study are described separately below.

2.4.1 DATA REDUCTION

Miles and Huberman describe the term *data reduction* as “the process of selecting, focusing, simplifying, abstracting, and transforming the raw data ...”.¹⁸⁶

¹⁸⁴ Charmaz *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* 113.

¹⁸⁵ Miles and Huberman “Drawing Valid Meaning from Qualitative Data: Towards a Shared a Craft” 23.

¹⁸⁶ Ibid.

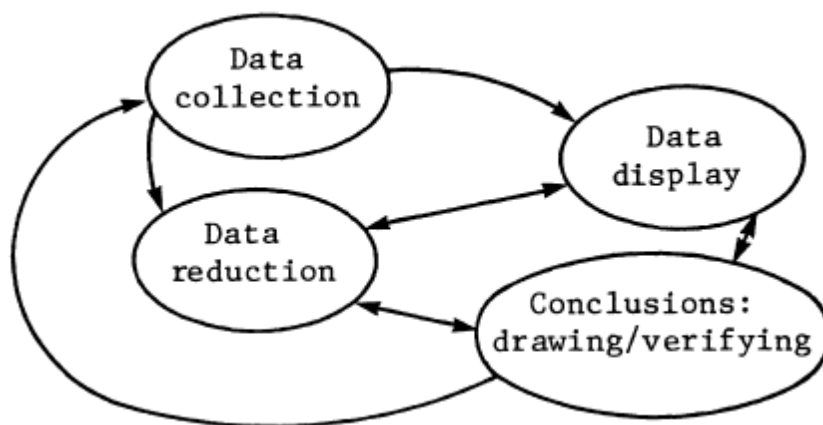


Figure 2.1: Components of data analysis: flow model (Miles & Huberman, 1984: 23).

PHASE I

In Phase I of the research the *selection* process included the choice of specific legal sources, while the *focus* was on the key term *fiduciary responsibility*. The data was *simplified a priori* in the sense that the three key questions¹⁸⁷ were used. The categorisation of the data according to these *a priori* questions, as well as by the key role players, represented an *a priori* or initial coding. Answers to the key questions were then *abstracted* from the raw data, which, in this phase, consisted of a number of the legal sources found by means of the desktop review. Because of the unconventional approach taken, which involved “interviewing” the legal sources, a limited number of very specific sources were chosen for the interviews. As for interviews with human participants, sources that would be most likely to provide answers to the questions were chosen. Firstly, legislation and case law applicable to the pension fund industry and which are primary legal sources were “interviewed”. All the cases that were “interviewed” are reported in the Pensions Law Reports, published by Butterworths. Secondly, specific Financial Services Board (FSB) Circulars¹⁸⁸ were interrogated. In order to stay close to the qualitative nature of this

¹⁸⁷ See Sections 1.5 and 2.2.

¹⁸⁸ 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

study, the legal sources were “asked” the interview questions. This meant that all the sources were read and re-read in order to see if they provided answers to the key questions. As a result of this process, the “answers” to these interview questions represent that which a lay person would find if they were to review the legal sources.¹⁸⁹ All the answers and their sources were noted and *transformed* into “field notes”,¹⁹⁰ and these field notes were then coded using a method referred to as “open-coding”.¹⁹¹

Pandit¹⁹² describes “open-coding” as

... that part of analysis that deals with the labeling and categorizing of phenomena as indicated by the data. The product of labeling and categorizing is concepts – the basic building blocks of grounded theory construction.

Practically, this process involved reading and re-reading the field notes and identifying themes or codes in them. This can be done by writing one’s own “headings” in the margins of the raw data or, alternatively, using different colours to highlight the text in the field notes to indicate repetitive themes.¹⁹³ During this phase the researcher used both methods on the raw data.

The limitations of Phase I were brought about by the unconventional approach taken in “interviewing” the sources. These limitations arose as a result of the fact that legal sources can never be equated to human participants. An example of a conventional qualitative study with human participants would be Phase II of this study, where one requirement for the interviewees in each group of role players was that they actually

legislation. Circulars PF Nos. 3 to 130 specifically deals with matters relating to pension funds. These Circulars have no legal effect but can be persuasive sources.

¹⁸⁹ As explained in Section 2.3.1 the answers represented in this chapter might differ from answers that a legal practitioner would retrieve from this exercise.

¹⁹⁰ Field notes are notes made by the researcher during the interview process with regard to recurring themes or anything else that might aid in the coding process of the data.

¹⁹¹ Pandit “The Creation of Theory: A Recent Application of the Grounded Theory Method” (<http://www.nova.edu/ssss/QR/QR2-4/pandit.html>) Date accessed: 2011-09-06.

¹⁹² Ibid.

¹⁹³ Burnard “A Method of Analysing Interview Transcripts in Qualitative Research” 462.

had to be a member of that profession in order to represent that specific group. In other words, only pension fund trustees, asset managers and asset consultants were interviewed. On the other hand, the requirements for Phase I were that the sources should actually address the specific questions. This was not, however, the case, because legal sources are not that specific. This created the impression that the legal sources are silent on a number of the issues. Consequently, the following limitations are specifically acknowledged:

- Not all possible sources were exhausted and the scope of the study was therefore limited.
- The sources could not be probed for further information or better explanations, which, in turn, gave the impression that the sources were silent on several issues. This differs from conventional qualitative studies where human participants are interviewed, open conversations are used to “interview” the participants, and researchers use specialised probing skills to get in-depth descriptions of a specific experience.
- The saturation in this phase could be questioned, because the universe of legal sources could inevitably keep on providing new information. The saturation is obviously limited to those sources that were interviewed, but this may not necessarily present a consensus view of all legal sources.

PHASE II

In Phase II of the research, the *selection* process simply involved extracting the lists of asset management and consulting companies identified from “The State of Responsible Investment”,¹⁹⁴ as well as the pension funds of some of the top companies in the country that were approached. As already described in the section above on Phase I, the *focus* in this phase was also on the key term, *fiduciary responsibility* and the data was *simplified* by using the key questions listed in Section 1.2.3. The field notes for this phase were made by the researcher in a research journal throughout the interview process. These notes comprised any repetitive themes, interesting ideas and

¹⁹⁴ Eccles et al *The State of Responsible Investment*.

additional questions that emerged from the interviews. All the interviews were recorded and then transcribed.

In order to further reduce the data, all the transcripts were coded. The process of coding in Phase II differed slightly from the open-coding process conducted in Phase I, although open-coding formed part of the various steps of coding in this phase. Burnard describes fourteen “stages” of coding. Accordingly, the coding that was done for this phase is almost identical to the first six stages of coding.¹⁹⁵ Burnard describes these steps as follows:

1. Write down the topics discussed in each interview;
2. Read transcripts and write down the general themes as notes;
3. Read transcripts again and develop as many categories of discussion as possible;
4. Group categories;
5. Make a last list of categories by looking at the groups again to see if there is still any overlap;
6. Co-coders are invited to go through the same process. Afterwards the coding of the independent co-coders is compared with that of the first researcher.¹⁹⁶

Furthermore, to ensure the dependability of the coding, verification is needed. Verification simply entails that other researchers should come to the same conclusions when presented with the same set of data.¹⁹⁷ As described in the sixth step above, all interviews were independently coded by two other independent researchers, both of whom are experts in the field of qualitative data analysis. A consensus discussion was

¹⁹⁵ Burnard “A Method of Analysing Interview Transcripts in Qualitative Research” 461.

¹⁹⁶ Idem 463.

¹⁹⁷ Miles and Huberman “Drawing Valid Meaning from Qualitative Data: Towards a Shared Craft” 27.

held to reach agreement on an interpretation and conclusions. Burnard also describes a consensus discussion as part of his stage six, but in less detail.¹⁹⁸

The consensus discussion also provided an opportunity for giving the primary researcher critical feedback regarding the interview process itself. In this regard, the following possible weaknesses were identified:

- *Role confusion.* During the interviews, the primary researcher was sometimes introduced as a researcher and other times as a lawyer.
- *Leading questions.* There were instances where the participants were led into answers due to “rescuing behaviour” by the researcher, such as when the researcher helped the participants by providing them with explanations for questions asked. These instances were actually an indication of their lack of knowledge or occasions when they struggled to express themselves.
- The use of *a structured questionnaire* as opposed to completely open-ended conversations.

These limitations to the research were mitigated in the following ways:

- *Role confusion.* The occurrences were infrequent and therefore not deemed to have any material influence on the overall results.
- *Leading questions.* The occurrences were also infrequent and again not deemed to be of substantial concern.
- *Semi-structured questionnaire.* Although open-ended conversations could have provided more substantive qualitative descriptions, the semi-structured interviews were chosen for the purpose of addressing a specific question directly. As mentioned previously, Burnard also acknowledges this method in qualitative research when he states that semi-structured interviews may be used as a “principle methodology”.¹⁹⁹ The purpose of

¹⁹⁸ Burnard “A Method of Analysing Interview Transcripts in Qualitative Research” 463.

¹⁹⁹ Idem 461.

the interviews was to find descriptions of fiduciary responsibility. These descriptions were, in turn, essential for pulling them into the interpretation matrices in order to address the overarching research question. Waiving the qualitative “ideals” of open-ended conversations and prolonged engagement therefore seemed reasonable in the context of this study.

At the end of Phases I and II, the data was reduced further in order to make it possible to insert the descriptions of fiduciary responsibility into the interpretation matrices of Phase III. As part of this data reduction process, the two sets of data (Phase I and Phase II) were compared. Not only was Phase I compared with Phase II, but the answers from the different legal sources and the different groups of practitioners were also compared internally.²⁰⁰ This was done in order to identify discrepancies between what the legal sources state and what the practitioners said. Inconsistencies within each phase were also identified during this process.

These comparisons were conducted using the basic concepts of set theory. Accordingly, the *union* would be an inclusive view of all the answers; the *intersection* would represent a consensus view; and the *set differences* would then represent the union minus the intersection.²⁰¹

2.4.2 DATA DISPLAY

Miles and Huberman²⁰² state that data display can be defined as “an organized assembly of information that permits conclusion-drawing and action-taking”. In this study, a combination of descriptive matrices²⁰³ and narrative descriptions were used to display the data. Descriptive matrices were used because they are able to contain a wide variety of data.²⁰⁴ Consequently, in this dissertation the descriptive matrices contain the different sources and their paraphrased answers to the key questions.

²⁰⁰ See Section 3.4.

²⁰¹ Burgess in *The Blackwell Guide to Philosophical Logic* 55–71.

²⁰² Miles and Huberman “Drawing Valid Meaning from Qualitative Data: Towards a Shared Craft” 27.

²⁰³ Idem 26.

²⁰⁴ Idem 27.

Together, the effect of the descriptive matrices and the narrative descriptions was to provide a rich description of the results from Phases I and II of the research.

Nine descriptive matrices were produced²⁰⁵ in Chapter 3 for Phase I of the research: one descriptive matrix for every question (three questions) asked of each role player (three role players). In Chapter 3 for Phase II of the research, fifteen descriptive matrices were produced.²⁰⁶ Once again, there is a matrix for every question (five questions) asked of each role player (three role players). A further 13 tables²⁰⁷ were produced to illustrate the comparisons within and between Phase I and Phase II of the data.

2.4.3 CONCLUSION-DRAWING AND VERIFICATION

Phase III of the research was a phase of conclusion-drawing and verification. As mentioned earlier, the purpose of Phase III was to find answers to the overall research question:

Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?

A special class of descriptive matrices, which I refer to as interpretation matrices, were used to facilitate the process of conclusion-drawing. Descriptions of the two key concepts from the research question; fiduciary responsibility and responsible investment, are pulled together to create these interpretation matrices, with responsible investment descriptions in the columns and fiduciary responsibility descriptions in the rows.²⁰⁸

²⁰⁵ See Tables 3.1–3.9.

²⁰⁶ See Tables 3.10–3.24.

²⁰⁷ See Tables 3.25–3.38.

²⁰⁸ See all the tables presented in Chapter 4 that illustrate the way these interpretation matrices allow one to resolve the range of possible answers to the research question.

2.5 CONCLUSION

A qualitative research approach was chosen for this study, the aim of which was to describe and understand the two key concepts, fiduciary responsibility and responsible investment. Hence, descriptions of the two key concepts were needed to address the overall research question:

Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?

Two specific interpretations of responsible investment were already identified at the outset of this dissertation in Chapter 1: a “business-case”²⁰⁹ form and a social form of responsible investment. The research was further divided into three distinct phases. In Phase I, South African law as it applies to the fiduciary responsibility of the key role players was considered; Phase II involved an exploration of the different key role players’ understanding(s) of fiduciary responsibility; while Phase III primarily entailed the use of interpretation matrices to describe the range of valid answers to the core research question.

Chapter 3 essentially displays the data for Phase I and II of this research. The aim of both of these phases was to provide extensive descriptions of the key term, *fiduciary responsibility*, within a very specific context – the pension fund investment chain in South Africa.

²⁰⁹ Richardson “Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability” 555.

CHAPTER 3: FIDUCIARY RESPONSIBILITY – SOUTH AFRICAN LAW AND PRACTITIONER VIEWS

3.1 INTRODUCTION

As discussed in Chapter 2, Phases I and II of the research provided extensive descriptions and interpretations of the fiduciary responsibilities of the key role players in the pension fund investment chain. Phase I of the research encompassed an “interview” process with South African legal sources,²¹⁰ whereby the research considered the law as it applies to the fiduciary responsibility of pension fund trustees, asset managers and asset consultants. Aspects of fiduciary responsibility were interrogated using the following three questions:

1. Are pension fund trustees, asset managers and asset consultants fiduciaries in the pension fund investment chain?
2. If the answer to the first question is yes, to whom do they owe their fiduciary responsibility respectively?
3. What are their fiduciary duties?

In this chapter, I present these descriptions and interpretations. This presentation is structured as follows. In Section 3.2, I describe the range of interpretations emerging from the engagement or “interviews” with the South African legal sources. These interviews were limited to a specific “population”, which comprised statutes relevant to the pension fund industry and case law (primary legal sources), and Financial Services Board (FSB) Circulars, specifically Circulars PF Nos. 3–130, which contain information about pension funds.

The two sections (3.2 and 3.3) that contain the responses obtained in Phases I and II are structured, firstly, according to the key role players and, secondly, according to the three interview questions. The answers obtained to every question in Phase I were categorised according to the source, that is, legislation, case law or the FSB Circulars. Therefore, each subsection of Section 3.2 typically starts with a description of the

²¹⁰ See Chapter 2 Section 2.3.1 where the selection design and data collection methods of this unconventional process are described in more detail.

answers obtained from legislation and case law, and then moves on to the FSB Circulars.

This is then followed in Section 3.3 by descriptions of practitioner views or interpretations. Finally, by way of consolidation and discussion in Section 3.4, the two sets of descriptions are compared and contrasted. This comparing and contrasting is done with a view to achieving data reduction. Thus, the outcome of this chapter is a range of interpretations of fiduciary responsibility, which are subsequently used in Chapter 4 to directly address the overarching research question.

3.2 PHASE I: “INTERVIEWS” WITH SOUTH AFRICAN LEGAL SOURCES

3.2.1 PENSION FUND TRUSTEES

- Question 1: Are pension fund trustees fiduciaries?

At first glance, South African legislation appears to be silent on the question of whether pension fund trustees are fiduciaries. However, it is only silent in the sense that it does not explicitly state “trustees are fiduciaries” or “trustees have fiduciary duties”.²¹¹ Nevertheless, the statutory duties ascribed to pension fund trustees include those that are generally recognised as fiduciary duties.²¹²

²¹¹ The list of generally recognised common law fiduciary duties was deduced from the literature review in Chapter 1. See Sections 1.2.2 and 1.2.3 specifically. Furthermore, there are only two places in the legislation that was reviewed where the actual word “fiduciary” appears. The first is the term *fiduciary capacity*, which appears in s 4(3)(b) of the Financial Institutions (Protection of Funds) Act and refers to shares or debentures being held in a fiduciary capacity in cases where the financial institution cannot be registered as the owner of the shares or debentures and a manager holds them as nominee. Also see s 4(3)(a). The second instance is in the revised Regulation 28 published in terms of s 36 of the Pension Funds Act. An extensive discussion on the revised Regulation 28 can be found at the end of this dissertation in the form of an epilogue. This was done because the revised Regulation 28 was only published after the completion of the actual research contained in this dissertation.

²¹² See s 7C of the Pension Funds Act as well as s 2 of the Financial Institutions Act.

The answer from case law is fairly easy to trace: from the list of 32 recent cases (from 2004 onwards) that were specifically interrogated for this phase of the research (Appendix A), the first 13 cases²¹³ unambiguously acknowledged a fiduciary duty for pension fund trustees. In *Dollman v The Irvin and Johnson Retirement Fund & Others*²¹⁴ it is stated that:

In light of the fiduciary duties of the board, it does not have an unfettered discretion in dealing with pension fund assets. Instead it is bound to exercise its control over the property in such a way that it is to the general benefit of fund members.

In *Milton v Bidcorp Group Pension Fund*²¹⁵ it is stated that:

... the trustees of a fund owe a fiduciary duty to the fund and to its members and other beneficiaries. These duties are clearly established in terms of common law, case law, and statute, the most important legislative sources being the Pension Funds Act and the Financial Institutions (Protection of Funds) Act 28 of 2001.

In *Moeng v John Abbot Garage Services & Others*²¹⁶ it is emphasised that:

In terms of fiduciary duties owed by trustees of a fund to its members, trustees are required to direct, control and oversee operations of a fund with applicable laws and rules of the fund; to take all reasonable steps to ensure that interests of members in

²¹³ *Wentworth v GG Umbrella Provident Fund and Others* [2009] 1 BPLR 87 (PFA); *Dollman v The Irvin and Johnson Retirement Fund and Others* [2008] BPLR 137 (PFA); *Milton v Bidcorp Group Pension Fund* [2008] 2 BPLR 156 (PFA); *Moeng v John Abbot Garage Services and Others* [2008] JOL 22810 (PFA); *Mthimkhulu v NBC Holdings (Pty) Ltd and Another* [2008] 2 BPLR 184 (PFA); *Mtshixa v Mine Employees Pension Fund* [2008] 2 BPLR 189 (PFA); *H v Bidcorp Provident Fund and Another* [2008] 1 BPLR (PFA); *Wilson v Bidcorp Group Pension Fund and Others* [2008] 1 BPLR 89 (PFA); *Machoga v Soweto City Council Pension Fund and Others* [2007] 3 BPLR 342 (PFA); *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorspersoneel) v Registrar of Pension Funds* [2007] 1 BPLR 57 (T); *Browne v South African Retirement Annuity Fund and Others* [2006] 4 BPLR 311 (PFA); *Central Retirement Annuity Fund v Adjudicator of Pension Fund and Others* [2006] 4 All SA 251 (C); *Du Plessis v Lifestyle Retirement Annuity Fund and Another* [2005] 5 BPLR 383 (PFA).

²¹⁴ [2008] 2 BPLR 137 (PFA) 2.

²¹⁵ [2008] JOL 22728 (PFA) 5.

²¹⁶ [2008] JOL 22810 (PFA) 1.

terms of rules of the fund and provisions of the Pension Funds Act 24 of 1956 are protected at all times; and to act with due care, diligence, in good faith and to avoid conflicts of interest.

The consensus view presented in the 32 cases was unambiguous: trustees are indeed fiduciaries.²¹⁷ In none of the population explored was dissent detected.

Circular PF 130²¹⁸ 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.

Furthermore, Circular PF 98²¹⁹ states that “the board acts in a fiduciary capacity ...”. Pension fund trustees make up the “boards” referred to in these circulars as well as in the Pension Funds Act. The FSB consequently regards the trustees as fiduciaries.

Thus, the law, as suggested in legislation through the codification of duties that are generally recognised as fiduciary duties, confirmed in case law, and as discussed in FSB Circulars, is strongly suggestive of the fact that pension fund trustees are fiduciaries. The results for pension fund trustees are now summarised in Table 3.1 below.

