

Rollason, (Chairman and Independent trustee), Ray Welham (Independent Trustee), Francisco Khoza (Independent trustee), Clive Stuart (Trustee).

- 2. The statement is filed in response to the complaint, dated 10 May 2011, lodged in terms section 30A of the Pension Funds Act by Jonathan Mort Attorneys on behalf of the Employer and Member Complainants, collectively referred to herein as the "complainants".
- 3. Neither the Funds nor the current boards are cited as Respondents by the complainants, notwithstanding, the Funds wish to provide the Pension Funds Adjudicator ("the PFA") with comment and background for the benefit of the PFA, the Complainants and the Respondents. As the Funds have not been cited as a Respondent, it is submitted that no formal relief can be sought against the Funds.
- 4. The Funds also wish to make suggestions on who should receive notice of the complaint and on how the complaint should be resolved.
- 5. Where statements contained in the complaint pertain to the Funds but have not been canvassed herein, they are to be regarded as having been denied, and the Funds reserve their rights to deal with such issues at an appropriate stage.

The complainants

- 6. The complainants only represent a portion of the members of the Funds, yet every other member of the Funds has been equally affected by the grounds which give rise to this complaint.
- 7. This is relevant in that any relief or recovery finally obtained must ultimately be distributed equally to all the members' investments.

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Overview of complaint

8. The complaint has two legs, as described in paragraph 6 thereof. The first leg deals with the decision by the previous trustees (the First Respondents) to initiate the rebuild and the second is centred on the alleged maladministration of the Funds by certain previous trustees (the Second Respondents).

9. Regarding the second leg, the complainants submit that certain previous trustees failed to properly perform their oversight function in monitoring and supervising the conduct of its administrators, which action constitutes maladministration. It is submitted by the complainants that the maladministration caused the inaccuracies or unreliability of the Funds' records and the cost of the rebuild and that such trustees, effectively the group of trustees referred to as the Second Respondent, should be held accountable.

(The second leg -- references at paragraphs: 6, 26 to 31)

10. The complainants also submit that if the First Respondents had the power, which the complainants do not concede, to authorise the cost of the rebuild exercise, such power was improperly exercised because it resulted in the members of the IF Funds suffering the consequences of the failure of the board of trustees to perform a proper oversight function.

(The first leg -- references at paragraphs: 6 and 33).

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Notice to previous trustees

- 11. We attach a table reflecting the tenure of the previous and current trustees, annexure A.
- 12. The decision to effect the rebuild was taken in July 2010 by previous trustees: Gail le Grellier, Renier Botha, David Lepar and Carel Smith.
- 13. The liability of any trustees (the Second Respondent) responsible for maladministration should probably be limited to those previous trustees who were in office up to 1 February 2008 as the 2,5% contribution for the cost of the rebuild is calculated up to this date. 1 February 2008 is the date upon which Aon South Africa (Pty) Ltd ("Aon") took over the administration of the Funds records from the previous administrators, Dynam-ique SA Consultants and Actuaries (Pty) Ltd ("Dynam-ique").
- 14. The complaint was delivered by hand to the registered offices of the Funds on or about 12 May 2011 and was made out for the attention of Aon. Paragraph 1 of the covering note indicates that the complaint should be delivered to the registered address of the Funds by Aon.
- 15. The previous boards of trustees, and the previous trustees individually, both of whom are cited as Respondents, are separate entities to the Funds themselves.
- 16. The previous trustees must each receive formal notice of the complaint and be advised of the date by which they must respond to the complaint lodged. Currently, the obligation to provide notice to the Respondents has been passed on to the administrators, Aon, and the Funds.
- 17. As appears below, The Funds and the administrators have done their best to assist with the distribution of the complaint to previous trustees and the provision of the contact details of the previous trustees, but the process is not complete.