²¹⁷ The following examples also illustrate the unambiguity of case law on this subject: See *Dollman v The Irvin and Johnson Retirement Fund and Others* [2008] 2 BPLR 137 (PFA): “In light of the fiduciary duties of the board...”; *Milton v Bidcorp Group Pension Fund* [2008] 2 BPLR 156 (PFA): “The Respondent concedes that the trustees owe a fiduciary duty to the fund and to its members and other beneficiaries.” *Central Retirement Annuity Fund v Adjudicator of Pension Funds and Others* [2005] 8 BPLR 655 (C): “... the Court highlighted the fiduciary duties of the fund’s board of management to members”; *Skinner v De Beers Pension Fund and Another* [2005] 5 BPLR 453 (PFA): “The trustees of the De Beers fund owed a fiduciary duty to the Complainant to act in good faith.”

²¹⁸ <ftp://ftp.fsb.co.za/public/pension/circular/PF1302.pdf> Date accessed: 2010-10-29.

²¹⁹ Ibid.

Table 3.1: Descriptive matrix displaying the answers to Question 1, “Are pension fund trustees fiduciaries?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act 24 of 1956 (PFA)	Explicitly silent although the duties specified in s 7C resemble what are generally recognised as fiduciary duties
General Pensions Act 29 of 1979	Silent
Government Employees Pension Law, 1996	Silent
Financial Services Board Act 97 of 1990	Silent
Financial Institutions (Protection of Funds) Act 28 of 2001	Explicitly silent although some of the duties specified in s 2 resemble what are generally recognised as fiduciary duties
Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act)	Explicitly silent although some of the duties specified in s 16 resemble what are generally recognised as fiduciary duties
Case law	Yes
Circular PF 98	Silent
Circular PF 130	Yes

- Question 2: Who are the beneficiaries of trustees’ fiduciary responsibility?

The legal sources are more ambiguous with regard to the question of who are the beneficiaries of the fiduciary responsibility of pension fund trustees. However, because the legislation presents duties that are generally recognised as fiduciary duties, it was interpreted as being evidence for the existence of a fiduciary relationship. The Pension Funds Act does not explicitly mention the beneficiaries of the duties outlined for the boards of trustees; it merely states in section 7C(2)(a) that “the interests of members in terms of the rules of the fund and the provisions of the Act” must be protected at all times. On the other hand, in section 2 of the Financial Institutions Act it is implied that the duties ascribed to “a director, member, partner, official, employee or agent of a financial institution” are owed to the financial institution itself and indirectly to the owners of the assets, meaning the members of the fund. In section 2(a) and (b) of the Financial Institutions Act it is stated that the persons/institutions responsible must act with the utmost good faith with regard to “such funds” and the “trust property”. This would mean that the persons responsible have a fiduciary duty with regard to the assets they manage, which would mean the

fiduciary duty is owed to the owner of the assets, namely, the pension fund. Also see section 2(c):

... may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned.

The “principal concerned” in this case is a reference to the person who entrusted the financial institution with funds to keep in trust on his/her behalf. This Act applies to a variety of financial institutions in addition to pension funds. The members of a pension fund would not, however, be regarded as “principals”.

Case law offered a range of opinions on the question of who the beneficiaries are in terms of the fiduciary responsibility placed on pension fund trustees. The list of 32 recent cases²²⁰ provided four possible answers to this question. In 14 cases²²¹ it was said that the trustees owe a fiduciary duty to the members of the fund. In *Burke v Mitchell Cotts Pension Fund and Another*,²²² the term *the members as a whole* is used, as opposed to only members. However, it is not clear from the rest of this case what exactly is meant by this term. In four cases²²³ it was concluded that the trustees owe a

²²⁰ See Appendix A.

²²¹ *Wentworth v GG Umbrella Provident Fund and Others* [2009] 1 BPLR 87 (PFA); *Dollman v The Irvin and Johnson Retirement Fund and Others* [2008] BPLR 137 (PFA); *Moeng v John Abbot Garage Services and Others* [2008] 2 BPLR 169 (PFA); *Mtshixa v Mine Employees Pension Fund; Machoga v Soweto City Council Pension Fund and Others* [2008] 2 BPLR 189 (PFA); *Browne v South African Retirement Annuity Fund and Others* [2006] 4 BPLR 311 (PFA); *Central Retirement Annuity Fund v Adjudicator of Pension Fund and Others* [2006] 4 All SA 251 (C); *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (PFA); *Seipobi v Momentum Retirement Annuity Fund and Another* [2005] 6 BPLR 534 (PFA); *Du Plessis v Lifestyle Retirement Annuity Fund and Another* [2005] 5 BPLR 383 (PFA); *Burke v Mitchell Cotts Pension Fund and Another* [2005] 4 BPLR 292 (PFA); *Pankhurst and Another v Solomon Nicolson Rein and Verster Provident Fund and Another* [2005] 1 BPLR 56 (PFA); *Van der Linde v Telkom Retirement Fund* [2004] 8 BPLR 6257 (PFA).

²²² [2005] 4 BPLR 292 (PFA).

²²³ *Milton v Bidcorp Group Pension Fund* [2008] 2 BPLR 156 (PFA); *Chairman of the Board of the Sanlam Pensioenfondse (Kantoorpersoneel) v Registrar of Pension Funds* [2007] 1 BPLR 57 (T);

fiduciary responsibility to the fund and to its members and other beneficiaries. In *Hossack v Chep South Africa (Pty) Ltd and Another*²²⁴ it was said that the fiduciary duty is owed to the fund, but the remaining cases²²⁵ did not provide an answer to this question.

FSB Circular PF 98²²⁶ states that “the board should not only have the interest of active members at heart but also those of pensioners, deferred pensioners and beneficiaries”. Circular PF 130²²⁷ states that the board stands “in a position of trust or fiduciary relationship to funds ...” and “the board of management therefore holds fund assets in trust for those persons who will ultimately benefit from them” and later on it is mentioned that “the board shall at all times act with the utmost good faith towards the fund and in the best interest of all the members”. Circular PF 130 therefore implies that the trustees owe their fiduciary duties to the fund itself, but also to all the members and the members’ beneficiaries.

Odayan v Orion Money Purchase Pension Fund and Another [2005] 6 BPLR 523 (PFA); *Zwane v Wiseman and Others* [2005] 1 BPLR 92 (PFA).

²²⁴ [2005] 11 BPLR 944 (PFA).

²²⁵ *Mthimkhulu v NBC Holdings (Pty) Ltd and Another* [2008] 2 BPLR 184 (PFA); *H v Bidcorp Provident Fund and Another* [2008] 1 BPLR 19 (PFA); *Wilson v Bidcorp Group Pension Fund and Others* 1 BPLR 89 (PFA); *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others* [2006] 3 BPLR 210 (N); *Central Retirement Annuity Fund v Adjudicator of Pension Fund and Others* [2006] 4 All SA 251 (C); *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 435 (PFA); *Holmes v Morris Crane Aid Pension Fund* [2005] 4 BPLR 309 (PFA); *De Beer v Central Retirement Annuity Fund and Another* [2005] 3 BPLR 257 (PFA); *Mine Employees Pension Fund v Murphy NO and Others* [2004] 11 BPLR 6204 (W); *Kamaldien v Telkom Retirement fund and Another* [2004] 9 BPLR 6072 (PFA); *Wood v ABSA Group Pension Fund* [2004] 8 BPLR 6003 (PFA).

²²⁶ <ftp://ftp.fsb.co.za/public/pension/circular/PF98.htm> Date accessed: 2011-02-24.

²²⁷ Ibid.

Table 3.2: Descriptive matrix displaying the answers to Question 2, “To whom do pension fund trustees owe their fiduciary responsibility?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act	Members and other beneficiaries
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions (Protection of Funds) Act	Explicitly silent although it is stated that they owe a duty to act with the utmost good faith with regard to funds and trust property and it is implied that they should not have conflicting interests with the fund itself
Financial Advisory and Intermediary Services Act	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
Case law	Members; ²²⁸ the fund, members and beneficiaries; ²²⁹ the fund; ²³⁰ members as a whole ²³¹
Circular PF 98	Explicitly silent although it is stated that the board should not only have the interest of active members at heart, but also pensioners, deferred pensioners and beneficiaries’
Circular PF 130	The fund itself; all members; “persons who will ultimately benefit”

In summary,²³² the law provides a range of interpretations with regard to the question of who the beneficiaries of the fiduciary duties of pension fund trustees are. Suggestions by the legal sources as to whom fiduciary duties are owed include the following:

- The members of the fund/members as a whole
- The members and other beneficiaries

²²⁸ *Moeng v John Abbot Garage Services and Others* [2008] 2 BPLR 169 (PFA).

²²⁹ *Milton v Bidcorp Group Pension Fund* [2008] 2 BPLR 156 (PFA); *Chairman of the Board of the Sanlam Pensioenfondse (Kantoorpersoneel) v Registrar of Pension Funds* [2007] 1 BPLR 57 (T); *Odayan v Orion Money Purchase Pension Fund and Another* [2005] 6 BPLR 523 (PFA); *Zwane v Wiseman and Others* [2005] 1 BPLR 92 (PFA).

²³⁰ *Hossack v Chep South Africa (Pty) Ltd and Another* [2005] 11 BPLR 944 (PFA).

²³¹ *Burke v Mitchell Cotts Pension Fund and Another* [2005] 4 BPLR 292 (PFA).

²³² See Table 3.2.

- The fund itself

These views differ from legislation to case law and FSB Circulars. There were also discrepancies within case law and within the Circulars.

- Question 3: What are trustees' fiduciary duties?

The third question asked about what South African law states with regard to the specific fiduciary duties of pension fund trustees. As already noted, the words “fiduciary duties for pension fund trustees” do not appear explicitly in legislation. In six²³³ of the 32 recent cases listed²³⁴ the sentiment was expressed that section 7C of the Pension Funds Act codifies the common-law fiduciary duties owed by the trustees of a fund to its members.²³⁵ In *Milton v Bidcorp Group Pension Fund*,²³⁶ it is simply stated that the most important legislative sources for establishing the fiduciary duties owed to the members by the trustees are the Pension Funds Act and the Financial Institutions Act.

Circular PF 98 clearly states that this circular “should not be regarded as either an exhaustive or a definitive account of the fiduciary duties of boards of management”. It does, however, refer to section 7C of the Pension Funds Act and states that boards are bound by the rules of the fund. Furthermore, that boards

²³³ *Dollman v The Irvin and Johnson Retirement Fund and Others* [2008] BPLR 137 (PFA); *Moeng v John Abbot Garage Services and Others* [2008] 2 BPLR 169 (PFA) ; *Milton v Bidcorp Group Pension Fund and Others* [2008] 1 BPLR 89 (PFA); *Machoga v Soweto City Council Pension Fund and Others* [2007] 3 BPLR 342 (PFA); *Browne v South African Retirement Annuity Fund and Others* [2006] 4 BPLR 311 (PFA); *Seipobi v Momentum Retirement Annuity Fund and Another* [2005] 6 BPLR 534 (PFA).

²³⁴ See Appendix A.

²³⁵ The fact that it is said that s 7C of the Pension Funds Act is a statutory formulation of the fiduciary duties does not necessarily mean that the entire section is devoted to a codification of the fiduciary duties without any additional duties or aspects being contained in the section. A codification can only relate to something that was an uncoded common-law principle.

²³⁶ [2008] 2 BPLR 156 (PFA).

... may vary them only in accordance with the amendment provisions set out in the Act [Pension Funds Act] and rules. In making amendments, the board must have regard to the other fiduciary duties governing its conduct.

These so called “other fiduciary duties” are not described in any detail.

Circular PF 130 states that the trustees are in a “fiduciary relationship to funds and therefore must act with integrity”. It then continues, saying that the board “should deal with all matters relating to the fund and its members in accordance with their fiduciary duties, fairly and with respect”, but it also does not describe these fiduciary duties.

South African legal sources thus provide us with two possible answers to the question of what the particular fiduciary duties are (Table 3.3). Accordingly, the fiduciary duties of trustees are the following:

1. Either the statutory formulation of the common law fiduciary duties mentioned in section 7C of the Pension Funds Act or the statutory formulation of the common law fiduciary duties mentioned in section 2 of the Financial Institutions Act or both;
2. “Other fiduciary duties” as mentioned in the Circulars, which presumably also refer to the generally recognised common law fiduciary duties.²³⁷

²³⁷ A duty to act in the best interests of the beneficiaries; a duty to act in good faith; a duty of impartiality; a duty to avoid conflicting interests; a duty not to make any secret profits; a duty to disclose; a duty to act for a proper purpose; a duty to not exceed powers; a duty to maintain an unfettered discretion.

Table 3.3: Descriptive matrix displaying the answers to Question 3, “What are the fiduciary duties of pension fund trustees?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act	Statutory duties listed in s 7C that resemble what are generally recognised to be fiduciary duties: “best interests” “good faith” “conflicts of interests” “impartiality” “disclose”
General Pensions Act	Silent
Government Employees Pension Law	Statutory duties listed in Schedule 1, rule 4.1.19 that resemble what are generally recognised to be fiduciary duties: “best interests” “good faith” “conflicts of interest” “impartiality”
Financial Services Board Act	Silent
Financial Institutions (Protection of Funds) Act	Statutory duties listed in s 2 that resemble what are generally recognised to be fiduciary duties: “good faith” “no secret profit” “conflicts of interest”
Case law	Refers to s 7C of the Pension Funds Act and common law fiduciary duties
Circular PF 98	“PF 98 should not be regarded as an exhaustive or definitive account of the fiduciary duties of boards of management.”

3.2.2 ASSET MANAGERS

- Question 1: Are asset managers fiduciaries?

As already mentioned in the section above on trustees, at first glance the legislation appears to be silent on this question. A number of legal duties are, however, conferred on asset managers by legislation. Accordingly, when these statutes are reviewed carefully it becomes evident that the legislation can be seen as a statutory formulation of what has been identified in Section 1.2.2 in Chapter 1, as generally recognised common law fiduciary duties.²³⁸ Most of these generally recognised common law

²³⁸ In order to answer the question of whether asset managers are fiduciaries, a slight deviation from the normal inductive reasoning in qualitative studies was used. Instead of providing in-depth descriptions from a number of sources and then reaching conclusions; the argument is built on the suggestion that there is a fiduciary relationship between asset managers and the pension fund as presented in Chapter 1. The norm in qualitative studies is to do “literature control”, meaning that

fiduciary duties are represented in the lists of statutory duties attached to asset managers in section 2 of the Financial Institutions Act²³⁹ and section 16(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (hereafter referred to as the FAIS Act).²⁴⁰ The following generally recognised common law fiduciary duties are mentioned in these sections: a duty to act in good faith (s 2(a) and (b) of the Financial Institutions Act); a duty to avoid conflicts of interests (s 2(c) of the Financial Institutions Act and s 16(a) of FAIS Act); a duty to not make any secret profit (s 2(c) of the Financial Institutions Act) and a duty to act in the interests of clients (s 16(a) of FAIS Act).

Case law is silent on the question of whether asset managers are fiduciaries.²⁴¹ One might be inclined to infer from this silence that asset managers are not viewed as

the literature is used to “validate” or support what is found in the interviews. This deviation is also used for the same questions with regard to asset consultants.

²³⁹ Section 2 of the Financial Institutions Act reads: “A director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property – (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence; (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned.” In terms of this Act asset managers would be agents of a pension fund and the fund is, in turn, a financial institution.

²⁴⁰ Section 16(1)(a) of the FAIS Act, which regulates role players such as asset managers and asset consultants, however, states that “financial services providers, and their representatives, are obliged by the provisions of such code – (a) to act honestly, fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry”.

²⁴¹ It is of the utmost importance to note at this point that asset managers and asset consultants are not administrators. In *Dollman v The Irvin and Johnson Retirement Fund and Others* [2008] BPLR 137 (PFA) as well as *Milton v Bidcorp Group Pension Fund and Others* [2008] 1 BPLR 89 (PFA) it was implied that administrators have a fiduciary duty to not make any secret profit by bulking the fund’s bank accounts. It should be pointed out again that administrators fulfil a purely clerical role.

fiduciaries; however, there are logical problems with making such an inference. The alternative is simply that, to date, no action has been brought against an asset manager for breach of their fiduciary duties in the South African pension fund context specifically.²⁴²

Circular PF 130²⁴³ states that:

... as fiduciaries, the board, 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.

Since it is reasonable to assume that asset managers 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 managers are indeed considered to be fiduciaries.

In summary then (Table 3.4), asset managers have statutory duties that reflect the generally recognised common law fiduciary duties. This might be an indication that they are fiduciaries. Case law is silent on the question of whether asset managers are indeed fiduciaries. PF Circular 130 points to the notion that they are fiduciaries. Therefore the possible answers to the question of whether asset managers are fiduciaries obtained from the legislation, case law and the Circulars respectively are: a) yes; and b) ambivalent.

They do however administer all incoming and outgoing payments and therefore operate the fund’s bank accounts. They are however not responsible for the actual investment of assets. The fact that there is confusion around the term administrator should nonetheless be acknowledged. This confusion is worsened by the fact that there are companies that provide administering, asset managing as well as asset consulting services. Furthermore, the legislation only refers to administrators. Asset managers and asset consultants are not mentioned in the Pension Funds Act.

²⁴² As discussed in Section 2.4, unlike with the practitioners the sources could not be prompted or encouraged to provide answers to this question and this is acknowledged as a limitation.

²⁴³ <ftp://ftp.fsb.co.za/public/pension/circular/PF1302.pdf> Date accessed: 2011-02-24.

Table 3.4: Descriptive matrix displaying the answers to Question 1, “Are asset managers fiduciaries?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act	Silent
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions (Protection of Funds) Act	Explicitly silent although some of the duties specified in s 2 (in relation to agents) resemble what are generally recognised as common law fiduciary duties “good faith” “no secret profit” “conflicts of interest”
Financial Advisory and Intermediary Services (FAIS) Act	Explicitly silent although some of the duties (in relation to representatives) specified in s 16 resemble what are generally recognised to be common law fiduciary duties “interests of clients” “conflicts of interests” “good faith” “impartiality”
Case law	Silent
Circular PF 98	Silent
Circular PF 130	Yes

- Question 2: Who are the beneficiaries of asset managers’ fiduciary responsibility?

The South African legal sources are silent on the question of who are the beneficiaries of asset managers’ fiduciary responsibility, in the sense that no direct, literal answer could be found in any of the sources. Some of the generally recognised common law fiduciary duties are, however, described in section 2(a), (b) and (c) of the Financial Institutions Act and section 16(1)(a) of the FAIS Act. These statutes are relevant because, as explained in Section 1.2.2, asset managers technically act as agents of the pension fund. Section 2(a), (b) and (c) of the Financial Institutions Act mentions the generally recognised common law fiduciary duties of “good faith” and “no conflicts of interest”, but is silent in the sense that it does not state that the duties mentioned are owed to a specific party or institution. Instead, it attaches the duties to “such funds”

and “the trust property” in section 2(a) and (b).²⁴⁴ This means that the fiduciary duty is owed to the owner of the assets which is the pension fund. In section 2(c) it is implied that the fiduciary duty is owed to the fund itself.²⁴⁵

Section 16(1)(a) the FAIS Act,²⁴⁶ which regulates role players such as asset managers and asset consultants, mentions a duty to act honestly that could refer to the duty of good faith; a duty to act fairly that could refer to a duty of impartiality; a duty of due care, skill and diligence; and a duty to act in the interests of clients and the integrity of the industry.

²⁴⁴ Trust property is defined in the Financial Institutions (Protection of Funds) Act as “any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal”.

²⁴⁵ S 2 of the Financial Institutions Act reads: “A director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property – (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence; (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned.” In terms of this Act, asset managers would be agents of a pension fund and the fund is, in turn, a financial institution.

²⁴⁶ S 16(1)(a) of the FAIS Act reads: “financial services providers, and their representatives, are obliged by the provisions of such code – to act honestly, fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry.”

“Such code” refers to the publication of codes of conduct that is prescribed to financial intermediaries and advisors in terms of s 15 of the FAIS Act. These codes are published in the *Government Gazette* from time to time and there are different codes for different categories of service providers.

Table 3.5: Descriptive matrix displaying the answers to Question 2, “To whom do asset managers owe their fiduciary responsibility?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act	Silent
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions (Protection of Funds) Act	Silent, even though some of the generally recognised common law fiduciary duties are described in s 2(a), (b) and (c) in relation to agents and it is stated that “with regard to such funds, observe the utmost good faith ...” and “with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith ...”.
FAIS Act	Explicitly silent although some of the generally recognised common law fiduciary duties are described in s 16(1)(a) in relation to representatives of financial services providers and it is stated that they owe a duty to “act in the interests of clients and the integrity of the industry”.
Circular PF 130	Silent
Case law	Silent

Again, referring back to the discussion in Section 1.2.2 of the generally recognised common law fiduciary duties, it is possible to conclude that the Act is saying that financial advisors and intermediaries owe all their duties (including presumably any fiduciary duties they might have) to their clients and to the integrity of the industry. Assuming that the contracting client of asset managers, in the context of the pension fund industry, is the fund itself, this suggests that whatever responsibility exists (fiduciary or otherwise) is toward the fund. With regard to “the integrity of the industry” it is not obvious how the integrity of the industry could be determined. Interpretations of this in case law would be helpful but as mentioned previously, such could not be found in the legal sources that were interrogated. Therefore, the possible answer to this question found in the sources is that asset managers owe their fiduciary duties to the pension fund itself (Table 3.5).

- Question 3: What are asset managers’ fiduciary duties?

The legal sources do not provide a clear-cut answer to the third question for asset managers. As already noted,²⁴⁷ nowhere in the South African legal sources reviewed is a list of fiduciary duties for any of the role players explicitly presented. Some of the generally recognised common law fiduciary duties are, however, found in the lists of statutory duties attached to asset managers in section 2 of the Financial Institutions Act and section 16(1) of the FAIS Act. This could be an indication that these are statutory formulations of the fiduciary duties of asset managers. It is also stated in section 16(1)(e) of the FAIS Act that

... authorized financial services providers, and their representatives, are obliged by the provisions of such code to comply with all applicable statutory or common law requirements applicable to the conduct of business.²⁴⁸

One can assume that this “conduct of business” refers to the General Code of Conduct that is published in terms of section 15 of the FAIS Act, but the code itself merely states the following:

A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.²⁴⁹

Again, it is necessary to deviate slightly from the standard qualitative paradigm in order to interpret the legislation. As it is stated that common law requirements would apply, the common law fiduciary duties would be applicable if one could prove the existence of a fiduciary relationship between asset managers and beneficiaries in the pension fund investment chain. Accordingly, it has already been suggested in Section 1.2.1 that asset managers are agents and stand in a fiduciary relationship toward the trustees and the beneficiaries of the fund.

²⁴⁷ See section above on “What are trustees’ fiduciary duties?”

²⁴⁸ Again, the “integrity of the financial services industry” is not defined, nor is it explained how it may be determined.

²⁴⁹ <http://www.fsb.co.za/> Date accessed: 2012-02-12.

Table 3.6: Descriptive matrix displaying the answers to Question 3, “What are the fiduciary duties of asset managers?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act	Silent
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions (Protection of Funds) Act	Statutory duties listed in s 2 that resemble what are generally recognised to be common law fiduciary duties: “good faith” “no secret profit” “conflicts of interest”
FAIS Act	Statutory duties listed in s 16(1) that resemble what are generally recognised to be common law fiduciary duties: “interests of clients” “conflicts of interests” The other generally recognised common law fiduciary duties that 16(1) might be referring to are: “no secret profit” “a duty to disclose” “a duty of impartiality” “a duty to act in good faith”
Circular PF 98	Silent
Circular PF 130	Silent
Case law	Silent

In summary, it is proposed that the fiduciary duties of asset managers are at least those generally recognised common law fiduciary duties listed in section 2 of the Financial Institutions Act and section 16(1) of the FAIS Act, and most likely also all the other generally recognised common law fiduciary duties.²⁵⁰

3.2.3 ASSET CONSULTANTS

The answers to the three questions asked of asset consultants closely match those presented above for asset managers.

²⁵⁰ A duty to act in the best interests of the beneficiaries; a duty to act in good faith; a duty of impartiality; a duty to avoid conflicting interests; a duty not to make any secret profits; a duty to disclose; a duty to act for a proper purpose; a duty to not exceed powers; a duty to maintain an unfettered discretion.

- Question 1: Are asset consultants fiduciaries?

Nowhere in the legislation reviewed does it explicitly state that asset consultants are fiduciaries in the pension fund context. Case law is also silent on the question of whether asset consultants are fiduciaries. However, as with asset managers, this does not necessarily mean that they are not fiduciaries. At best it is possible to conclude that this has, to date, not been tested in court.

It is, however, possible to argue that asset consultants, like asset managers, fall into the category of “other persons duly appointed by the board to act on its behalf”.²⁵¹ Asset consultants are technically only contracted to advise the trustees, but frequently the trustees who represent the employees lack confidence in making such decisions and therefore rely to a large extent on the advice of their asset consultants when making investment decisions.²⁵² Consequently, asset consultants directly influence decisions made by pension fund trustees. This is a reasonably strong indication that asset consultants are fiduciaries in the pension fund investment chain (especially considering the notion of the existence of a trust relationship, as discussed in Section 1.2.1).

In summary then (Table 3.7), the answers obtained from the legislation, case law and the Circulars respectively for asset consultants are the same as for asset managers in terms of whether this group is a fiduciary or not and include: a) yes; and b) ambivalent.

²⁵¹ Circular PF 130 p 1 par 1 <ftp://ftp.fsb.co.za/public/pension/circular/PF1302.pdf> Date accessed: 2011-02-24.

²⁵² The following quote was taken from an interview with a trustee. It is included here to support the notion that trustees are not necessarily highly educated individuals and are influenced by the asset consultants. This particular trustee, who preferred to stay anonymous, said: “It is because a lot of these trustees, come from very poor backgrounds, very very poor, especially the Union funds. Very, very poor backgrounds. Say, workers in factories, and they come here to Johannesburg, and they are winned and dined, and they’re given woman and they’re being – without them knowing – corrupted.” Later in the interview the trustee continued, saying: “The consultants to the funds are almost like gatekeepers. They are the ones that – who try to influence the trustees to accept their decisions, to that consultant’s benefit.”

Table 3.7: Descriptive matrix displaying the answers to Question 1, “Are asset consultants fiduciaries?” obtained from South African legal sources

Publication	Interpretation
Pension Funds Act	Silent
The General Pensions Act	Silent
Government Employees Pension Law	Silent
The Financial Services Board Act	Silent
The Financial Institutions Act	Not applicable
FAIS Act	Explicitly silent although some of the duties specified in s 16 resemble what are generally recognised as common law fiduciary duties: “interests of clients” “conflicts of interests”
Case law	Silent
Circular PF 98	Silent
Circular PF 130	Yes

- Question 2: Who are the beneficiaries of asset consultants’ fiduciary responsibility?

The South African legal sources are even more silent on this question of the beneficiaries of asset consultants’ fiduciary responsibility than on the question of whether asset consultants are fiduciaries. Nonetheless, the possible answers to this question are generally exactly the same as it were for asset managers. In so far as it seems likely that asset consultants are in fact fiduciaries, as argued in Section 1.2.1, it follows from the South African legal sources that such responsibility would be owed to the fund (Table 3.8 below).

Table 3.8: Descriptive matrix displaying the answers to Question 2, “To whom do asset consultants owe their fiduciary responsibility?” obtained from South African legal sources

Publication	Interpretation
PFA	Silent
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions Act	Silent
FAIS Act	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”.
Case law	Silent
Circular PF 98	Silent
Circular PF 130	Silent

- Question 3: What are asset consultants’ fiduciary duties?

Again, answers to the third question are similar for asset consultants and asset managers. One possible answer is based on the suggestion contained in the Circular PF 130 that asset consultants are indeed fiduciaries. A logical inference is, therefore, that asset consultants’ fiduciary duties are the generally recognised common-law fiduciary duties, because of the fact that some of these are also presented in the statutory duties attached to asset consultants (Table 3.9 below).²⁵³ The possible answers to the question of what asset consultants fiduciary duties are, obtained from the legislation, case law and the Circulars respectively, include a) the full list of generally recognised common law fiduciary duties; or b) the generally recognised fiduciary duties captured in section 16(1) of the FAIS Act; or c) ambivalence.

²⁵³ S 16(1) of FAIS Act.

Table 3.9: Descriptive matrix displaying the answers to Question 3, “What are the fiduciary duties of asset consultants?” from South African legal sources

Publication	Interpretation
PFA	Silent
General Pensions Act	Silent
Government Employees Pension Law	Silent
Financial Services Board Act	Silent
Financial Institutions Act	Not applicable
FAIS Act	Statutory duties listed in s 16(1) that resemble what are generally recognised to be common law fiduciary duties: “interests of clients” “conflicts of interests” The other generally recognised common law fiduciary duties that 16(1) might be referring to are: “no secret profit” “a duty to disclose” “a duty of impartiality” “a duty to act in good faith”
Circular PF 98	Silent
Circular PF 130	Silent
Case law	Silent

3.3 PHASE II: INTERVIEWS WITH THE KEY ROLE PLAYERS IN THE PENSION FUND INVESTMENT CHAIN

3.3.1 PENSION FUND TRUSTEES

- Question 1: Are pension fund trustees fiduciaries?

In terms of the first question, the majority of pension fund trustees confirmed that they saw themselves as fiduciaries. Only one trustee was ambivalent in answering this question and stated:

Look it depends on what you want to say, if I think they should be or if I see them as is ... I think there are a lot of them that are. But unfortunately a lot of them are not, either.

This answer suggests that the interviewee thought that some trustees act as fiduciaries and others do not, but perhaps failed to answer the question of whether the participant

indeed sees trustees as fiduciaries in the current legal context. Nonetheless, interpreting the answer to this question literally implies that the range of interpretations expressed by pension fund trustees themselves in terms of the first question included (Table 3.10): a) yes; b) possibly

Table 3.10: Descriptive matrix displaying the answers to Question 1, “Do you see yourself as a fiduciary in the pension fund investment chain?” – opinions expressed by actual pension fund trustees

Respondent	Opinion	Respondent	Opinion
1	Yes	6	Yes
2	Yes	7	Yes
3	Yes	8	Yes
4	Yes	9	Yes
5	Ambivalent	10	Yes

- Question 2: To whom do pension fund trustees owe their fiduciary responsibility?

All trustees interviewed, including the outlier in terms of Question 1, were of the opinion that their fiduciary responsibility is owed to the members of the fund. Four of the trustees added other parties to the list of beneficiaries, of which two trustees said that their fiduciary responsibility is owed to the employer as well. One trustee mentioned the pension fund itself and another mentioned “other pensioners”. It is not clear what exactly this latter trustee meant by “other pensioners” and it is not fair to assume that the trustee was referring to a broader social responsibility. This might, however, prompt an interesting question to put to trustees in future research: Do pension fund trustees believe that they have a broader social responsibility to other pensioners beyond the ones in their own fund?

These answers suggest that the range of interpretations on the second question is (Table 3.11) a) the members of the fund; b) the members and the employer; c) the members and the pension fund; d) the members and other pensioners.

Table 3.11: Descriptive matrix displaying the answers to Question 2, “To whom do you owe your fiduciary responsibility?” – opinions expressed by actual pension fund trustees

Respondent	Opinion
1	Members as a collective entity
2	Members and the employer
3	The members of the fund
4	The members of the fund
5	The members of the fund, the fund and dependents
6	The members of the fund
7	The members and “other pensioners”
8	The members of the fund
9	Members and the employer
10	The members of the fund

- Question 3: Describe trustees’ fiduciary duties?

It is evident from the trustees’ answers to the third question that some were unfamiliar with the generally recognised common law fiduciary duties (Table 3.12).²⁵⁴ Three out of ten did not mention any of these duties in their answers, although the other seven mentioned at least one of the generally recognised common law duties; however, none of them mentioned more than two of the nine.

To act in the best interests of members was the generally recognised common law duty that was mentioned most (three out of the ten trustees). This duty was also the one mentioned by the most authors, as mentioned in the discussion on fiduciary responsibility in Section 1.2.2. The duty to act with good faith was mentioned twice and the duty to act with care and diligence was mentioned once. The fact that the duty to act with care was also mentioned by trustees when asked to describe fiduciary duties supports the notion that there is confusion around this duty and whether it is a fiduciary duty or not.²⁵⁵

²⁵⁴ Also see Section 1.2.

²⁵⁵ See also Section 1.2.2.

Table 3.12: Descriptive matrix displaying the answers to Question 3, “What are your fiduciary duties?” – opinions expressed by actual pension fund trustees

Respondent	Opinion
1	<i>Generally recognised common law fiduciary duties noted:</i> A duty to act with good faith A duty to disclose (accountability) <i>Other duties:</i> Measure against correct benchmarks
2	<i>Generally recognised common law fiduciary duties noted:</i> None <i>Other duties:</i> Submission of regulatory requirements Review of service providers Ensure that benefits are paid
3	<i>Generally recognised common law fiduciary duties noted:</i> None <i>Other duties:</i> Investing in a responsible manner
4	<i>Generally recognised common law fiduciary duties noted:</i> None <i>Other duties:</i> Making sure the investment returns are adequate to cover liabilities of fund Benefits are paid
5	<i>Generally recognised common law fiduciary duties noted:</i> A duty to disclose (benefit statements communicated) <i>Other duties:</i> A number of administrative tasks mentioned Mitigate risks
6	<i>Generally recognised common law fiduciary duties noted:</i> A duty to act in the interests of members <i>Other duties:</i> A duty of care and diligence
7	<i>Generally recognised common law fiduciary duties noted:</i> A duty to not exceed one’s powers (stay within the investment mandate and remaining within the law)
8	<i>Generally recognised common law duties noted:</i> A duty to act in the interests of members <i>Other duties:</i> None
9	<i>Generally recognised common law fiduciary duties noted:</i> A duty to act with good faith (no hidden agendas) <i>Other duties:</i> None
10	<i>Generally recognised common law fiduciary duties noted:</i> A duty to act in the interests of members <i>Other duties:</i> Balance risk and return

- Question 4: Describe the duty to act in good faith in your own words.

When the trustees were asked to describe the duty of good faith it was evident that most of them could not separate this duty from the duty to act in the best interests of

members. Five out of the ten trustees used words like “to act in the interests of” or “for the benefit of members” to describe this duty. Two other ideas that were highlighted in their answers (Table 3.13) were that there should not be any conflicting interests and that the members should be supplied with information on a regular basis.

Table 3.13: Descriptive matrix displaying the answers to Question 4, “Describe the duty to act with good faith.” – opinions expressed by actual pension fund trustees

Respondent	Opinion
1	Knowledge and skills and in the best interests of the members
2	No self-interest
3	The outcome must benefit the role player
4	Making an investment with the best information available
5	Act in such a way that the interests of members are paramount
6	Act trustworthy, reliable, faithful and responsible
7	Believe in what the person is doing
8	Have as much information as possible before making decisions
9	Act in such a way as to preserve the interests of the role players
10	Do everything honestly; not thinking of yourself; think of others

- Question 5: Describe the duty to act in the best interests of beneficiaries in your own words.

It was evident from the trustees’ answers that they struggled to put “the duty to act in the best interests” into words. For example:

... well best interest is ensuring that they are getting um, but administration at um a cost, at a cost effect, from a cost effective supplier and that um people um get ripped off and that there is too much cross subsidization

This quote was a particularly striking example of the general confusion on the subject that clearly emerged in the interviews.²⁵⁶ The idea that this duty is closely related to or

²⁵⁶ It is also obvious that we cannot take what the interviewee said literally, because this would mean that he/she is saying “to act in the best interests” means to get ripped off, which is likely not what the interviewee intended to say.

inseparable from the duty of good faith again came out strongly (Table 3.14). Two trustees explained that best interests are

... to act as you would as though it was acting for yourself.

Table 3.14: Descriptive matrix displaying the answers to Question 5, “Describe the duty to act in the best interests of beneficiaries” – opinions expressed by actual pension fund trustees

Respondent	Opinion
1	Interwoven concepts – acting in the best interests is also acting in good faith
2	Does not want to take decisions that have the effect of disadvantaging members and beneficiaries in any way
3	You put their interests ahead of everything else
4	Invest in a way that protects the financial investment
5	Deliver on fund rules
6	Though you are acting for yourself
7	No front running and good management
8	Cost-effective administration; no cross subsidies; communication; best returns
9	Same as good faith; decisions must not be in conflict with the rules/law
10	Same as good faith; no difference

It was not clear from these answers whether the trustees thought best interests automatically imply financial benefit, or if they could include other benefits like a healthy physical environment. Two trustees, however, highlighted the importance of financial benefit:

Now you’ve got to try and see that you invest their money in the – to get them the best pension possible, but also invest their money in a safe way. So there’s risk attached to it, and you’ve got to try and balance the two, and help the pensioners to get the best they can.

... to provide the best uh, financial um, investment portfolio at – at the time of retirement so that the member can retire with a decent pension.

In the first of these quotes, it is clear that the interviewee emphasises maximisation of financial return at an appropriate level of risk by his/her use of the word “best”. The second quotation, however, illustrates two possible interpretations. In the same sentence the word “best” and then later “decent” is used. “Best” in this case points to

maximising financial return, but a “decent” pension does not necessarily mean maximising financial return. Another, however, said:

... one doesn’t want to make decisions which have the effect of disadvantaging members and beneficiaries in any way.

It is possible to deduce from this statement that, if the words “in any way” are recognised, beneficiaries’ interests can include a wider range of benefits than just financial benefits. However, it might not have been the intention of the interviewee to have these words loaded with so much meaning. Considering the context of the abovementioned quote, it would seem that the interviewee placed a lot of emphasis on the fact that trustees have a duty to avoid conflicting interests and none of the parties should ever be favoured at the expense of another.

3.3.2 ASSET MANAGERS

- Question 1: Are asset managers fiduciaries?

As is indicated in Table 3.15, without exception asset managers saw themselves as fiduciaries in the pension fund investment chain.

Table 3.15: Descriptive matrix displaying the answers to Question 1, “Do you see yourself as a fiduciary in the pension fund investment chain?” – opinions expressed by actual asset managers

Respondent	Opinion
1	Yes
2	Yes
3	Yes
4	Yes
5	Yes

- Question 2: Who are the beneficiaries of asset managers’ fiduciary responsibility?

Two of the five asset managers said their fiduciary responsibility is owed to the members of the fund (Table 3.16). A third also mentioned the members of the fund, but said that the primary responsibility is to the primary client – the fund itself.

Another also mentioned the pension fund itself and one asset manager mentioned the broader society and the environment.

Table 3.16: Descriptive matrix displaying the answers to Question 2, “To whom do you owe your fiduciary responsibility?” – opinions expressed by actual asset managers

Respondent	Opinion
1	The client, the pension fund
2	Primarily the investor, primary intermediary and financial advisor; secondarily, the pension fund shareholders, employees of the company, society and environment
3	The members of the pension fund
4	Primarily party clients – the trustees, the members of the fund, government and beneficiaries
5	The members of the fund

The responses of asset managers to the second question therefore suggest that the range of interpretations expressed included a) the members of the fund; b) the fund itself and the members of the fund; c) the fund itself; d) broader society and the environment.