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18. The Second Respondent is broadly cited as "any former trustee... over the period relevant to complaint, whose identities are unknown." The complainants are thus themselves not sure which trustees should be provided with a copy of the complaint.
19. The Funds submit that, as will be evidenced from a discussion of the events below, the trustees who require notice of the complaint are:
- 12.1 Botha
 - 12.2 Jager
 - 12.3 Rosen
 - 12.4 Mol
 - 12.5 Kamionsky
 - 12.6 Murewa
 - 12.7 Stolterfoht
 - 12.8 Le Grellier (First Respondent)
 - 12.9 Lepar (First Respondent)
 - 12.10 Smith (First Respondent)
20. The complainants may wish to serve notice on additional trustees and to this end the attached table, annexure A, may assist.
21. Aon and the Funds have endeavoured to track down contact details of all the previous trustees, and have, where possible, provided the previous trustees with a copy of this complaint. The attached schedule, annexure B, indicates the contact details of the previous trustees and which trustees have been provided with a copy of the complaint. (Only Tammy Murewa's contact details have not been confirmed but the funds expect to obtain such shortly.)
22. The Respondents are not however aware of a date by which they are required to respond to the complaint and it is submitted that this needs to be properly coordinated and that the individual trustees must individually be provided with notice of such.

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- 23. It is submitted that the email list which emerges from the table can be utilised to advise the previous trustees of a date by which they must file a response. The Funds can supply additional details, such as phone numbers, if needed.
- 24. I attach a copy of an electronic correspondence, annexure B1, provided to the following previous trustees: Smith; Le Grellier; Lepar and Botha, advising them that the Funds would respond by 29 July 2011 (which date was extended by the PFA to 3 August 2011), but that the PFA would be asked to ensure that they are provided with adequate notice.
- 25. As the complainants seek to hold previous trustees accountable, both as first and second Respondents, and seek an order based on such accountability, it is crucial that in respect of such trustees:
 - 25.1 service of the complaint is confirmed,
 - 25.2 an opportunity to respond to the PFA is afforded to each of them,
 - 25.3 adequate notice of the date by which such response must be submitted to the PFA is confirmed with each trustee.

Mr Clive Stuart

- 26. Mr Clive Stuart was appointed as a trustee on 10 December 2010 and is a current member of both Funds' boards.
- 27. As can be seen from the information below Mr Stuart's tenure as trustee does not overlap with the events complained of. It is submitted that Mr Stuart has been incorrectly cited in the group comprising the First Respondent.

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Complaint against First Respondents (First Leg): The decision to commence the rebuild

28. The decision to initiate the rebuild process was done because the data relating to members' investments up to the end of February 2008 was potentially inaccurate. Deloitte, a leading firm of auditors, were tasked with verifying the accuracy of members' information up to the end of January 2008 and commenced the rebuild in July 2010.
 29. The previous trustees took legal advice from their attorneys before implementing their decision.
 30. The decision and the reasons therefore, were communicated to members in a communiqué dated 1 November 2010 (Annexure C). The reasons for the rebuild were again disclosed in a communication by trustees on 28 January 2011, annexure D.
 31. Carel Smith resigned with effect from 31 August 2010. The balance of the trustees who made the decision to effect the rebuild (Le Grellier, Lepar and Botha) resigned on 10 February 2011.
 32. The new board of trustees, appointed from 10 February 2011, included: John Rollason (chairman), Ray Welham, Stefane Bredenkamp and Clive Stuart. (Clive Stuart had already been serving as a board member since 10 December 2010.)
 33. The new trustees considered the need for the rebuild and have no reason not to endorse the decision made by the First Respondent.
 34. We attach Aon's recent report, annexure E, dated 15 July 2011, which provides an update on the rebuild process.
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35. Aon have instructed Deloitte to continue with the rebuild process from February 2008 through to the present date at Aon's own cost.

Complaint against Second Respondents (Second Leg): Liability of parties responsible for maladministration

36. The parties potentially liable for the maladministration of the funds records which caused the need for, and cost of, the rebuild up to February 2008 are:

36.1 Dynam-ique,

36.2 Mr Tony Kamionsky,

36.3 Aon,

36.4 Any former trustees whose maladministration contributed to the rebuild (effectively the Second Respondent as anticipated by the complainants).

37. The complainants have detailed the claims already instituted against the entities listed at 36.1 to 36.3. The Funds are proceeding with all three of these claims.