- Question 3: Describe the fiduciary duties of asset managers

Answers to this question are summarised in Table 3.17. When asked to describe their fiduciary duties, asset managers most frequently mentioned the duty to act in the best interests of beneficiaries (four out of the five mentioned this duty). This reinforces the emerging trend that the duty to act in the best interests of beneficiaries is seen as a primary, or perhaps overarching, fiduciary duty by a range of stakeholders in the pension fund investment chain. In the previous section it was also mentioned that this was the duty mentioned by most trustees. This was also identified as an overarching duty in the literature, as discussed in Section 1.2.2.

Table 3.17: Descriptive matrix displaying the answers to Question 3, “What are your fiduciary duties?” – opinions expressed by actual asset managers

Respondent	Opinion
1	<p><i>Generally recognised common law duties noted:</i></p> <p>A duty to act in the interests of the client</p> <p>A duty to avoid conflicts of interest</p> <p>No secret profit</p> <p><i>Other duties:</i></p> <p>A duty to act with care and diligence</p>
2	<p><i>Generally recognised common law duties noted:</i></p> <p>A duty to act in the interests of the client</p> <p>A duty to not exceed one’s powers (Fund managed within mandate)</p> <p><i>Other duties:</i></p> <p>Moral background</p>
3	<p><i>Generally recognised common law duties noted:</i></p> <p>A duty to act in the interests of members</p> <p><i>Other duties:</i></p> <p>Act within the law</p> <p>Behave in trust</p>
4	<p><i>Generally recognised common law duties noted:</i></p> <p>A duty to act in the interests of the client</p> <p>A duty to disclose (fair disclosure)</p> <p><i>Other duties:</i></p> <p>Deal fairly in capital markets</p> <p>Provide value-for-money service</p> <p>Ethical responsibility</p> <p>Educate, advocate and train about ethics</p> <p>Gatekeepers</p>
5	<p><i>Generally recognised common law duties noted:</i></p> <p>A duty to not exceed one’s powers (to act within the mandate)</p> <p><i>Other duties:</i></p> <p>Look after the assets in a diligent and responsible way</p>

One of the interviewees mentioned three out of the nine generally recognised common law duties, while two asset managers mentioned two out of the nine. A duty to stay within the mandate was mentioned by at least two asset managers, which could be a reference to the generally recognised common law fiduciary duty to not exceed one’s powers.

Asset managers, like trustees, also mentioned several other (not generally recognised) duties which they believed to be fiduciary duties:

- “moral and ethical responsibility”
- “to trade fairly within capital markets”
- “to stay within the law”

- “to provide value for money service”
- “to disclose fairly and to educate, advocate and train about ethics”

The last duty on this list could include a reference to the generally recognised common law fiduciary duty to disclose, but this was not said explicitly. As the interviewee did not separate these ideas, it would not be accurate to present them in such a manner. Instead, the possibility that the interviewee could have referred to this duty is recognised.

- Question 4: Describe the duty to act in good faith

As is indicated in Table 3.18, asset managers gave a wide variety of descriptions for the duty to act in good faith. The word “integrity” was mentioned by two asset managers, while the word “skill” was also mentioned twice.

Table 3.18: Descriptive matrix displaying the answers to Question 4, “Describe the duty to act with good faith.” – paraphrased opinions expressed by actual asset managers

Respondent	Opinion
1	Acting in the best interests of the client
2	Act of integrity
3	Being transparent; skill
4	Skill
5	Absolute integrity

One of the asset managers who mentioned the word “skill” explained it as follows:

Uhm, I think the essence of good faith is, is things like uhm, skill, I don’t sell a product so you cannot manage, don’t sell an investment idea you cannot do, its uhm
... .

This particular interviewee was then interrupted by a colleague, but later continued, saying:

So I think uh, that’s right and that summarizes neatly into the clients’ interest to always come first and define the clients broadly as I said that the consultants, the trustees, the beneficiaries, even the nation, even the capital markets come first. And

that is the essence of good faith because what it defines is: I won't sell a product; we won't sell a product we cannot manage.

A sentence or two further on the interviewee said:

Uhm, you'll act with uhm, competence, uh diligence, are the key words that come to mind.

Another asset manager mentioned that they could describe the duty of "good faith" as "being transparent", and then went on to explain:

So tell your client what you are going to do, put processes in place that makes sure that you can do that and make sure that you have the skills to make sure that you can do what you have told them and then go out and actually do it and finally report back to your client.

These quotations illustrate that these interviewees, like many other role players, struggled to put these concepts into their own words, although they are clearly referring to the duty of care and skill. Again, it is interesting to note that the duty of care is viewed as part of another fiduciary duty. A possible explanation for this is the fact that the duty of care is always listed in the same sections of legislation as other generally recognised fiduciary duties. Furthermore, it is implied that the duty to act in good faith is to act in the best interests of beneficiaries. This echoes what trustees said²⁵⁷ in describing this duty. By and large, they too could not seem to separate these two duties.

Another asset manager described the duty to act in good faith as follows:

Ooh, that's quite difficult, I mean I, you know (silence) good faith is, you know you either act in the best interest of the client or you're not. Uhm, you know I think there is some sort of binary outcome. Uhm, you can't be acting partly in good faith or uhm, or in a degree in good faith uhm so I think if you are acting in the best interest of the client, trying to, to balance the, the objective that you are trying to achieve uhm within acceptable, acceptable risk parameters as set out in the mandate then I think you are acting in the best interest of the client.

²⁵⁷ See Section 3.3.1.

Although this quotation illustrates that the interviewee had a lot of difficulty explaining what he/she thought the duty to act in good faith means, the one thing that comes across quite plainly is the fact that the interviewee could not separate this duty from the duty to act in the best interests of beneficiaries. As previously mentioned, such views were also expressed by a noteworthy number of trustees and again reinforces the recurring theme that “the duty to act in the best interests of” is viewed as an all-encompassing fiduciary duty.

- Question 5: Describe the duty to act in the best interests of beneficiaries.

Three out of the five asset managers referred to skill, diligence, competence, and/or prudence (Table 3.19). One possible conclusion that could be made here is that asset managers do not view the duty of care and skill as a separate fiduciary duty. Another possibility might be that asset managers definitely see the duty of care as part of their fiduciary duties because it is mentioned several times when they were asked to describe other fiduciary duties – as if they see the duty of care as part of an inherent set of duties. The fact that confusion exists around the duty of care was already identified at the outset of this study²⁵⁸ and is a recurring theme in the empirical phase of the research. This reinforces the submission made earlier that when the layman reads the legislation he/she may become confused, as the duty of care is always mentioned in the same paragraph as the other fiduciary duties.

One asset manager mentioned putting the client in a “better off condition” when asked about acting in the best interests of beneficiaries:

It could simply mean that they are in a better off condition when the end of your product is reached than where, where they were when they started with you. And – and for me that would not only include financial condition, but a psychological condition as well.

This is an interesting comment considering the discussion around the issue of whether best interests means profit maximisation or whether it could include other

²⁵⁸ The dichotomy in the literature about whether the duty of care is indeed a fiduciary duty or a separate duty is described in detail in Section 1.2.

“benefits”.²⁵⁹ This interviewee clearly suggests that best interests can include other benefits, like a better “psychological condition”.

Table 3.19: Descriptive matrix displaying the answers to Question 5, “Describe the duty to act in the best interests of your client.” – opinions expressed by actual asset managers

Respondent	Opinion
1	“It is using due care skill and diligence to achieve the objective that is given to you by the client ...”
2	“It could simply be that they are in a better off condition when the end of your product is reached then where they were when they started with you ...”
3	“... what you do is well considered prudent and responsible ...”
4	Putting their interests above your own; beyond words it comes down to actions; manage investments the way we would manage your own investments; act with competence and diligence
5	“The execution of your mandate in such a way that it provides a reasonable chance for meeting the members’ objectives ...”

Furthermore, the achievement of the client’s or the member’s objectives was mentioned twice. It is not clear what the member’s objectives are and one interviewee actually explained that:

Now we are on pretty vague territory because most of the time we don’t know anything about the actual end-member – we only make generic assumptions about the end-member but we assume that they want to grow their savings in a reasonable and responsible way. How that is interpreted will differ from person to person.

This quote reveals at least three things: uncertainty regarding members’ objectives; variation in the objectives of different members of the same fund; and uncertainty as to the meaning and implications of growing savings in a “reasonable and responsible” way. This possibly indicates that there is a need for future research to determine what members’ objectives or interests are.

3.3.3 ASSET CONSULTANTS

- Question 1: Are asset consultants fiduciaries?

²⁵⁹ This theme of profit maximisation has already been raised early on in Section 1.2.2 of this dissertation, but is mainly discussed in Chapter 4, where the results are interpreted using the interpretation matrices.

In answer to the first question of whether asset consultants see themselves as fiduciaries, the majority of asset consultants interviewed (five out of seven) believed that they were indeed fiduciaries (Table 3.20). 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.

It is not completely clear what this interviewee meant by the “bigger plan”, but one can speculate that it is a reference to the fact that every role player in the pension fund chain has a specific responsibility. It is suggested that this is a fiduciary responsibility which could be expressed through a single collective fiduciary duty: to act in the best interests of the beneficiaries.

Table 3.20: Descriptive matrix displaying the answers to Question 1, “Do you see yourself as a fiduciary in the pension fund investment chain?” – opinions expressed by actual asset consultants

Respondent	Opinion
1	Yes
2	Yes
3	Yes
4	Yes
5	No, or at least not directly
6	Ambivalent
7	Yes

Another respondent stated the following:

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 quotes suggest a certain degree of ambivalence, indicating that the range of interpretations of the first question expressed by asset consultants themselves includes: a) yes; b) ambivalent; and c) no or at least not directly.

- Question 2: To whom do asset consultants owe their fiduciary responsibility?

As illustrated in Table 3.21, three distinct interpretations emerged from question 2. The most common view was that the beneficiaries of asset consultants' fiduciary responsibility were the members of the fund, with six out of the seven asset consultants mentioning members as beneficiaries. This view closely mirrors the views expressed by trustees on this question, as they were also of the opinion that they owe their fiduciary responsibility to the members. As two of the five asset managers said they owe their fiduciary responsibility to the members of the fund, this is clearly a recurring theme in the role players' views.

Table 3.21: Descriptive matrix displaying the answers to Question 2, "To whom do you owe your fiduciary responsibility?" – opinions expressed by actual asset consultants

Respondent	Opinion
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

Two of the asset consultants did, however, indicate that their first responsibility is toward the trustees. This is perhaps not surprising, as asset consultants have a close trust relationship with trustees. As was explained earlier, the trustees rely heavily on the advice asset consultants provide them with, because they often lack the confidence to make important investment decisions themselves.

The final interpretation expressed was that the fund is the beneficiary. This view corresponds with the answers to this question obtained from the South African legal sources.²⁶⁰

- Question 3: Describe the fiduciary duties of asset consultants.

²⁶⁰ See Section 3.2.3.

The range of asset consultant responses to this question is illustrated in Table 3.22. The duty most frequently mentioned by the asset consultants themselves (three out of seven) was the duty to act in the best interests of members. This was the same for the pension fund trustees and asset managers. Moreover, this was also the duty mentioned by the most authors in Chapter 1, and again highlights the recurring theme that this duty might be viewed as an overarching fiduciary duty. The two other generally recognised common law fiduciary duties noted by asset consultants were the duty to avoid conflicts of interests and the duty to disclose.

One asset consultant responded to this question as follows:

Well, uh, I would say, uh we're obviously a service provider to the board of trustees for example and um, that means that we are contracted to give them advice on um, on... everything concerning investments of the retirement funds and the pension funds as such a role player, uh our duty would entail, uh, that uhm we've got to be very aware of the correctness of the advice, um soundness of the advice and also make sure that there's a risk and return profile that's properly communicated to the board of trustees, basically to ensure that the mission and vision of the funds what um, what members expect in the end is fulfilled and is basically um carried out.

This quotation again²⁶¹ illustrates that the interviewees really struggled to express themselves. In this specific instance it may also point to the fact that the interviewee had little knowledge of the generally recognised common law fiduciary duties as none of them was mentioned explicitly. Of the five asset consultants who did mention some of the generally recognised common law fiduciary duties, four cited the duty to act in the best interests of the beneficiary, as discussed above.

²⁶¹ See Question 4 in Section 3.3.2.

Table 3.22: Descriptive matrix displaying the answers to Question 3, “What are your fiduciary duties?” – opinions expressed by actual asset consultants

Respondent	Opinion
1	<i>Generally recognised common law duties noted:</i> None <i>Other duties:</i> A duty to give advice on investment strategy
2	<i>Generally recognised common law duties noted:</i> A duty to act in the interests of members
3	<i>Generally recognised common law duties noted:</i> A duty to disclose (communicate risk and return profile properly) <i>Other duties:</i> A duty to give advice
4	<i>Generally recognised common law duties noted:</i> None <i>Other duties:</i> A duty to help the trustees to do a good job
5	<i>Generally recognised common law duties noted:</i> A duty to act in the interests of members <i>Other duties:</i> None
6	<i>Generally recognised common law duties noted:</i> A duty to act in the interests of members <i>Other duties:</i> A duty to compile the investment strategy A duty to educate the trustees
7	<i>Generally recognised common law duties noted:</i> A duty to act in the interests of members A duty to avoid conflicts of interests <i>Other duties:</i> None

Notwithstanding the debate²⁶² on whether the duty of care, skill and diligence is a fiduciary duty or not, no asset consultant mentioned it. This result is interesting, considering that this is probably the duty that consultants run the highest risk of breaching, owing to the fact that their entire industry is built on the foundation of having superior knowledge and skills. It is therefore essential for asset consultants to always prove that they have applied care, skill and diligence in the execution of their tasks. The fact that asset consultants did not mention the duty to act with care could point to the fact that asset consultants generally, like the majority of academic writers

²⁶² See Section 1.2.

and the South African legislation,²⁶³ do not consider the duty of care to be part of the list of fiduciary duties; or it could be that this duty is just so integral to their roles that they did not feel the need to mention it.

The asset consultant quoted above does seem to imply that his/her fiduciary responsibility entails fulfilling pension fund members' expectations; a view that was also expressed by asset managers. This could simply be interpreted to mean that the asset consultant was trying to say that they should act in the best interests of the members, but simply did not know the correct term or just struggled to find the right words. It is not, however, clear what exactly the consultant meant and therefore the consultant was also asked how it could be known what members expect. This was the response:

Well that is uh ... that is uh, that I think, we base that on uh (silence) what we say would be the average member or the reasonable expectation of a member or uh, industry norms.

Clearly, the interviewee seems to be very unsure of the answer and seems to say that members expect industry norms. This would mean that as long as the fund performs within industry norms, the members would be happy. This is obviously a huge assumption to make and the need for future research on the question of what members' interests are is once more raised.

The other duties mentioned by asset consultants do not correspond explicitly with the generally recognised common law fiduciary duties, but indicate that asset consultants, like asset managers, struggle to differentiate between their contractual obligations and their fiduciary duties, or they seem to think they are the same thing. This is not necessarily wrong, because the generally recognised fiduciary duty to not exceed one's powers would include in this context to "stay within the mandate", as was also mentioned by asset managers, and therefore would include some of the contractual

²⁶³ See the Companies Act ss 75; 76(2) and (3) and 77(2)(a); Sealy "Some Principles of Fiduciary Obligation" 119–140 ; Havenga "Breach of Directors' Fiduciary Duties: Liability on What Basis?" 367–368; Rotman "Fiduciary Principles and Pensions" 1–3.

obligations.²⁶⁴ Duties like giving advice on investment strategy; helping trustees to do a good job; compiling an investment strategy and educating trustees (see Table 3.22) are typically part of their contractual obligations.

- Question 4: Describe the duty to act in good faith.

As was the case with trustees²⁶⁵ and asset managers,²⁶⁶ most of the asset consultants found it difficult to describe the duty of good faith.

Good faith is also rather about ethics isn't it? It's about ethics and when it comes to ethics it is quite hard to define that sort of thing, it is the sort of thing that you know, you know if you are given a specific example you will know whether it is right or wrong.

In addition to illustrating the difficulty that asset consultants had in describing good faith, this quote is interesting in that it introduced the word “ethics” for the first time. Other role players mentioned words like *integrity*, while another asset consultant described good faith as a “moral code”, which is closely related to this idea of ethics.

I think um, you know, good faith speaks to behaviour, and intentions, um as well as honesty so it's pretty much a moral code where you basically say, um, the advice is required to be made with the best intention. Now, um, there yes, you know um I'm not great with language, I'm not a linguist but to my mind the way to achieve that with clients is to have, um, a code of transparency and honesty, and to make sure that your advice is independent, um, and also to put all conflicts of interest on the table.

²⁶⁴ See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 (6) SA 531 (SCA) 537: “Contractual duties owed by one party to another will no doubt often go a long way towards defining whether the relationship is one of trust but contractual privity is not indispensable to such relationships, as correctly observed by the court below. Having said that, the court below went on to find that Yssel indeed owed fiduciary duties to Volvo, but only in relation to the exercise of the specific functions that were assigned to him in the various agreements between Volvo and Highveld (the functions I have listed in para [2] above). Because his functions did not extend to the recruitment, employment or acquisition of staff, so the court reasoned, he was under no duty to act in the interests of Volvo when he engaged in the activities with which we are now concerned. That seems to me to view the matter too narrowly.”

²⁶⁵ See Question 4 in Section 3.3.1.

²⁶⁶ See Question 4 in Section 3.3.2.

This quote illustrates that the interviewee thinks that good faith includes several things, but emphasises the intentions with which it is carried out and uses words like “a code of transparency and honesty”. The word “transparency” was used by another asset consultant as well (Table 3.23). This other interviewee then continued to say that the advice one gives should be independent. This seems to be a reference to the generally recognised common law fiduciary duty to maintain an unfettered discretion.²⁶⁷ The interviewee also seems to refer to that of avoiding conflicts of interests. This is confirmed with the suggestion that one “should put all conflicts of interest on the table”.

Table 3.23: Descriptive matrix displaying the answers to Question 4, “Describe the duty to act in good faith” – opinions expressed by actual asset consultants

Respondent	Opinion
1	Unclear – the same as best interests
2	It’s about ethics – knowing right from wrong
3	Must be able to fulfil promises
4	About trust and transparency
5	Having the interests of members uppermost in your mind
6	The best decisions given the information that they have; accountability
7	It is about behaviour and intentions. It is a moral code where the advice given is with the best intentions. Transparency

On this note, it was also suggested that the pension fund industry as a whole struggles with conflicting interests because so many of the service providers are what was called “one-stop-shop” companies. This refers to the fact that many companies in this industry provide asset management, asset consulting and pension fund administration services.²⁶⁸ In a situation where the same company provides all three of these services to a specific pension fund, there can be conflicting interests. This is particularly

²⁶⁷ Also see the description of the meaning of this duty in Section 1.2.2, where it is also stated that it means independent judgement.

²⁶⁸ Pension fund administrators were not included in this study because they are not responsible in any way for the actual investment of the assets.

prevalent where asset consultants advise trustees to contract asset managers to manage their assets from what is in fact the same company.

Another asset consultant mentioned that acting in good faith is the same as the duty to act in the interest of beneficiaries. This view was also expressed by some of the trustees and the asset managers.

- Question 5: Describe the duty to act in the best interests of beneficiaries.

Once again, when the asset consultants were asked to describe this duty, most found it challenging to articulate the concept (Table 3.24). 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 also described differently by all the participants. One participant described it as “ethical standards”, while another used the words “honourable intentions”. What should be immediately apparent is that much the same words were used to describe the duty to act in good faith. This points to the fact that asset consultants, like the other role players, struggled to separate these two duties from each other.

Two participants also described the best interests of beneficiaries as trying to achieve the “best possible outcome” for the member.

Whatever decision you make it from a point of view where you want to maximise benefit for the beneficiary.

The interviewer then probed further, asking whether this meant to maximise risk-adjusted financial returns; the interviewee responded as follows:

Well, let me put it this way. I think what you have got to do is you have got to maximise the probability of the beneficiary achieving their objectives and the reason why I say that is not about maximising growing assets.

Although the interviewee explicitly states that “it is not about maximising growing assets”, it is actually not clear what maximising benefit for the beneficiary is all about. Another recurring theme that is mentioned in this quote is that the beneficiaries’ *objectives* should be achieved. This idea was also mentioned when the asset consultants were asked to describe their fiduciary duties and it was mentioned twice by asset managers when they were asked to describe the duty to act in the best interests of beneficiaries.²⁶⁹ The idea of members’ objectives could be a reference to the different profiles of the members, for example those members who are close to retirement and those who are far from it. Some members of defined contribution funds also get to choose between options like a high-risk maximum growth and a lower-risk stability option. Nonetheless, these possibilities were not discussed by the specific interviewee in this context and the uncertainty therefore remains.

Table 3.24: Descriptive matrix displaying the answers to Question 5, “Describe the duty to act in the best interests of your client” – opinions expressed by actual asset consultants

Respondent	Opinion
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 maximise the probability of the beneficiaries achieving their objectives, but this is not necessarily about maximising growing assets
5	To meet the liabilities determined by the actuary
6	Doing what is best for the members as opposed to what is best for the trustees
7	Honourable intentions, like good faith; no conflicts of interests

3.4 DATA REDUCTION: COMPARING THE SETS

3.4.1 INTRODUCTION

The two preceding sections displayed many recurring themes, as well as some discrepancies, in the results of the interviews with the legal sources and those with practitioners. The purpose of this section is to provide the reader with comparisons,

²⁶⁹ Also see Section 3.3.2, Question 5.

mostly in the form of tables, in order to present an overall view of the results that have been displayed. It also aims to reduce the data in order to transfer it to the interpretation matrices in Chapter 4. In this section, basic set theory concepts of the *union*, the *intersection*, and *set differences* are used to do these comparisons.²⁷⁰

This section is presented in two main parts. The first part contains the comparisons between the answers obtained from the key role players to each of the five questions posed. In other words, the answers trustees gave are compared with those provided by the asset managers and with those by the asset consultants. Consequently, the three sets of answers are compared with one another.

The second part of this section contains comparisons between the legal sources (Phase I of the research as displayed in Section 3.2) and the opinions of the practitioners (Phase II of the research as displayed in Section 3.3) for each of the three questions. These comparisons are presented in the same sequence as the other results for Phases I and II given earlier in this chapter – with subsections for each role player. The section concludes with a description of the reduced data and the gaps that were identified for future research, as deduced from these results.

3.4.2 COMPARISON OF THE PRACTITIONERS' ANSWERS

- Question 1: Do you see yourself as a fiduciary?

The sets compared here emerged from the answers to the question: “Do you see yourself as a fiduciary?” given by trustees, asset managers and asset consultants, which were presented in Tables 3.10, 3.15 and 3.20 respectively. This detail has been reduced²⁷¹ and this reduction is presented as the three sets in the columns labelled “Trustees”, “Asset Managers” and “Asset Consultants” in Table 3.25.

²⁷⁰ This was explained in Section 2.4.1.

²⁷¹ This is described in Section 2.4.1.

Table 3.25: Question 1, “Do you see yourself as fiduciaries?” – comparison of practitioners’ answers

Q 1 – Do you see yourself as a fiduciary?	Trustees	Asset Managers	Asset Consultants
Yes	✓	✓	✓
Ambivalent	✓		✓
No, not directly			✓

The first column in this table represents the *union*, in that it contains *all* the answers that were received from practitioners. This applies to all the tables throughout this section. An *intersection* is illustrated by the row where all the cells are ticked. This is where the answer to the first question was yes. This represents a consensus position. The *set difference* is then illustrated in the “Ambivalent” and the “No, not directly” rows, which indicate that some of the trustees and asset consultants did not necessarily think that they are fiduciaries. However, in this case, all the asset managers were of the opinion that they are indeed fiduciaries.

- Question 2: To whom do you owe your fiduciary responsibility?

The answer that the responsibility is owed to members of the fund is the *intersection*. In other words, the members of the fund are the one beneficiary that all three role players acknowledged as beneficiaries of their fiduciary responsibility. The *set differences* are indicated in the rows where just one or two cells were ticked (Table 3.26).

Three interesting ideas that emerged from the set differences are: firstly, asset managers and asset consultants do not seem to distinguish between members, dependents and pensioners, but rather seem to view this as one group that falls under “members”, although trustees do seem to make a distinction between these groups.

Secondly, trustees are, not surprisingly, the only role player that did not mention “the client”, which points to a clear distinction between the trustees on the one hand and the “service providing” role players on the other (asset managers and asset consultants). This was also hinted at in Section 3.3, where it emerged that asset

managers and asset consultants struggled to differentiate between their contractual obligations and their fiduciary duties.

Table 3.26: Question 2, “To whom do you owe your fiduciary responsibility?” – comparison of practitioners’ answers

Q 2 – To whom do you owe your fiduciary responsibility?	Trustees	Asset Managers	Asset Consultants
The members of the fund	✓	✓	✓
The members, the fund and dependents	✓		
The members and pensioners	✓		
The members and the employer	✓		
The client – the pension fund		✓	✓
The client (the pension fund), the members, the government and beneficiaries		✓	
The investor, pension fund shareholders, employees, society		✓	
First the members, then the trustees			✓
First the trustees, then the members			✓

Thirdly, asset managers were the only group in which the view emerged that “the society” is a beneficiary. They also seemed to be the only group that really described the beneficiaries in “financial” terms, such as *shareholders* and *investors*. One possible explanation for this might be that because of the nature of their work, asset managers are used to using many financial terms and this just came out more strongly in the interviews than with the other role players. With regard to the mention of “society” – this was a specific asset manager who seemed to support the social form of responsible investment, as described in this dissertation, throughout the interview.

- Question 3: Describe your fiduciary duties.

Table 3.27 presents all the duties that were mentioned as fiduciary duties by the practitioners. Except for the generally recognised common law fiduciary duties (which are greyed out in Table 3.27), there was very little overlap between what the different role players said.

Table 3.27: Question 3, “Describe your fiduciary duties?” – comparisons of practitioners’ answers

Q 3 – Describe your fiduciary duties.	Trustees	Asset Managers	Asset Consultants
Duty to act in the best interests of beneficiaries	✓	✓	✓
Duty to act in good faith	✓		
Duty to avoid conflicts of interest		✓	✓
Duty to not make any secret profit		✓	
Duty to disclose (benefit statements communicated; accountability; fair disclosure; communication of risk and return profile)	✓	✓	✓
Duty to not exceed powers (fund managed within mandate; stay within the mandate; Stay within the law)	✓	✓	
Duty to act with care, skill and diligence	✓	✓	
Measure against correct benchmark	✓		
Review of service providers	✓		
Investing in a responsible manner	✓		
Make sure investment returns are adequate to cover liabilities	✓		
To educate and help trustees			✓
Providence of advice			✓
Look after assets in a diligent and responsible way		✓	
Ethical responsibility		✓	
Provide value for money service		✓	
Deal fairly in capital markets		✓	
To educate, advocate and train in ethics		✓	
Balance risk and return	✓		
Moral background		✓	
No hidden agendas	✓		
Benefits must be paid	✓		
Administrative tasks	✓		
Mitigate risks	✓		

Note: The dark grey section of this table represents the generally recognised common law fiduciary duties, while the medium grey section represents all the other duties and the white section represents administrative duties.

Two very similar duties were mentioned by trustees and asset managers. Trustees mentioned a “submission to regulatory requirements” and asset managers said fiduciaries should “act within the law”. These were merged under the generally recognised fiduciary duty to not exceed one’s powers.²⁷²

Table 3.27 furthermore shows that practitioners collectively mentioned six out of the nine generally recognised common law fiduciary duties. The three that were not mentioned explicitly were a duty to disclose; a duty of impartiality and a duty to act for a proper purpose. Technically, it can be deduced from the practitioners’ comments that their mention of terms such as *fair disclosure* and *accountability* may be references to a duty to disclose. The duty of impartiality as well as the duty to act for a proper purpose are closely related to the duty to act in the best interests of beneficiaries and the duty to avoid conflicts of interest, and this may be why they were not mentioned as separate duties.²⁷³

The *intersection* is clearly at a duty to act in the best interests of beneficiaries and a duty to disclose. This means that these two duties are the generally recognised common law fiduciary duties that were mentioned by all the groups. The duty to disclose was not, however, mentioned explicitly; it was merely implied by the practitioners’ words.

- Question 4: Describe the duty to act in good faith.

Table 3.28 presents reductions of the practitioners’ descriptions of the duty to act in good faith. It is obvious from this presentation that there was only one *intersection* in terms of how the groups of practitioners described this duty. The different role players

²⁷² See a short description of this duty in Section 1.2.2.

²⁷³ The idea that these duties are very closely related and that most of the generally recognised common law fiduciary duties could fall under the duty to act in the best interests of beneficiaries was also discussed Section 1.2.2.

provided a list of 14 different descriptions for this duty, some of which resemble the same themes, such as ethics and a moral code.²⁷⁴

Table 3.28: Question 4, “Describe the duty to act in good faith” – comparisons of practitioners’ answers

Q 4 – Describe the duty to act in good faith	Trustees	Asset Managers	Asset Consultants
Knowledge and skills	✓	✓	
No self-interest	✓		
Outcome must benefit the role players	✓		
Making an investment with the best information available	✓		✓
To act in the best interests of beneficiaries	✓	✓	✓
Trustworthy, reliable, faithful and responsible	✓		
Have as much information as possible before making decisions	✓		✓
Integrity		✓	
Transparency		✓	✓
Ethics – knowing right from wrong			✓
Accountability			✓
Fulfil promises			✓
Moral code			✓
Behaviour and intentions			✓

The *intersection* illustrates that the key role players struggled to separate the duty to act in good faith from the duty to act in the best interests of beneficiaries, or that they think that acting in the best interests of beneficiaries includes acting in good faith. It is likely that they argued that it would be impossible to act in bad faith and still in the best interests of the beneficiaries, but this is not clear. It would, however, be possible to act in the beneficiaries’ financial interests and in bad faith. For instance, if a trustee has some “inside information” on a company and suggests to the board that the fund should buy shares in that company but does not reveal the source of his “superior knowledge”, he is acting in bad faith but still in the best financial interests of the beneficiaries.

²⁷⁴ These are actually grouped together for the purpose of the final interpretation matrices in this dissertation in Chapter 4, Section 4.4.

According to the law it can never be in the best interests of the beneficiaries to do something illegal. The law therefore settles this matter quite easily. Accordingly, it is proposed that the practitioners are not wrong in their thinking that these two duties cannot be separated.²⁷⁵

- Question 5: Describe the duty to act in the best interests of beneficiaries.

Table 3.29 presents the descriptions that were provided by the three key role players for the duty to act in the best interests of beneficiaries. The table illustrates that the groups gave 15 different descriptions for this duty. Some of the ideas were grouped together for the purpose of this Table, where it was obvious that the data could be reduced to a single item. This was for instance done for the description of meeting members' objectives. Some asset managers and some asset consultants described it a little differently but it was clear that this was what they meant.

Most interestingly, there is no *intersection* for these set comparisons, which means that none of the descriptions provided was representative of a description from all three groups. As a result it can be suggested that practitioners have no clarity on what this duty entails and that it might mean something different for every individual.

²⁷⁵ It was suggested in Section 1.2.2 that the difference between these two duties is that “good faith” refers to an attitude or the way in which you act, while “best interests” refers to what should be achieved by your actions. Still, it can be argued that in order to act in the best interests of beneficiaries you must also act in good faith. This reiterates the notion that the duty to act in the best interests of beneficiaries is an overarching fiduciary duty and includes all the other generally recognised common law fiduciary duties.

Table 3.29: Question 5, “Describe the duty in the best interests of beneficiaries” – comparisons of the practitioners’ answers

Q 5 – Describe the duty to act in the best interests of beneficiaries.	Trustees	Asset Managers	Asset Consultants
To act with good faith	✓		✓
Decisions must not disadvantage members in <i>any way</i>	✓		
Put their interests ahead of everything else	✓		
Invest in a way that protects financial investment	✓		
Deliver on fund rules	✓		
Act as if you are acting for yourself	✓	✓	
No front running and good management	✓		
Cost-effective administration, no cross subsidies, good communication and best returns	✓		
Care and skill		✓	
Members must be in a better-off condition (this includes a psychological condition)		✓	
Meeting the members’ objectives		✓	✓
To give the best advice, given available information			✓
Doing what is best for the members (putting their interests above your own and above the trustees’ interests)			✓
Maximise benefit but not necessarily “maximising growing assets”			✓
No conflicts of interest			✓

3.4.3 COMPARISON OF THE SOUTH AFRICAN LEGAL SOURCES’ AND THE PRACTITIONERS’ ANSWERS

3.4.3.1 Pension fund trustees

- Question 1: Are pension fund trustees fiduciaries?

The majority of pension fund trustees saw themselves as fiduciaries and this notion was also reflected in the legal sources. As can be seen from Table 3.30, none of the legal sources or practitioners’ opinions reflected the view that pension fund trustees

are *not* fiduciaries in the absolute sense. In fact, nine out of the ten actual pension fund trustees responded that they do consider themselves to be fiduciaries.²⁷⁶ The *intersection* illustrates that some of the legal sources and the majority of the trustees agree that pension fund trustees are fiduciaries.

Table 3.30: Question 1, “Are pension fund trustees fiduciaries?” – comparison of South African legal sources’ and trustees’ answers.

Q 1 – Are pension fund trustees fiduciaries?	Legal sources	Trustees
Yes	✓	✓
Silence	✓	NA
Ambivalent		✓

- Question 2: To whom do pension fund trustees owe their fiduciary responsibility?

The answers from the legal sources and the trustees were very similar for this question (Table 3.31). The *intersection* for this question includes a range of interpretations, including the members, the fund itself, the members as a whole (or collective entity) and members, pensioners and other beneficiaries.

Table 3.31: Question 2, “To whom do pension fund trustees owe their fiduciary duty?” – comparison of answers South African legal sources’ and trustees’ answers

Q 2 – To whom do pension fund trustees owe their fiduciary duty?	Legal sources	Trustees
The members of the fund	✓	✓
The fund itself	✓	✓
The members and the employer		✓
The members as a collective entity	✓	✓
The members, pensioners and other beneficiaries	✓	✓

The table illustrates that the *set difference* is “the employer”. This is an interesting result and prompts the question: why do some trustees perceive the employer to also be a beneficiary of their fiduciary responsibility? There are a number of possible

²⁷⁶ See Section 3.3.1.

answers to this. One could simply be the fact that both trustees that listed this beneficiary were employer representative trustees. A far more interesting avenue of consideration might relate to the nature of the pension fund on which these trustees served. As discussed in Chapter 1, Section 1.1, two basic fund types exist: defined benefit (DB) and defined contribution (DC). Intuitively speaking one might expect trustees serving on a DB fund to be more likely to claim a loyalty to the employer. After all, in DB funds it is the sponsoring employer that carries all of the investment risk and not the members, pensioners or other beneficiaries. In DC funds, the investment risk lies with the members themselves. Because of the qualitative nature of the study and the room for probing in qualitative interviews, both the participants who mentioned the employer as being one of the beneficiaries were asked their reason for doing so. It should be noted that they both represented hybrid funds, which have DB and DC components. The one did not really answer the question but the other response is given below:

I think the interests of members are paramount, whether they're DB or DC, and one wants to always make sure that whatever decisions you take, you don't harm the sponsoring company's financial interests in any way, you want to keep the good will of the sponsoring company, and its interest in your Fund and its members.

This quote provides some support for the idea that trustees of DB funds might tend to be more loyal towards the sponsoring company and as a result they view the employer (the sponsoring company) as one of the beneficiaries of their fiduciary responsibility.

- Question 3: Describe the fiduciary duties of pension fund trustees.

Table 3.32 presents all the duties that were mentioned in the legal sources and by the trustees as being fiduciary duties. The duties listed in the legal sources are mainly those duties listed in section 7C of the Pension Funds Act and section 2 of the Financial Institutions (Protection of Funds) Act. The duties mentioned by the trustees themselves included some of the generally recognised common law fiduciary duties, but also a variety of other technical and administrative duties.

Table 3.32: Question 3, “What are the fiduciary duties of pension fund trustees?” – comparison of South African legal sources’ and trustees’ answers.

Q 3 – Describe the fiduciary duties of pension fund trustees	Legal sources	Trustees
A duty to act in the best interests of beneficiaries	✓	✓
A duty to act in good faith	✓	✓
A duty to not make any secret profit	✓	
A duty to avoid conflicts of interests	✓	
A duty to act with impartiality with regard to all members and beneficiaries	✓	
A duty to disclose	✓	✓
A duty to not exceed powers	✓	✓
A duty to maintain an unfettered discretion	✓	
A duty to act for a proper purpose	✓	
Duty to act with due care and diligence	✓	✓
Measure against correct benchmarks		✓
Investing in a responsible manner		✓
Make sure investment returns are adequate to cover liabilities		✓
Mitigate risks		✓
No hidden agendas		✓
Balance risk and return		✓
Ensure that benefits are paid		✓
Administrative tasks		✓

Note: The dark grey section of this table represents the generally recognised common law fiduciary duties, the medium grey section represents the other duties and the white section represents administrative duties.

The *intersections* in Table 3.32 illustrate that the legal sources and the trustees are in agreement about five “fiduciary duties”. The first four are generally recognised common law fiduciary duties; that is, a duty to act in the best interests of beneficiaries; a duty to act in good faith; a duty to disclose; and a duty to not exceed one’s powers. The first one is hardly surprising in the sense that it has been suggested throughout this dissertation that this duty is an overarching fiduciary duty. It has also

been proposed that a duty to act in good faith cannot be separated from the duty to act in the best interests of beneficiaries.

Interestingly, the third one, a duty to disclose, was specifically recognised as part of a duty to act in good faith in case law,²⁷⁷ which leads back again to the duty to act in the best interest of beneficiaries. It was also suggested in Section 3.4.2 that it can never be in the best interests of beneficiaries to do anything illegal. Although the duty to not exceed one's powers does not only refer to illegal actions this is also an indication that the duty to act in the best interests of beneficiaries can include this duty also.

The fifth duty, the duty to act with care and diligence, is controversial. The debate as to whether this duty is indeed a fiduciary duty has already been acknowledged at the outset of this study in Section 1.2.2. This *intersection* reinforces the idea that laymen might not recognise the distinction between the duty to act with care, skill and diligence and the generally recognised common law fiduciary duties.²⁷⁸

3.4.3.2 Asset managers

- Question 1: Are asset managers fiduciaries?

All the asset managers see themselves as fiduciaries, as indicated by Table 3.33. Although this view could also be traced in the legal sources, they were generally silent on the matter. However, none of the legal sources' or respondents' opinions reflected the view that asset managers are *not* fiduciaries.

Table 3.33: Question 1, "Are asset managers' fiduciaries?" – comparison of South African legal sources' and asset managers' answers

Q 1 – Are asset managers fiduciaries?	Legal sources	Asset managers
Yes	✓	✓
Silence	✓	

²⁷⁷ See *Skinner v De Beers Pension Fund and Another* [2005] 5 BPLR 453 (PFA) where it was said that the duty to act in good faith includes a duty to disclose adequate relevant information.

²⁷⁸ This debate is also discussed elsewhere in this dissertation. See Chapter 1, Section 1.2.2.

Considering the position that asset managers hold in the pension fund investment chain²⁷⁹ (Chapter 1, Section 1.1), this is an interesting result, as asset managers are actually quite far removed from the actual beneficiaries in the pension fund compared to the trustees and even the asset consultants. So, even though they definitely have an influence on what the member gets at the end of the day, their main purpose is to execute an investment strategy. It is therefore interesting to note that none of the sources indicated that they are not fiduciaries and that the asset managers all thought of themselves as fiduciaries.

- Question 2: To whom do asset managers owe their fiduciary responsibility?