38. Mr Tony Kamionsky has been sued in his capacity as both a director of Dynam-ique and as a previous trustee of the Funds. Possible action against other directors of Dynam-ique was reviewed but not proceeded with.

39. The decision to institute action against the parties listed at 36.1 to 36.3 above was made by Le Grellier, Botha, Lepar and Stuart during January 2011. Copies of the pleadings in each of these matters are available on request.

40. Regarding the potential liability of former trustees, as listed at 36.4, the funds have also considered, and are still considering, such recovery.

41. Regarding trustees who only held office prior to July 2008 and not at any time thereafter (i.e. excluding persons who acted both before and after July 2008), the trustees resolved to issue suit against Tony Kamionsky and not the other trustees.

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The potential of successful actions against the other trustees was considered, with reference to legal advice, but not instituted after a consideration of, *inter alia*, the following factors;

- 41.1 possibility of recovery,
- 41.2 cost and complexity of action,
- 41.3 likelihood of success.

- 42. The current board is currently reviewing the actions of the trustees who held office both before and after, or solely after, July 2008. The complainant will appreciate that some of these trustees have only recently resigned.
- 43. The Funds will report to its members via a communiqué in this regard and provide the PFA and the complainants with a copy if requested. The Funds cannot currently provide further comment on the actions of previous trustees, other than as discussed above.
- 44. The Funds repeat that the trustees whom the complainant seeks to hold accountable must be afforded an opportunity to respond to this complaint.
- 45. The Funds also point out that the averments by the Funds in the actions against the previous and current administrators, and Mr Kamionsky, which averments the complainants seek to impute to the previous trustees as grounds for their liability (see paragraph 30), are currently being defended by those parties and that it would be premature for the PFA to make any award in light of such defence.

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Insurance

- 46. The Funds have, since August 2004, held Pension Fund Trustees' liability based on the terms and conditions as available in the insurance market and subject to the prevailing conditions in the market at the time of purchase.
- 47. The current period of insurance initially ran from 1 August 2010 to 31 July 2011. The period, as discussed below, has now been revised to run from 1 June 2011 to 31 May 2012.
- 48. The policy indemnifies officers of the Funds, such as trustees and administrators, for claims made against them by members who have suffered losses as a result of the negligence of officers, provided the terms of the policy have been complied with. This portion of the policy operates as protection against claims from third parties, including members.
- 49. The policy also provides cover for theft, fraud, dishonesty and computer crime. This portion of the policy allows the Funds to claim compensation for such an event directly from insurers, provided the terms of the policy have been complied with.
- 50. The cost of the rebuild to the Fund itself is not a claim covered by the portion of the policy dealing with theft, fraud, dishonesty and computer crime. In this regard, the Funds cannot simply lodge such a claim with their insurers for payment. The Funds themselves are unable to claim compensation from insurers for the cost it incurred in effecting the rebuild. This cost, as indicated in previous circulars, has thus far been borne by the Funds' members. It is hoped that the recovery procedure, updated below, will at least offset a portion of these losses suffered by members.
- 51. Members who believe they have suffered losses as a result of the cost of the rebuild must seek their own counsel should they be of the view that they have valid claims against the Fund, trustees or administrators.

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- 52. It appears that the insurers were first notified of the circumstances giving rise to the cost of the rebuild during the insurance period beginning 1 August 2010. Various exclusion conditions applied to this period. The trustees have sought an opinion from their legal advisors and it appears that claims which arise from the cost of the rebuild, such as claims by members for their contributions to the cost of the rebuild, will probably be excluded in terms thereof. The trustees have instructed their legal advisors to advise on the possible actions or omissions of the parties who attended to the insurance arrangements and to advise on possible recovery.
- 53. On 18 March 2011 the Funds were advised by their underwriting managers that the policies had lapsed due to non-payment of premiums. With the assistance of the Funds' brokers, cover was reinstated with effect from 1 June 2011 to 31 May 2012. The cover will continue to act retroactively to 21 November 2006.
- 54. The revised terms of cover also contain exclusions which are effectively the same as the exclusions applying to the initial period from 1 August 2010 to 31 July 2011. The Funds have reserved their rights against the Funds' brokers and administrators for any claims which may arise as a result of the apparent lapsing. Aside from complaints to the Pension Funds Adjudicator which relate to the rebuild, no other claims, in terms of the policies, arose against the Funds during the period of renegotiation.
- 55. For clarity, it appears that claims from members against the Funds, or its officers, based on losses suffered as a result of the cost of the rebuild, would have been excluded in terms of the exclusions applying to the policy period 1 August 2010 to 31 July 2011, but each claim will have to be evaluated on its own terms if any are received. Further, the revised policy term, from 1 June 2011 to 31 May 2012, also has exclusions which are effectively the same as the previous exclusions, and such claims from members (i.e. claims relating to the cost of the rebuild) will probably also be excluded in terms thereof.