Table 3.34 illustrates that the answer suggested by the legal sources was that the responsibility is owed to the members (the owners of the assets), the fund itself and the industry. Two of the asset managers mentioned the fund itself, whilst three out of five mentioned the members of the fund.

Table 3.34: Question 2, “To whom do asset managers’ owe their fiduciary responsibility?” – comparison of South African legal sources’ and trustees’ answers

Q 2 – To whom do pension fund trustees owe their fiduciary responsibility?	Legal sources	Asset managers
The members of the fund	✓	✓
The fund itself (the client)	✓	✓
The industry	✓	
The fund, the members, government and beneficiaries		✓
The investor, pension fund shareholders, employees, society and the environment		✓

The *intersections* in Table 3.34 are the “members of the fund” and the “fund itself”. The fact that the members of the fund are identified as a beneficiary of fiduciary duties by both the asset managers themselves and the legal sources can be seen as a surprising result, considering the position of asset managers in the pension fund investment chain, as also discussed in the preceding section. The fact that the other

²⁷⁹ Also see Chapter 1, Section 1.1.

intersection is the “fund itself” is a more obvious result in the sense that asset managers are mainly a service-providing role player and are essentially contracted by a pension fund to manage the fund’s assets.

- Question 3: Describe the fiduciary duties of asset managers.

Table 3.35: Question 3, “Describe the fiduciary duties of asset managers?” – comparison of South African legal sources’ and asset managers’ answers

Q 3 – Describe the fiduciary duties of asset managers	Legal sources	Asset managers
A duty to act in the best interests of beneficiaries	✓	✓
A duty to act with good faith	✓	✓
A duty to not make any secret profit	✓	✓
A duty to avoid conflicts of interests	✓	✓
A duty to disclose	✓	✓
A duty to not exceed powers	✓	✓
A duty to maintain an unfettered discretion	✓	
A duty to act with impartiality with regard to all members and beneficiaries	✓	
A duty to act for a proper purpose	✓	
The duty to act with due care and diligence	✓	✓
Ethical responsibility		✓
Educate, advocate and train about ethics		✓
Gatekeepers		✓
Moral background		✓
Act within the law		✓
Behave in trust		✓
Deal fairly in capital markets		✓
Provide value-for-money service		✓
Look after assets in diligent and responsible way		✓

Note: The dark grey section of this table represents the generally recognised common law fiduciary duties and the medium grey section represents the other duties mentioned by asset managers.

The essential answer suggested from legal sources on this question was the list of generally recognised common law fiduciary duties.²⁸⁰ As illustrated by the *intersections* in Table 3.35, the asset managers also mentioned a number (six out of the nine) of the generally recognised common law fiduciary duties.

The *intersections* in Table 3.35 are mostly for the generally recognised common law fiduciary duties (see the dark grey section at the top of the table). The only *intersection* that is not a generally recognised common law fiduciary duty is the duty to act with due care and diligence; yet again confirming the confusion surrounding this duty and its status as a fiduciary duty.²⁸¹

The *set differences* are basically all the administrative and other duties mentioned by the asset managers. This illustrates firstly that the asset managers mentioned a whole array of duties that are not found in the legal sources and, secondly, this may indicate that asset managers are not really sure what their fiduciary duties per se are, and therefore just mentioned most of the duties they know they have.

3.4.3.3 Asset consultants

- Question 1: Are asset consultants fiduciaries?

The *union* (or range of interpretations) between Phases I and II is: a) yes; b) silence; and c) ambivalence, as illustrated in Table 3.36. The *intersection* is “yes”; the *set difference* relative to Phase I is silence and relative to Phase II is ambivalence and “yes”. The *intersection* could point to the fact that asset consultants are indeed fiduciaries. As can be seen from Table 3.36, none of the legal sources’ or respondents’ opinions reflected the view that asset consultants are not fiduciaries. There also appears to be no legal basis²⁸² for the interpretation that they do not have a fiduciary responsibility other than the complete absence of case law.

²⁸⁰ See Chapter 3, Section 3.2.2.

²⁸¹ See also the previous discussion on this duty in Section 3.4.1.

²⁸² This was also discussed earlier in Section 3.2.3 of this chapter.

Table 3.36: Question 1, “Are asset consultants’ fiduciaries?” – comparison of South African legal sources’ and asset consultants’ answers

Q 1 – Are asset managers fiduciaries?	Legal sources	Asset consultants
Yes	✓	✓
Ambivalence		✓
Silence	✓	

Question 2: To whom do asset consultants owe their fiduciary responsibility?

As presented in Table 3.37, the asset consultants’ answers portrayed a wider spectrum of beneficiaries of their fiduciary duties than was evident in the legal sources. This possibly points to uncertainty around this question in the minds of asset consultants. The silence in the legal sources may also contribute to this uncertainty and possibly points to gaps in the legislation.

Table 3.37: Question 2, “To whom do asset consultants’ owe their fiduciary responsibility?” Comparison of South African legal sources’ and asset consultants’ answers.

Q 2 – To whom do asset consultants owe their fiduciary responsibility?	Legal sources	Asset consultants
Silence	✓	
The fund itself (the client)	✓	✓
The industry	✓	
The members of the fund		✓
First the members and then the trustees		✓
First the trustees and then the members		✓

If the *intersection* were to be a representative answer, the fund itself would be the beneficiary of asset consultants’ fiduciary duties. This makes sense because asset consultants are contracted by the fund and their responsibilities are suggested by the contractual relationship. If asset consultants then act in the interests of the fund, they automatically act in the interests of members, because the trustees are representatives of the fund and thus have to act in members’ interests. However, once again the question of what type of fund it is creeps in, as there one may be confronted with the

question of whether there should be differences between DB and DC funds.²⁸³ For a DB fund one could argue that the contracting client is not only the fund but also, indirectly, the sponsoring company. If this is so, then the asset consultants' duty to act in the interests of the client might become increasingly difficult, because the members of the fund and the sponsoring company will most likely have conflicting interests. To some extent this observation suggests a certain inadequacy in the present legal framework to deal with DB and DC fund types, as the legislation does not make distinctions between the two types of fund in terms of responsibilities and beneficiaries, which might create confusion.

- Question 3: Describe the fiduciary duties of asset consultants.

The *set differences*, in Table 3.38, essentially indicate that the asset consultants' views differed markedly from those of the legal sources in the sense that the consultants mentioned a number of "other" duties that are not contained in the legal sources. Furthermore, the *intersections* show that the legal sources and the consultants were only in agreement on three duties (all of which were generally recognised common law fiduciary duties).²⁸⁴ Firstly, the duty to act in the best interests of beneficiaries was listed in both sets, which yet again supports the notion that this might be an overarching fiduciary duty. Secondly, it was mentioned in both sets that the duty to avoid conflicts of interest is a fiduciary duty; this may point to the fact that asset consultants might be specifically conscious of this duty. Thirdly, it was evident that the duty to disclose appeared in both sets, although the asset consultants did not mention this duty explicitly.

²⁸³ See the discussion in Section 3.4.2 above.

²⁸⁴ The generally recognised common law fiduciary duties are greyed out in Table 38.

Table 3.38: Question 3, “Describe the fiduciary duties of consultants?” – comparison of South African legal sources’ and asset consultants’ answers

Q 3 – Describe the fiduciary duties of asset consultants	Legal sources	Asset consultants
Silence	✓	NA
A duty to act in the best interests of beneficiaries	✓	✓
A duty to act with good faith	✓	
A duty to not make any secret profit	✓	✓
A duty to avoid conflicts of interest	✓	
A duty to disclose	✓	✓
A duty to not exceed one’s powers	✓	
A duty to maintain an unfettered discretion	✓	
A duty to act with impartiality with regard to all members and beneficiaries	✓	
A duty to act for a proper purpose	✓	
The duty to act with care and diligence	✓	
To seek information	✓	
Honestly and fairly	✓	
To give advice		✓
To educate trustees		✓
To help trustees do a good job		✓
To compile the investment strategy		✓
To give advice on investment strategy		✓

Note: The dark grey section of this table represents the generally recognised common law fiduciary duties and the medium grey section represents all the other duties that were mentioned by asset consultants.

3.5 CONCLUSION

The main purpose of this chapter was to describe the interpretations of fiduciary responsibility given by the key role players in the pension fund investment chain, with a view to using the descriptions in the interpretation matrices in Chapter 4 to address the overarching research question. The chapter therefore presented the descriptions and interpretations for fiduciary responsibility provided by the South African legal

sources (Phase I) and the key role players in the pension fund investment chain (Phase II). Furthermore, a comparison of the results obtained from the practitioners and those obtained from the legal sources was provided with a view to reducing the data so as to transfer it to the interpretation matrices in Chapter 4.

A number of recurring themes were identified in this chapter. The most important one of these with regard to progressing with the study is probably the idea that the duty to act in the best interests of beneficiaries is viewed as an overarching fiduciary duty. This was confirmed by the *intersections* in the preceding section (3.4) which illustrated that the duty to act in the best interests of beneficiaries was the one duty that was mentioned in both sets among all three groups of role players.²⁸⁵

The details of the content of this duty are, however, unclear and no generally accepted definition was presented in the legal sources or by the practitioners. In fact, it would seem that practitioners struggled to put this duty in words and could not necessarily separate the duty to act in the best interests of beneficiaries from the duty to act in good faith. Moreover, the legal sources simply seem to be silent on this matter. This points to gaps in terms of the statutory formulation of these duties and suggests that it would be useful if this duty and other duties were to be described or defined in legal sources.

These possible gaps in legislation and the lack of definitions for this duty point to the need for future research on the meaning of “best interests”, specifically in the context of the members of pension funds.

Another repetitive theme was the confusion surrounding the fiduciary status of the duty to act with care, skill and diligence. It was suggested that people generally regard this duty as a fiduciary duty, because it is always mentioned in the same sections of legislation as other generally recognised common law fiduciary duties.

Finally, it was established that there might also be gaps in the legislation with regard to the different types of pension funds (DB and DC) and how the type of fund might

²⁸⁵ See Tables 3.32, 3.35 and 3.38.

influence the roles and responsibilities of the investment chain, primarily because the risk for these two types of fund varies considerably.

CHAPTER 4: FIDUCIARY RESPONSIBILITY AND RESPONSIBLE INVESTMENT – INTERPRETATION MATRICES

4.1 INTRODUCTION

This chapter is devoted to the process of conclusion-drawing²⁸⁶ – Phase III of the research. The aim is to pull together the two key concepts in the dissertation, fiduciary responsibility and responsible investment, in order to answer the core research question:

Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?

As described in Chapter 2, the process of conclusion-drawing has been achieved with the use of interpretation matrices. Interpretation matrices are a special form of descriptive matrices²⁸⁷ that assisted in exploring the abovementioned research question in this study. It was already suggested at the outset of this study²⁸⁸ that responsible investment has at least two forms: a) a “business case form”²⁸⁹ in which ESG issues are considered only in so far as they are financially material; and b) a social form in which ESG issues are considered before financial return maximisation is considered. The responsible investment side of the interpretation matrices is therefore restricted to these two forms throughout this chapter. In contrast, the fiduciary responsibility side of the matrices is populated on the basis of a range of interpretations of fiduciary responsibility uncovered during Phase I (interviews with the legal sources) and Phase II (interviews with practitioners) of the research, as presented in Chapter 3.

This chapter is structured according to the three questions used in Phases I and II to inform interpretations and definitions for fiduciary responsibility. The logic behind

²⁸⁶ See Chapter 2, Section 2.4.

²⁸⁷ Miles and Huberman “Drawing Valid Meaning from Qualitative Data: Towards a Shared Craft” 27.

²⁸⁸ See Chapter 1, Section 1.3.

²⁸⁹ Richardson “Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability” 555.

this structure is to represent all the interpretations for fiduciary responsibility found in this study for both the legal sources and the key role players themselves.

4.2 QUESTION 1: ARE THE KEY ROLE PLAYERS FIDUCIARIES IN THE PENSION FUND INVESTMENT CHAIN?

Tables 4.1 to 4.3 consider the implications of interpretations from the legal sources and the key role players on the question of whether they are indeed fiduciaries. In the column on the left-hand side of the tables under the heading “Question 1 scenarios”, actual paraphrased answers from the legal sources and the key role players are presented. In terms of set theory, as used in Chapter 3, Section 3.4, these columns represent the *union* of the sets. Under every answer, the source of the answer is indicated in brackets.

Table 4.1: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the question of whether pension fund trustees are fiduciaries vs forms of responsible investment

	Forms of responsible investment	
Question 1 scenarios	Business case form	Social form
Yes (LS and PFTs – Tables 3.1 and 3.10)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
Ambivalent (Only one PFTs – Table 3.10)	Possibly a barrier – depends on how the ambivalence is interpreted	Possibly a barrier – depends on how the ambivalence is interpreted

Note: LS = legal sources; PFT = pension fund trustees

Logically speaking, fiduciary responsibility can only be a possible barrier to the implementation of responsible investment if the key role players are indeed fiduciaries. While a limited number of the pension fund trustees²⁹⁰ and asset consultants²⁹¹ expressed some ambivalence with regard to this question, the general consensus seemed to be that they are indeed fiduciaries. Consequently, if they are indeed fiduciaries, they will be subject to certain legal obligations or duties²⁹² and if

²⁹⁰ See Tables 3.10 and 4.1.

²⁹¹ See Tables 3.20 and 4.3.

²⁹² See Chapter 1 Section 1.2 where the fact that a fiduciary will have certain legal duties is described as one of the key characteristics of a fiduciary.

the content of these duties clash with the implementation of responsible investment, there may be a fiduciary barrier. However, this will clearly depend on the details of the fiduciary duties.

All the asset managers²⁹³ saw themselves as fiduciaries. Under this 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 4.2: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the question of whether asset managers are fiduciaries vs forms of responsible investment

	Forms of responsible investment	
Question 1 scenarios	Business case form	Social form
Yes (LS and AMs – Tables 3.4 and 3.15)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties

Note: LS = legal sources; AMs = asset managers

Table 4.3: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the question of whether asset consultants are fiduciaries vs forms of responsible investment

	Forms of responsible investment	
Question 1 scenarios	Business case form	Social form
Yes (LS and ACs – Tables 3.7 and 3.20)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
Ambivalent (Minority of ACs only – Table 3.20)	Possibly a barrier – depends on how the ambivalence is interpreted	Possibly a barrier – depends on how the ambivalence is interpreted

Note: LS = legal sources; ACs = asset consultants

4.3 QUESTION 2: TO WHOM DO THE KEY ROLE PLAYERS OWE THEIR FIDUCIARY RESPONSIBILITY?

Irrespective of the answer to this question, it is again entirely possible that fiduciary responsibility could be a barrier to both forms of responsible investment, depending on the specific duties. This applies to all three of the key role players in the pension fund investment chain (pension fund trustees – Table 4.4; asset managers – Table 4.5; asset consultants – Table 4.6). Whether or not there are barriers depends not so much on who the beneficiaries are but rather on what the specific duties are. This should

²⁹³ See Tables 3.15 and 4.2.

however be qualified. If the broader society and the environment could be seen as beneficiaries, then the answers to this question would be directly relevant.

Table 4.4: Interpretation matrix representing fiduciary responsibility scenarios emerging from the question of to whom pension fund trustees owe their fiduciary responsibility vs forms of responsible investment.

	Forms of responsible investment	
Question 2 scenarios (Table 3.31)	Business case form	Social form
The members (LS and PFTs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The fund itself (LS and PFTs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The members and the employer (PFTs only)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The members as a collective entity (LS and PFTs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The members, pensioners (present & future) and beneficiaries (LS and PFTs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties

Note: LS = legal sources; PFTs = pension fund trustees

Table 4.5: Interpretation matrix representing fiduciary responsibility scenarios emerging from the question of to whom asset managers owe their fiduciary responsibility vs forms of responsible investment

	Forms of responsible investment	
Question 2 scenarios (Table 3.34)	Business case form	Social form
The members of the fund (LS and AMs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The fund itself (LS and AMs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The industry (LS only)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The fund, the members, government and beneficiaries (AMs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The investors, pension fund shareholders, employees, society and the environment (AMs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties

Note: LS = legal sources; AMs = asset managers

Table 4.6: Interpretation matrix representing fiduciary responsibility scenarios emerging from the question of to whom asset consultants owe their fiduciary responsibility vs forms of responsible investment

	Form of responsible investment	
Question 2 scenarios (Table 37)	Business case form	Social form
Silence (LS only)	Possibly a barrier – depends on how the silence is interpreted	Possibly a barrier – depends on how the silence is interpreted
The fund itself (LS and ACs)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The industry (LS only)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
The members of the fund (ACs only)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
First the members then the trustees (ACs only)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties
First the trustees then the members (ACs only)	Possibly a barrier – depends on specific duties	Possibly a barrier – depends on specific duties

Note: LS = legal sources; AC = asset consultant

4.4 QUESTION 3: DESCRIBE THE FIDUCIARY DUTIES OF THE KEY ROLE PLAYERS IN THE PENSION FUND INVESTMENT CHAIN

In this section, the crucial matrices are displayed on the basis of the preceding argument that the barriers depend not so much on who the beneficiaries are, but rather on what the specific duties are. This is because these matrices will provide the platform for actually addressing the overall research question (*Does fiduciary responsibility create barriers to the implementation of responsible investment in the South African pension fund investment chain?*); they are found in Tables 4.7 to 4.9.

Table 4.7 illustrates the many possible barriers to responsible investment that exist, particularly for pension fund trustees. It also illustrates that the legal sources and the pension fund trustees were in agreement on five duties, of which three are generally recognised common law fiduciary duties. These duties can be divided into those that are generally recognised²⁹⁴ and those that are generally not.

²⁹⁴ See Table 3.32.

Table 4.7: Interpretation matrix representing fiduciary responsibility scenarios emerging from the question of what are pension fund trustees' fiduciary duties vs forms of responsible investment

	Forms of responsible investment	
Question 3 scenarios (Table 3.32)	Business case form	Social form
A duty to act in the best interests of beneficiaries (LS and PFTs)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
A duty to act in good faith (LS and PFTs)	Possibly a barrier – depends on the definition of “good faith”	Possibly a barrier – depends on the definition of “good faith”
A duty to not exceed powers (LS and PFTs)	Possibly a barrier – depends on the content of the investment mandate and the content of applicable legislation	Possibly a barrier – depends on the content of the investment mandate and the content of applicable legislation
A duty to not make any secret profit – (LS)	No barrier	No barrier
A duty to avoid conflicts of interest (LS)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
A duty to disclose (LS and PFTs)	No barrier	No barrier
A duty to act with impartiality (LS)	No barrier	No barrier
A duty to maintain an unfettered discretion – (LS)	No barrier	No barrier
A duty to act for a proper purpose – (LS)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
A duty to act with due care and diligence (LS and PFTs)	Possibly a barrier – depends on the definition of “care” and “diligence”	Possibly a barrier – depends on the definition of “care” and “diligence”
Measure against correct benchmarks – (PFTs only)	No barrier	No barrier
Ensure that benefits are paid (PFTs only)	No barrier	No barrier
Investing in a responsible manner (PFTs only)	Possibly a barrier – depends on the definition of “responsible manner”	Possibly a barrier – depends on the definition of “responsible manner”
Make sure investment returns are adequate to cover liabilities (PFTs only)	No barrier	No barrier
Administrative tasks (PFTs only)	No barrier	No barrier
Mitigate risks (PFTs only)	Possibly a barrier – depends on the definition of “risks”	Possibly a barrier – depends on the definition of “risks”
No hidden agendas (PFTs only)	No barrier	No barrier
Balance risk and return (PFTs only)	Possibly a barrier – depends on the definition of “risk and return”	Possibly a barrier – depends on the definition of “risk and return”

Note: LS = legal sources; PFTs = pension fund trustees

The duty to act in the best interests of beneficiaries poses a theoretical barrier to both forms of responsible investment in the following ways. On the one hand, if the duty to act in the best interests of beneficiaries is interpreted as meaning that a concern with ESG issues is considered to be more in the interests of beneficiaries than better financial returns, it presents a barrier to the “business case” form of responsible investment. On the other hand, however, if the duty to act in the best interests of beneficiaries is interpreted as meaning that risk-adjusted financial returns should be maximised, it presents a barrier to the social form of responsible investment. Table 4.7 also illustrates that the duty to avoid conflicts of interests could pose a barrier to either form of responsible investment, depending on the interpretation of best interests. This is because the question of whether interests are conflicting will depend on the interpretation of what those interests are.

The duty to act in good faith could present a barrier to the business case form of responsible investment if good faith means that ESG issues should be considered over and above financial return. Consequently, if good faith is interpreted as meaning that risk-adjusted financial returns should be maximised, then it presents a barrier to the social form of responsible investment. The possible barriers that these two duties present will stay the same for the other two role players as well.

The duty to not exceed one’s powers also presents a barrier to the business case form of responsible investment if the investment mandate or applicable legislation, for instance, requires that ESG issues should be considered above all else. On the other hand, this duty could also pose a risk to the social form of responsible investment if the mandate states that risk-adjusted returns should be maximised.

The duty to act for a proper purpose could also present barriers to either the forms of responsible investment, depending what is constituted as a “proper purpose”. It has been suggested in Section 1.2.2, where short descriptions of the generally recognised fiduciary duties were provided, that every action of the fiduciary could be examined in order to determine whether it was done for a “proper purpose”. Still, the question

that remains is whether the action was in the best interests of beneficiaries. These barriers will therefore also depend on the definition of “best interests”.

Apart from the generally recognised common law duties, four other duties mentioned by trustees could also present barriers to both of these forms of responsible investment. These barriers exist primarily in the minds of trustees, because they are not explicitly mentioned in the legal sources. Nevertheless, whether these barriers are factual legal barriers is not of concern; the issue here is the fact that these barriers might exist.

These duties could all present a barrier to the business case form of responsible investment if they are interpreted as meaning that ESG issues should be considered despite their influence on financial returns. On the other hand, these duties could also present a barrier to the social form of responsible investment if they are interpreted as meaning that risk-adjusted financial returns should be maximised.

Table 4.8 illustrates that the same barriers exist for the generally recognised common law fiduciary duties for asset managers as for pension fund trustees.²⁹⁵ If the duty to take care or be diligent means that ESG issues are so important that they should be considered above financial return then this would pose a barrier to the business case form of responsible investment. Conversely, if the duty to act with due care and diligence includes getting the best possible risk-adjusted financial returns for the beneficiaries, it would pose a barrier to the social form of responsible investment.

Asset managers also listed a number of other duties, besides the generally recognised common law fiduciary duties, which they view as fiduciary duties. Four of these other duties present possible barriers to the implementation of responsible investment, depending on how these duties are defined. Again, these duties could pose a barrier to the business case form if they are interpreted to mean that the concern with ESG issues should be considered when making investment decisions despite their influence on financial returns. They could also present a barrier to the social form of responsible

²⁹⁵ Also see the preceding section.

Table 4.8: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the question of what asset managers' fiduciary duties are vs forms of responsible investment

	Forms of responsible investment	
Question 3 scenarios (Table 3.35)	Business case form	Social form
A duty to act in the best interests of the beneficiaries (LS and AMs)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
A duty to act in good faith (LS and AMs)	Possibly a barrier – depends on the definition of “good faith”	Possibly a barrier – depends on the definition of “good faith”
A duty to not make any secret profit – (LS and AMs)	No barrier	No barrier
A duty to avoid conflicts of interest (LS and AMs)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
A duty to disclose (LS and AMs)	No barrier	No barrier
A duty to not exceed one's powers (LS and AMs)	Possibly a barrier – depends on the content of the investment mandate and the content of applicable legislation	Possibly a barrier – depends on the content of the investment mandate and the content of applicable legislation
A duty to maintain an unfettered discretion – (LS)	No barrier	No barrier
A duty of impartiality (LS)	No barrier	No barrier
A duty to act for a proper purpose (LS)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
The duty to act with due care and diligence (LS and AMs)	Possibly a barrier – depends on the definition of “care” and “diligence”	Possibly a barrier – depends on the definition of “care” and “diligence”
Ethical responsibility (AMs only)	Possibly a barrier – depends on the definition of “ethical responsibility”	Possibly a barrier – depends on the definition of “ethical responsibility”
To educate, advocate and train in ethics – (AMs only)	No barrier	No barrier
Gatekeepers (AMs only)	Possibly a barrier – depends on the definition of “gatekeepers”	Possibly a barrier – depends on the definition of “gatekeepers”
Moral background (AMs only)	No barrier	No barrier
Behave in trust (AMs only)	No barrier	No barrier
Deal fairly in the capital markets (AM's only)	No barrier	No barrier
Provide value-for-money service (AMs only)	Possibly a barrier – depends on the definition of “value for money”	Possibly a barrier – depends on the definition of “value for money”
Look after assets in diligent and responsible way (AMs only)	Possibly a barrier – depends on the definition of “diligent and responsible”	Possibly a barrier – depends on the definition of “diligent and responsible”

Note: LS = legal sources; AMs = asset managers

investment if they were interpreted as meaning that risk-adjusted financial returns should be maximised.

Table 4.9 indicates that there are five generally recognised common law fiduciary duties that present a barrier to both forms of responsible investment for asset consultants. These duties include a duty to act in the best interests of beneficiaries; a duty to act in good faith; a duty to avoid conflicts of interest; a duty to not exceed one's powers and a duty to act for a proper purpose. These duties and the potential barriers they present to the implementation of responsible investment were discussed in the preceding sections on pension fund trustees and asset managers.

Table 4.9 also illustrates the fact that two other duties, which were mentioned either in the legal sources or by the asset consultants themselves, could possibly present barriers to the implementation of responsible investment. These duties could pose a barrier to either form of responsible investment, depending on how these duties are interpreted. Further, these duties can also present a barrier to the business case form of responsible investment if they are interpreted as meaning that ESG issues should be considered regardless of their influence on financial returns, as well as the social form of responsible investment if they are interpreted as meaning that risk-adjusted financial returns should be maximised.

Table 4.9: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the question of what asset consultants' fiduciary duties are vs responsible investment forms

	Forms of responsible investment	
Question 3 scenarios	Business case form	Social form
Silence	No barrier	No barrier
A duty to act in the best interests of beneficiaries (LS and ACs)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
A duty to act in good faith (LS)	Possibly a barrier – depends on the definition of “good faith”	Possibly a barrier – depends on the definition of “good faith”
A duty to avoid conflicts of interests (LS and ACs)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
The duty not to make any secret profit – (LS)	No barrier	No barrier
A duty to disclose (LS and ACs)	No barrier	No barrier
A duty to not exceed one's powers (LS)	Possibly a barrier – depends on the content of the investment mandate and the content of applicable legislation	Possibly a barrier – depends on the content of the investment mandate and the content of applicable legislation
A duty to maintain an unfettered discretion – (LS)	No barrier	No barrier
A duty to act with impartiality (LS)	No barrier	No barrier
A duty to act for a proper purpose (LS)	Possibly a barrier – depends on definition of “best interest”	Possibly a barrier – depends on definition of “best interest”
The duty to act with due care and diligence (LS)	Possibly a barrier – depends on the definition of “care” and “diligence”	Possibly a barrier – depends on the definition of “care” and “diligence”
The duty to seek information (LS)	No barrier	No barrier
The duty to give advice (ACs only)	No barrier	No barrier
The duty to educate trustees (ACs only)	No barrier	No barrier
The duty to help trustees do a good job – (ACs only)	No barrier	No barrier
The duty to compile the investment strategy (ACs only)	Possibly a barrier – depends on what the investment strategy is	Possibly a barrier – depends on what the investment strategy is
The duty to give advice on the investment strategy – (ACs only)	No barrier	No barrier

Note: LS = legal sources; ACs = asset consultants

It has been established in Sections 1.2.2, 3.2 and 3.3 that the two duties which are almost universally recognised are the duty to act in good faith and the duty to act in

the best interests of beneficiaries, my attention now turns to these.²⁹⁶ Table 4.10 presents the interpretations of the duty to act in good faith. As discussed previously, Table 3.28 illustrated that the only description of good faith where an intersection occurred between all the role players was where this duty was described as acting in the best interests of beneficiaries.

Table 4.10: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the descriptions of good faith received from all the key role players

	Form of responsible investment	
Good faith interpretation	Business case form	Social form
Knowledge and skills	Possibly a barrier – depends on definition of “knowledge and skills”	Possibly a barrier – depends on definition of “knowledge and skills”
No self-interest	No barrier	No barrier
The outcome must benefit the role player	Possibly a barrier – depends on definition of “benefit”	Possibly a barrier – depends on definition of “benefit”
Making investments with the best possible information available	No barrier	No barrier
The duty to act in the best interests of beneficiaries	Possibly a barrier – depends on definition of “best interests”	Possibly a barrier – depends on definition of “best interests”
Trustworthy, reliable, faithful and responsible	Possibly a barrier – depends on definition of these terms	Possibly a barrier – depends on definition of these terms
Integrity	Possibly a barrier – depends on the definition of “integrity”	Possibly a barrier – depends on the definition of “integrity”
Transparency	Possibly a barrier – depends on the definition of “transparency”	Possibly a barrier – depends on the definition of “transparency”
Ethics	Possibly a barrier – depends on the definition of “ethics”	Possibly a barrier – depends on the definition of “ethics”
Accountability	No barrier	No barrier
Fulfil promises	Possibly a barrier – depends on the definition of “fulfil promises”	Possibly a barrier – depends on the definition of “fulfil promises”
Moral code	Possibly a barrier – depends on the definition of “moral code”	Possibly a barrier – depends on the definition of “moral code”
Behaviour and intentions	Possibly a barrier – depends on the definition of “behaviour and intentions”	Possibly a barrier – depends on the definition of “behaviour and intentions”

²⁹⁶ See Tables 4.10 and 4.11.

The reduced set of data, obtained from the set comparisons done in Section 3.4,²⁹⁷ therefore suggests that the interpretation of good faith depends on the interpretation of the duty to act in the best interests of beneficiaries. This also contributes to the notion that the duty to act in the best interests of beneficiaries is representative of all other fiduciary duties.²⁹⁸ Nevertheless, what remains is the fact that there are indeed possible barriers to responsible investment with regards to how the duty to act in good faith is interpreted by the key role players in the pension fund investment chain.²⁹⁹

In this study, the final step in the data reduction process is the focus on the possible interpretations of the duty to act in the best interests of beneficiaries. This specific focus is justified, since it was already suggested at the outset of this study³⁰⁰ that this duty is viewed as an overarching fiduciary duty. It was also the only duty where an intersection occurred between the two sets of research (Phase I and Phase II) and in all three groups of role players.

However, the final matrix is different in that it only presents two possible interpretations for “best interests”, as opposed to including all the descriptions provided for this duty in this study. As has already indicated, this was the very last step of the data reduction process. This was justified because the coding process throughout this study continually presented these two recurring themes.

The first theme identified in this study is the view that best interests refers to maximising risk-adjusted financial returns. This interpretation was expressed in the legal sources,³⁰¹ as well as in the interviews with practitioners.

²⁹⁷ See specifically Table 3.28.

²⁹⁸ Also see Sections 1.2.2, 3.2, 3.2 and 3.4.

²⁹⁹ See Table 4.10.

³⁰⁰ See Chapter 1 Section 1.2 and specifically Section 1.2.4 where it is stated that the background literature points to the fact that the duty to act in the best interests of the beneficiary is viewed as an overarching fiduciary duty.

³⁰¹ See Chapter 1, Section 1.2.2. Also see *Browne v South African Retirement Annuity Fund and Others* [2006] 4 BPLR 311 (PFA). In this case the court compared the relative financial position of the trustees with and without the breach of fiduciary responsibility.

The second theme is that best interests might well imply pursuing other forms of return (e.g. a healthy physical environment and a healthy society) hence sacrificing a financial return. This was also established in the practitioners' interpretations, where it was explicitly stated that "best interests" does not necessarily mean "maximising growing assets".

Table 4.11 presents these two basic interpretations on the duty to act in the best interests of beneficiaries concluded from this study. The first interpretation is the interpretation where "best interests" is replaced with "maximising risk-adjusted financial return". The second interpretation, on the other hand, came primarily from the interviews with the key role players.

As a result, if seeking the best interests of beneficiaries is about "other returns" there will be a barrier to the business case form of responsible investment. On the other hand, when best interests means maximising risk-adjusted financial returns, there is clearly a barrier to the pursuit of the social form of responsible investment.

Table 4.11: Interpretation matrix representing the fiduciary responsibility scenarios emerging from the descriptions of best interests received from all the legal sources and the key role players

	Form of responsible investment	
"Best interest" interpretation	Business case form	Social form
Maximising risk-adjusted financial returns (LS & KRPs)	No barrier	Barrier
Other returns (KRPs)	Barrier	No barrier

Note: LS = Legal sources; KRPs = Key role players

4.5 CONCLUSION

The purpose of this chapter was to further reduce the data and draw conclusions from the results that were displayed in Chapter 3. This was done in order to provide answers to the overall research question. Special interpretation matrices were used to draw the two key concepts of this dissertation together and to address this research question.

This chapter was presented in three major parts, which were aligned with the three key questions that were used throughout this study to inform the interpretations of fiduciary responsibility. Firstly, the data reduction process indicated that there can only be a barrier to the implementation of responsible investment if the key role players are fiduciaries. Secondly, it indicated that the barrier will not be determined by the fiduciary or the beneficiary of the fiduciary responsibility, but rather by the content and meaning of the fiduciary duties. Thirdly, it indicated that the duty to act in the best interests of beneficiaries is an overarching fiduciary duty.

As a result, the final and concluding interpretation matrix³⁰² displayed the two main interpretations of this duty concluded from this study, as they relate to the two forms of responsible investment described in this dissertation. This final interpretation matrix illustrates that there are indeed possible barriers to both forms of responsible investment, depending on the interpretation of best interests. If best interests imply that other returns should be sought then there is a barrier to the business case form of responsible investment. However, if best interests stand for maximising risk-adjusted financial returns, then there is a barrier to the social form of responsible investment.

The notion of what the best interests of beneficiaries might entail was recently considered by Richardson.³⁰³ In his exploration of this concept, one of the key issues that were addressed was how these best interests can be determined. Accordingly, the determination of the best interests of beneficiaries is also one of the major concerns identified in this dissertation. It is therefore suggested that this could be a theme for future research in the South African pension fund context.

³⁰² See Table 4.11.

³⁰³ Richardson “From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries” 5–19. He mentions a number of ways in which this could be done: “finding unanimity; following social customs; third-party stakeholders; consultation with and representation of beneficiaries”.

CHAPTER 5: CONCLUSION

The purpose of this study was to answer the question of whether fiduciary responsibility creates barriers to the implementation of responsible investment, specifically for the key role players in the pension fund investment chain of South Africa. Although this question has been addressed in research elsewhere, the focus was never on the key role players in the South African pension fund investment chain.

The research question clearly contains two key concepts: fiduciary responsibility and responsible investment. Accordingly, two specific interpretations of responsible investment were described at the beginning of this dissertation in Chapter 1: a business-case³⁰⁴ form and a social form. The interpretations and descriptions of fiduciary responsibility are contained in Section 1.2 and Chapter 3 of this dissertation.

In order to address the research question, the research was divided into three distinct phases of qualitative research. Phases I and II were dedicated to describing fiduciary responsibility in terms of the key role players in the pension fund investment chain in South Africa, while Phase III consisted of conclusion-drawing and verification. In order to draw these conclusions, a systematic data reduction process was performed, firstly, by making comparisons between Phase I and II, and finally, by means of special interpretation matrices,³⁰⁵ where the two key concepts were integrated.

This process included the use of a research journal and field notes throughout Phases I, II and III in order to note recurring themes. It also involved a coding process during which the data gathered from the interviews conducted in Phases I and II was coded. Throughout this process, the background literature, which was discussed in Chapter 1 of this dissertation, was used to form a framework for the study and, in addition, a literature control was performed, especially with regard to the notion of the generally recognised common law fiduciary duties. After the coding process was complete, the data was further reduced, using interpretation matrices to display the data in a format that is easy to assimilate.

³⁰⁴ Richardson “Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability” 555.

³⁰⁵ See Section 2.4.2.

The data reduction process indicated that there can only be a barrier to the implementation of responsible investment if the key role players are fiduciaries. It further indicated that the barrier will not be determined by the fiduciary or the beneficiary of the fiduciary responsibility, but rather by the content and meaning of the fiduciary duties. It was subsequently illustrated that a number of the generally recognised common law fiduciary duties and some of the other duties mentioned by the practitioners present barriers to the implementation of responsible investment; hence, potential fiduciary barriers not only arise from the current South African legal framework (as presented in the legal sources), but also exist in the minds of the key role players in the pension fund investment chain.

In addition, the data reduction process uncovered four prominent issues in the context of the fiduciary responsibility of the key role players in the South African pension fund investment chain. Firstly, the legal sources in South Africa are not particularly explicit on the fiduciary duties of the key role players, especially not about the fiduciary duties for asset managers and asset consultants. This observation could point to the notion that pension fund law in South Africa is inadequate and that the specific duties of all the key role players in the pension fund investment chain should be outlined more clearly in pension law. On the other hand, it is entirely possible that the vagueness of the legislation in respect of fiduciary responsibility is intended by the legislature in order to create space for specific situations to be interpreted in case law.³⁰⁶

³⁰⁶ In the meantime, the revised Regulation 28 was produced in which the words “fiduciary duty” are mentioned explicitly; in addition it states that fiduciary responsibility includes the consideration of ESG issues in investment decisions. This demonstrates two things: there was a definite gap concerning the issue of fiduciary responsibility in the pension fund industry and this has been identified and addressed by the legislature. It also proves that there was a need for the research question in this study to be addressed. The fact that the revised Regulation 28 was published after the research project was concluded and its possible influence on this study is considered in an epilogue (Fiduciary responsibility: new developments in legislation) that follows these concluding remarks.

Secondly, the fiduciary duties for the different types of pension fund might differ, but this is not acknowledged in the legal sources.³⁰⁷ This study pointed to the fact that the main difference between DB and DC funds are the bearers of the risk.³⁰⁸ In DB funds the sponsoring employer takes on the risk and in DC funds it is the members themselves that carry the risk. A logical conclusion would therefore be that a fiduciary responsibility is owed to the sponsoring employer by all the key role players in the pension fund investment chain in the case of a DB fund and to the members in a DC fund. The members' choice also becomes a major issue for DC funds, as one could reasonably expect that a person should have more control if they carry more risk.

Thirdly, a recurring dispute that was identified in Sections 1.2.2 and 3.4 of this dissertation is whether the duty of care and diligence is indeed a fiduciary duty. It was suggested that laymen might not be able to differentiate between this duty and the generally recognised common law fiduciary duties; although the legal position in South Africa might be that the duty of care is a separate duty. The notion that people generally think of this duty as a fiduciary duty was also revealed in the interviews with the key role players in the pension fund investment chain, because this duty was listed a number of times when they were asked to describe their fiduciary duties.

Fourthly, it was indicated that the duty to act in the best interests of beneficiaries is an overarching fiduciary duty. For this reason, the possible interpretations of the duty to act in the best interests of beneficiaries were used in the final and concluding interpretation matrix (Table 4.11) as representing the interpretations of fiduciary responsibility gathered from this study. The two most likely interpretations of best interests that were deducted from the interviews with legal sources and the key role players were either "maximising risk adjusted financial returns" or "seeking other returns".

This study consequently points to three burning questions that still need answers within the pension fund law landscape of South Africa. The first is whether the fiduciary responsibility of the key role players in the pension fund investment chain

³⁰⁷ Also see Section 3.2.