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56. The Funds will continue to report to their members via a communiqué in this regard and provide the PFA and the complainants with a copy if requested.
57. At paragraph 35, the complainants submit that, *"the First Respondents have failed to provide assurances that the cost of the rebuild exercise will be met from professional indemnity cover held in respect of themselves and the IF Funds."*
58. The Funds, and the current board, are, in light of the above information, also unable to provide such an assurance.
59. The complainants have submitted at paragraph 37 that the First Respondents *"ought to have secured the recovery of the cost of the rebuild exercise from the professional indemnity insurance cover held in respect of the IF Funds and that in terms of the right of subrogation held in respect of the IF Funds and that in terms of the right of subrogation held by the insurer, the insurer should thereafter seek recovery of the cost of the rebuild exercise from Aon, Dynam-ique and Kamionsky."*
60. An inspection of the terms of the policies will indicate to the complainants and to the PFA that the policies do not facilitate a direct claim for the cost of the rebuild as appears presupposed by the complainants in this statement. The policy will indemnify officers of the Funds for claims made against them provided the terms of the policy have been complied with.

The Funds not a party to these proceedings

61. The Funds and the current board wish to specifically point out to the PFA that the Funds are not cited as a party to this complaint, should any relief be sought against the Funds, the Funds require notice thereof. It is assumed that the relief sought against the Funds has been sought in error and the Funds reserve their right to supplement these papers should the complainants wish to persist therewith.
- T. Lee

- 62. The Funds have sought to provide information that may inform and assist the complainants as well as the Pension Funds Adjudicator.
- 63. The Funds also wish to ensure that the previous trustees, whom the complainants seek to hold liable, are adequately notified and afforded sufficient opportunity to respond to the complaint.

Relief sought by the complainant.

- 64. ~~The Funds do not agree with the relief being sought by the complainants.~~
- 65. The complainant seeks an order that *"the cost of the rebuild exercise and the loss suffered by the complainants be made good by the crediting of their member shares in the IF Funds in the amount of 2.5% together with fund return, alternatively interest at the prescribed rate of 15.5%, from date of the debit of their fund credits until date of crediting their member interests."*
- 66. We point out that some ambiguity is arguably created by the wording *"the cost of the rebuild exercise and the loss suffered"*. It is possibly unclear whether the complainant is seeking an order for losses suffered in addition to the cost of the rebuild itself, which cost was a 2.5% contribution of asset value for each member. ~~We submit that the complainants provide no grounds substantiating a basis for any losses in addition to the rebuild cost contribution.~~ We assume that this is not the intention of the complainants and we address such for the sake of clarity and completeness. ~~Whether members may have any additional losses can probably only be properly considered upon reviewing the revised records.~~
- 67. The members' shares can only be credited against a commensurate or pro-rata increase in the assets underpinning their investments. ~~The PFA will appreciate that it cannot order the Funds to make a "paper entry" increase in a member's shares which is unsupported by underpinning assets of proportionate value. Only upon the recovery of money or funds can members' assets be increased.~~

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- 68. Notwithstanding, any such increase would have to be applied equally or pro-rata to all members because each member contributed 2,5% of the value of their fund credits to the cost of the rebuild.
- 69. The Funds are taking all possible recovery steps and only upon such recovery can members' share accounts be credited.

Summary and suggestions for resolution of complaint

- 70. The decision to effect the rebuild operation was taken by the First Respondent in June 2010 by trustees; Le Grellier, Botha, Smith and Lepar. The decision was made because of the increasing unreliability of the Funds records.
- 71. The current trustees have had no reason not to endorse the decision made by the First Respondent.
- 72. The Funds note that the member complainants each contributed 2,5% of their Fund credits to the cost of the rebuild.
- 73. Various parties may be liable for the Funds incurring the cost of the rebuild, including the Second Respondents. The Funds have instituted action against all parties whom they believe could be held liable for such cost and from whom recovery is viable. In addition, the Funds are reviewing the potential liability of any further parties.
- 74. The actions that have been instituted are all being defended.
- 75. Regarding insurance, the terms of the policy do not enable the Funds to merely lodge a claim with their insurers. In light of the exclusions which apply to the period in which possible claims for the cost of the rebuild were reported, it appears that such claims will probably be excluded. The Funds can thus not provide any assurances as requested by the complainants. The trustees have instructed their legal advisors to advise on the possible actions or omissions of the parties attending to the insurance arrangements and to advise on possible recovery.

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76. The relief sought by the complainants cannot be effected unless a commensurate increase in Fund assets occurs, and any such relief must apply equally to all members.

77. All possible steps for recovery are being pursued by the Funds.

78. The Funds propose that the following directives/orders should be made by the PFA:

78.1 formal notice must be provided to all previous trustees (Respondents) whom the complainants seek to hold accountable and each trustee must be afforded adequate notice to respond,

78.2 the Funds be ordered to provide regular updates (at periods determined by the PFA) on the recovery steps being pursued.

78.3 The complainants are invited to comment what further recovery steps could be taken other than those outlined above.

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Dated at Cape Town on the 3rd of August 2011



Dunster and Associates
Attorneys for the Funds
and the current trustees
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42 Kearom Street
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Email: ren@dunster.co.za

To:

The Pension Funds Adjudicator
Ms Karabo Masekela
(PFA reference: PFA/WE/6292/2011/GM/vn)
Email: karabo@pfa.org.za

And To:

Jonathan Mort Inc
Attorneys for the complainants
Vanessa Bell
(Ref: VB/rf/CHAR1001.1)
Email: vbell@mortlaw.net



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TO Silas

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Please quote our reference: PFA/WE/6292/2011/SM
 BY REGISTERED POST

Affirm Marketing (Pty) Ltd
 C/o Jonathan Mort Inc
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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): AFFIRM MARKETING (PTY) LTD AND OTHERS ("complainants") v IF UMBRELLA PENSION FUND ("first respondent"); IF UMBRELLA PROVIDENT FUND ("second respondent") AND FORMER TRUSTEES OF THE FUNDS ("third respondents")

[1] INTRODUCTION

1.1 The complaint concerns the maladministration of the first and second respondents by their board of management in using the members' fund credits to fund the cost of reconstructing the funds' data and records.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 086 2837)

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- 1.2 The complaint was received by this Tribunal on 3 May 2011. On 17 May 2011, letters were dispatched to the first and second respondents giving them until 30 June 2011 to file their responses. A response on behalf of the first respondent, second respondent and the current board of trustees of the funds was received on 3 August 2011. This Tribunal received further submissions on behalf of the first and second respondents on 13 February 2012.
- 1.3 After considering the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complaint involves a group of employers who participate in the first and second respondents ("the IF Funds"). It also involves employees of the participating employers who are also members of the IF Funds. The first and second respondents are pension fund organisations registered in terms of section 4 of the Act. The third respondents are former trustees of the IF Funds, namely, Gail le Grellier, Renier Botha, Clive Stuart and David Lepar.
- 2.2 The IF Funds were initially administered by Dynamique SA Consultants & Actuaries (Pty) Ltd ("Dynamique") until 31 January 2008 when Aon South Africa (Pty) Ltd ("Aon") took over the administration of the IF Funds. The transfer of the IF Funds' administration occurred after Aon purchased the administration books of Dynamique in 2008. During July 2010, the board of trustees of the IF Funds appointed Deloitte & Touche to conduct a member level rebuild of the data and records of the funds from inception of the funds until 31 January 2008. This was necessitated by the fact that

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the data held in respect of the IF Funds was questionable and not accurate. The cost of the rebuild exercise amounted to approximately R20 million. This translated into an individual cost for each member of the IF Funds of 2.5% of their fund credits.