³⁰⁸ See Section 1.1.

should be outlined in legislation more clearly. The second is whether fiduciary responsibility for the key role players would differ for a DB as supposed to a DC fund. The third is whether the best interests of pension fund members can be defined and, if so, how these interests can be determined. It will only be possible for the fiduciaries in the pension fund investment chain to act in the best interests of beneficiaries if they know and understand the “interests” of these beneficiaries.

Finally, this study illustrated that, contrary to popular rhetoric,³⁰⁹ fiduciary responsibility can be a barrier to the pursuit of responsible investment. This study clearly illustrated that a number of the fiduciary duties of the key role players in the pension fund investment chain present possible barriers to the implementation of responsible investment. The answer to the overarching research question is therefore: it depends. Under certain interpretations of fiduciary responsibility and some interpretations of responsible investment, there are barriers to the implementation of responsible investment, while for other interpretations there are no barriers.

³⁰⁹ Freshfields *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*.

CHAPTER 6: EPILOGUE

6.1 FIDUCIARY RESPONSIBILITY: NEW DEVELOPMENTS IN PENSION FUND LEGISLATION

The revised Regulation 28³¹⁰ was published in *Government Gazette* 34070 on 4 March 2011 and came into effect on 1 July 2011. It seems to have caused a significant amount of discussion in the pension fund industry, especially with regard to the question of whether fiduciaries have a fiduciary responsibility to consider ESG issues when investing pension fund money.³¹¹ The burning issue with regard to this dissertation is how the revised Regulation 28 would influence the answers to the three key questions used throughout this study to inform the definitions, descriptions and interpretations of fiduciary responsibility.

In other words, would the answers from the South African legal sources and the key role players be different, if the interviews had been done after the publication of the revised Regulation 28. Obviously, it is not possible to address these questions in their entirety in an epilogue, but it is necessary to consider at least the following three key questions, which can be put to the revised Regulation 28. In other words, what can be provided in this section are answers to the following questions as obtained from the revised Regulation 28:

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

³¹⁰ In terms of s 36 of the Pension Funds Act, The Minister of Finances is entitled to make regulations that are not inconsistent with the provisions of the Act. These regulations are published from time to time in the *Government Gazette*.

³¹¹ Cameron "Revisions to Regulation 28" <http://www.iol.co.za/business/personal-finance/financial-planning/investments/revisions-to-regulation-28-1.1105151>. Date accessed: 2011-11-07.
Stokes "Everything you need to know about Regulation 28".
<http://www.acsis.co.za/knowledge/Pkdownloaddocument.aspx?docid=3343>. Date accessed: 2011-11-07.

It is not, however, possible to conclude how the Revised Regulation 28 has changed the perspectives and opinions of the key role players with regard to fiduciary responsibility, as this would require a completely new research project.

It is also essential to acknowledge at the outset of this discussion that regulations to statutes are “delegated or subordinate legislation”,³¹² which, should not be in conflict with original legislation.³¹³ At this stage it is still unclear whether the revised Regulation 28 is in conflict with the Pension Funds Act and this question should be answered by the courts. I can, however, speculate that there are some conflicts: the fact that the Act defines a benefit as “an amount payable” suggests that the legislature places a purely financial connotation on the word benefit. Yet, the revised regulation forces fiduciaries to consider ESG issues. Considering these issues might be beneficial on many levels, especially in terms of the conscience of the investor, but it might have a negative impact on financial return. This might mean that the revised regulation is in conflict with the Act.³¹⁴

Consequently, even if the revised Regulation 28 could potentially provide different answers to the three key questions to the ones obtained from the South African legal sources, as discussed in Chapter 3 of this dissertation, it still would not mean that the overall answers from the South African legal sources would change. It is suggested that the major difference between the legal sources that were questioned in Chapter 3, and the revised Regulation 28, is the fact that the words “fiduciary duty” are mentioned explicitly in the revised Regulation 28 (and the fact that it is mentioned together with the consideration of ESG issues, is most possibly also the reason for the stir it has caused). However, these words appear in the preamble to the revised

³¹² See Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* 373–376. On page 374 it is specifically stated that “even where a statute provides that the regulations made under it are part of the enactment, it must not be treated as a unitary piece of legislation and the regulations shall not be used as an aid to interpreting any of the statutory provisions, nor can the regulations be used to extend the meaning of the enactment”.

³¹³ See Du Plessis *The Interpretation of Statutes* 16.

³¹⁴ The issue of the definition of the word “benefit” in the Pension Funds Act and its limitations and consequences are discussed later on in this epilogue as well.

Regulation 28. Although the preamble is seen as part of the full text of an enactment, its intention is mainly to set out the purpose of the Act or, in this case, the Regulation. Furthermore, it is said that the preamble should only be used to interpret an Act “with regard to the obscure meaning of provisions in an Act”, but that the “preamble cannot be used when the enacting clause is clear and plain”.³¹⁵ It can, of course, be argued in this specific case that the inclusion of the term *fiduciary duty* in the revised Regulation 28 is significant, specifically because it is not mentioned in the Pension Funds Act and because it serves to address what might appear to be a gap in the Pension Funds Act. Furthermore, the purpose of Regulation 28 should always be at the forefront when considering the impact it has on the whole Act. The main purpose of Regulation 28 is to provide limits for a pension fund’s investment into different asset classes. Therefore, it still remains unclear to what extent the law on fiduciary duty in the pension fund industry has now changed.

The following section only includes the answers to the three key questions from the revised Regulation 28. Two sections will follow below – the first section contains the answers to the key questions for trustees and the second the answers to the key questions for asset managers and asset consultants. The latter two role players are grouped together in one section to avoid duplication, as the answers to the questions for both these role players are the same.

6.2 TRUSTEES

The answers to all three the key questions as they relate to pension fund trustees, are found in the preamble to the revised Regulation 28. This preamble commences by saying that:

A fund has a fiduciary duty to act in the best interests of its members whose benefits depend on the responsible management of fund assets. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn adequate risk adjusted returns suitable for the fund’s specific member profile, liquidity needs and liabilities. Prudent investing should give appropriate

³¹⁵ See Du Plessis *The Interpretation of Statutes* 13–16. Also see Kellaway *Principles of Legal Interpretation of Statutes, Contract and Wills* 260.

consideration to any factor which may materially affect the sustainable long-term performance of fund's assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of the fund in a stable and transparent environment.³¹⁶

On the first question of whether trustees are fiduciaries, the revised Regulation 28 provides a relatively clear answer. It is said that “[a] fund has a fiduciary duty ...” Although a pension fund is seen as a legal entity, the fund cannot act on its own and is therefore represented by a board of trustees. Consequently, it is this board of trustees that has that fiduciary duty and it is reasonable to conclude that having a fiduciary duty means you are a fiduciary.

With regard to the second question as to whom the trustees owe their fiduciary responsibility, the same sentence applies. It is stated that “[a] fund has a fiduciary duty to act in the best interests of its members whose benefits depend on the responsible management of fund assets”. This sentence highlights the fact that the fiduciary duty is owed to the members. The answer to the second question, according to the revised Regulation 28, is therefore that the trustees owe their fiduciary responsibility to the members of the fund. This answer is in line with what was found in the other legal sources, although other parties were also listed in some of these sources.³¹⁷

The above-mentioned sentence also highlights the idea that “to act in the best interest of” is viewed as an overarching fiduciary duty. This idea leads to the third question of what the trustees’ fiduciary duties are. The answer to this question is also found in the section from the preamble quoted above. The duty to act in the best interests of members is mentioned unambiguously and the meaning of this duty is then described a little further on in the sentence that follows.³¹⁸ This explanation seems to state that the duty to act in the best interests of members in the pension fund context is to adopt

³¹⁶ *Government Gazette* Vol. 549 Pretoria, 4 March 2011, 34070 5.

³¹⁷ See Chapter 3 Section 3.2 where the answers obtained from the legal sources are described.

³¹⁸ See the quoted section of the preamble on page 132.

a “responsible investment approach” and that this approach includes earning “adequate risk adjusted returns”.

Of particular importance are the term *adequate* and the way such a term would be interpreted by our courts. It is, however, possible to speculate on an interpretation by reflecting on the meaning of another specific piece of the sentence, “... whose benefits depend on a responsible investment approach”. If the members’ benefits depend on the type of investment approach and the word *benefit* is defined as “amount payable”³¹⁹ in the Act, the issue seems to be purely a financial one. In my view, it seems to say that the investment approach should be responsible in the sense that it should ensure a good “amount payable”. It does not seem to refer to the “social” form of responsible investment as described in this dissertation.

Therefore, the revised Regulation does seem to allude to the “business case” form of responsible investment as expressed in this dissertation and elsewhere,³²⁰ in the sense that ESG issues should be considered in so far as they influence returns. The fact that the definition of the word *benefit* in the Pension Fund Act is still unchanged further supports the notion that benefit has a purely financial meaning and that if other issues are considered over financial return, one would be infringing those members’ benefits.

The term *prudent investing* is also discussed in the following section of the preamble. This term takes us back to the fact that authors like Richardson refer to the duty of care and diligence in the context of investment as “the prudent investor rule”.³²¹ Whether this specific discussion could be a reference to the duty of care is not clear, but a case could be made for this argument.

³¹⁹ In the Pension Funds Act the word *benefit* is defined as, “in relation to a fund, [it] means any amount payable to a member or beneficiary in terms of the rules of that fund”.

³²⁰ See Chapter 1 Section 1.4.3 which describes that for the purposes of this dissertation I acknowledge at least two forms of responsible investment and that one of these is the business case form. This term was originally coined by Richardson, as described in Section 1.4.3.

³²¹ See Chapter 1 Section 1.2.2, where the legal duties of a fiduciary are discussed in detail. In this section the dichotomy that exists in legal literature around the issue of whether the duty of care is indeed an original fiduciary duty is described and it is explained that Richardson also refers to this duty as the prudent investor rule.

An “Explanatory Memorandum on the Final Regulation 28 that gives effect to section 36(1)(b) of the Pension Funds Act 1956” was also published in the *Government Gazette* of 4 March 2011. A discussion on the preamble and the principles of the Revised Regulation 28 is provided in this memorandum and is also useful for analysing the trustees’ fiduciary responsibility further according to the revised Regulation 28. An excerpt from the section is included below for exactly the same purpose as an explanatory memorandum is compiled in the first place: to provide the reader with guidance and explanations in order to better understand the revised Regulation 28:

A preamble frames the Regulation. It highlights the fiduciary responsibility of a retirement fund’s board to invest members’ savings in a way that promotes the long-term sustainability of the asset values when taking into account environmental, social and governance (ESG) issues. Read together with the principles, the preamble represents a new approach to Regulation 28, and better guides trustees to consider what investment strategy would be appropriate for the specific nature and obligations of their fund. Recognition is given to the fact that an overly conservative investment strategy (dominated for example by cash and non inflation-linked bonds) can be as damaging to long-term savings as one that is overly exposed to perceived risky assets.

The memorandum does not shed any particular light beyond what is already apparent. It confirms the fact that trustees have a fiduciary responsibility and that this responsibility involves protecting of the “long-term sustainability” of the assets by considering ESG issues. As mentioned in this memorandum, the preamble to the revised Regulation 28 is nonetheless a “new approach”, because the term “fiduciary duty” is actually used and because it links this duty with the consideration of ESG issues. The question of to what extent ESG issues should be considered is, however, still open for interpretation. In this regard an explanation of the word *adequate* would be especially helpful, because it is not clear whether “adequate risk adjusted returns” is a reference to profit maximisation or not. Nonetheless, the indication is that the revised Regulation 28 supports the business case form of responsible investment. In other words, ESG issues should be considered in so far as they influence financial return.

6.3 ASSET MANAGERS AND ASSET CONSULTANTS

These role players are not expressly mentioned anywhere in the revised Regulation 28, nor is it said that they are fiduciaries. The revised Regulation 28 is therefore silent on the three key questions for asset managers and asset consultants.

The only reference to other role players in the revised Regulation 28 is in sub-regulation 2(d), where it is stated that:

(d) With the appointment of third parties to perform functions which are required to be performed in order to comply with the principles in (c) above, the fund retains the responsibility for compliance with such principles.

This sub-regulation therefore acknowledges the fact that it is common practice for pension funds to appoint third parties, but emphasises that the fund (represented by the trustees) cannot abdicate any of its responsibilities, including their fiduciary responsibility to any other party. There is, however, no reason why other fiduciary relationships and responsibility cannot emerge in addition to the trustees' responsibility. The idea that fiduciary relationships can emerge from a variety of situations depending on the specific facts was discussed in Section 1.2.1 of this dissertation. It was then explained that one can assume that such a relationship exists between the fund and asset managers, as well as asset consultants, based on the power and influence these role players have in terms of the decisions of a fund, because they act as agents and representatives of the fund. It is also important to acknowledge that the submission that was made in Section 3.2 that they are indeed fiduciaries, because legislation prescribes what are generally recognised to be fiduciary duties for these two role players.³²²

6.4 SUMMARY

While the preamble to the revised Regulation 28 might indeed frame certain important contextual considerations which pertain to responsible investment (as defined in this dissertation), these comments remain bound to the preamble with all of the legal

³²² See the Financial Advisory and Intermediaries Services Act 37 of 2002 and Financial Institutions (Protection of Funds) Act 28 of 2001. Also see Chapter 3, sections 3.2.2 and 3.2.3.

limitations inherent in it. In addition to this, the ambiguity surrounding the concept of adequate risk adjusted returns stands. This revised Regulation does not, therefore, bring about any significant changes to the definitions, descriptions and interpretations provided for the fiduciary responsibility of the key role players in the pension fund investment chain by the South African legal sources in this dissertation.

It might be possible to speculate that revised Regulation 28 has influenced the role players' perspectives on fiduciary responsibility. It should surely at least encourage trustees to consider ESG issues. However, it is not reasonable to draw any conclusions with regard to how the revised Regulation 28 would have influenced the answers to the overall research question in this dissertation.

In summary, the revised Regulation 28 only confirms my earlier submissions that

- pension fund trustees are fiduciaries
- they owe their fiduciary duties to the members of the fund
- their overall fiduciary duty is to act in the best interests of beneficiaries
- the revised Regulation 28 (as the other legal sources) is explicitly silent on the fiduciary responsibility of the other two role players.

What makes the revised Regulation 28 “new” then? It describes the duty to act in the best interests of beneficiaries to include the implementation of a responsible investment approach which includes earning “adequate risk adjusted returns”. It is not, however, clear what the legislature intended with the use of the terms *responsible investment approach* and *adequate risk adjusted returns*.

This revised Regulation also mentions the fact that ESG issues must be considered in so far as these might be deemed material in achieving the adequate risk adjusted returns. This is all “new” in terms of what has been communicated by the legal sources up to this point. The difficulty, however, is that a “responsible investment approach” and “adequate” are not defined or described. Consequently, it is still not clear whether ESG issues are more important or should be considered over and above maximising financial return. Hence, it is uncertain whether the revised Regulation 28 therefore supports either one of the two forms of responsible investment as defined in

this dissertation. This, in turn, would mean that even if the revised Regulation 28 were to have been considered in this study, there would most probably still be two answers to the research question. In certain instances and under certain circumstances there will be no barrier to the implementation of either form of responsible investment, but under other circumstances there would indeed be a barrier.

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APPENDIX A

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18. *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (PFA)
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21. *Du Plessis v Lifestyle Retirement Annuity Fund and Another* [2005] 5 BPLR 383 (PFA)
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30. *Van der Linde v Telkom Retirement Fund* [2004] 11 BPLR 6257 (PFA)
31. *Kamaldien v Telkom Retirement Fund and Another* [2004] 9 BPLR 6072 (PFA)
32. *Wood v ABSA Group Pension Fund* [2004] 8 BPLR 6003 (PFA)

APPENDIX B

UNISA CCC/ Fiduciary Responsibility Study

Dear <name>

Thank you for making the time to participate in our Fiduciary Responsibility Study. Our interview time is confirmed for <time> on the <date>.

Please find attached a confidentiality agreement confirming that comments made during the interview will not be published in such a way that content can be linked to the interviewee.

I look forward to hearing your views.

Kind regards,
Rene Swart

UNISA Centre for Corporate Citizenship
Email: dklerri@unisa.ac.za
Phone: +27 (0) 12 429 3810

This agreement is made as of the , by and between:

RENE SWART
(**the Researcher**)
and
(**the Interviewee**),
of (**the Company**).

This Agreement shall govern the conditions of disclosure by **the Researcher** of any information provided by **the Interviewee** during the course of the Fiduciary Responsibility Study.

With regard to the above stated information, **the Researcher** hereby agrees:

1. To submit a transcript of the interview to **the Interviewee** for scrutiny and comment on content.
2. Not to publish any of the interview content in such a way that that content can be related to **the interviewee** (either in their personal capacity, or as a representative of **the Company**) without prior written consent of both **the Interviewee** and **the Company**.

The Researcher reserves the right to:

1. Publish the interview content as part of bulked statistical data or as anonymous quotes that can in no way be linked to **the Interviewee** or **the Company**, without prior written consent of either **the Interviewee** or **the Company**.

The Researcher agrees to the conditions of this Agreement as of the day and year first above written.



Rene Swart
Senior Researcher: UNISA Centre for Corporate Citizenship

Consent Form

The information gathered from me will be held in strictest confidence, and its primary use is in partial completion of the Research Project for the LLM degree at the Centre for Corporate Citizenship of the University of South Africa. I hereby agree that I will comply with the ethical principles set out in the UNISA Policy on Research Ethics. It is understood by me that the results hereof will be used for research purposes only, and that there are no known risks or dangers to me associated with this study.

Please circle one choice out of the two possibilities below (if research permission has been given):

- Rene Swart may conduct such research, drawing out trends and themes from my interview, and **MAY** use my name and appropriate quotations to highlight key areas/themes in the research, and in publication.
- Rene Swart may conduct such research, drawing out trends and themes from my interview, but **MAY NOT** use my name, and any other information that can uniquely identify me in the research, or in publication.

I acknowledge that I am participating in this study of my own free will. I understand that I may refuse to participate or stop participating at any time without penalty. I agree to hold the University of South Africa, and Rene Swart, harmless from any liability, loss or damage caused by my statements or materials furnished by me. If I wish, I will be given a copy of this release/consent form as well as a copy of the transcription of my interview.

PRINT FULL NAME & SIGN

DATE

EMAIL

TELEPHONE

Release Form

The information gathered from me will be held in strictest confidence, and its primary use is in partial completion of the Research Project for the LLM degree at the Centre for Corporate Citizenship of the University of South Africa. I hereby agree that I will comply with the ethical principles set out in the UNISA Policy on Research Ethics. It is understood by me that the results hereof will be used for research purposes only, and that there are no known risks or dangers to me associated with this study.

All participants received a confidentiality agreement before the interview was undertaken. The confidentiality agreement stated that the researcher reserves the right to publish the interview content as part of bulked statistical data or as anonymous quotes that can in no way be linked to **the Interviewee** or **the Company**, without prior written consent of either **the Interviewee** or **the Company**. The purpose of this release form is therefore to give all the participants the option to either withdraw or give that written consent. Please circle one choice out of the two possibilities below:

- Rene Swart may conduct such research, drawing out trends and themes from my interview, and **MAY** use my name and appropriate quotations to highlight key areas/themes in the research, and in publication.
- Rene Swart may conduct such research, drawing out trends and themes from my interview and use appropriate quotations, but **MAY NOT** use my name, and any other information that can uniquely identify me in the research, or in publication.
- Rene Swart may conduct such research, drawing out trends and themes from my interview, but **MAY NOT** use my name, quotations or any other information that can uniquely identify me in the research, or in publication.

I acknowledge that I am participating in this study of my own free will. I understand that I may refuse to participate or stop participating at any time without penalty. I agree to hold the University of South Africa, and Rene Swart, harmless from any liability, loss or damage caused by my statements or materials furnished by me. If I wish, I will be given a copy of this release form.

PRINT FULL NAME & SIGN

DATE

EMAIL

TELEPHONE