2.3 Upon receiving communication of the boards' decision to rebuild the funds' data in November 2010, the complainants indicated their dissatisfaction with the decision to debit the members' fund credits in order to fund the rebuild exercise. In a letter dated 8 December 2010, the complainants were advised that the current board of trustees were taking legal action to recover the cost of the rebuild exercise from the previous board of trustees.

[3] COMPLAINT

3.1 The complainants state that the decision to rebuild the IF Funds' data occurred as a result of maladministration of the funds. The maladministration of the funds relates, *inter alia*, to reinvestments not being credited to members' accounts, switches between investments not being correctly recorded, inaccurate recording of monies being deposited in the bank accounts of other funds and a lack of monthly and annual audits. The complainants submit that the particulars of claim against the director of Dynamique that were filed at the South Gauteng High Court indicate that it breached its administration agreement with the IF Funds. The particulars of claim state that there was a failure to ensure that the IF Funds' investments were made in accordance with the Act and the Intermediary Services Act of 2002. This is due to the fact that the administrator failed to keep proper records, failed to perform monthly and annual audits, assets and liquidity requirements were not maintained and the sale of Dynamique's fund administration business to Aon was not adequately disclosed or dealt with in terms of section 13B(5)(a) of the Act.

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- 3.2 The board of trustees also failed to comply with its fiduciary duties provided in sections 7C and 7D of the Act. Although the board is entitled to delegate its functions to administrators, it remains responsible for the actions of such service providers who act as agents of the funds. The delegation of duties does not amount to a transfer of oversight function of the board, nor does it amount to an abdication of responsibilities entrusted to the board.
- 3.3 The complainants aver that the respondents failed to perform their oversight function over the administrators in respect of the administration of the IF Funds. They contend that the respondents should be held accountable for the maladministration of the IF Funds by the agents appointed by them. The respondents have not accounted for the loss suffered by the members in that their fund credits were reduced by 2.5% for the rebuild exercise. There is a further potential loss in that the costs of the rebuild exercise may not be recovered.
- 3.4 The decision to use the members' fund credits in order to fund the rebuild exercise amounts to improper exercise of powers by the board of management. This improper exercise of powers prejudiced members financially. There are members who may withdraw, die or retire before the cost of the rebuild exercise is recovered, if recovery is possible. The first and second respondents have failed to provide assurance that the cost of the rebuild exercise will be met from the professional indemnity insurance cover held in respect of the IF Funds.
- 3.5 The complainants request an order that the respondents should be held accountable for the cost of the rebuild exercise and that the loss suffered by the members be made good by crediting their member shares in the IF Funds in the amount of 2.5% plus fund return. Alternatively they request that interest at a prescribed rate of 15.5% from the date of the debit of

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their fund credits be added until the date of crediting of their member shares.

[4] . RESPONSE

4.1 The respondents filed a response through their attorneys, Dunster & Associates. The response is on behalf of the IF Funds and the current board of trustees. They indicate that the funds and the current board of trustees were not cited as respondents by the complainant and as a result no relief can be sought against the funds.

4.2 The complaint consists of two aspects as it appears from the complainants' submissions. The first aspect relates to the decision of the previous board of trustees to conduct a rebuild of the funds data and the second aspect is based on alleged maladministration of the funds by previous trustees.

4.3 The decision to conduct a rebuild of the funds data was taken in July 2010 by the previous trustees of the funds, namely, Gall le Grellier, Renier Botha, David Lepar and Carel Smith. The liability of the former trustees should be limited to those who were in office up to 1 February 2008 as the 2,5% contribution for the cost of the rebuilding exercise is computed up to this date. Aon took over the administration of the funds from Dynamique on 1 February 2008. The previous board of trustees and the former trustees individually are separate entities from the funds. The previous trustees should therefore receive formal notice of the complaint and be advised to file their responses.

4.4 The funds and its administrator have done their best to assist the distribution of the complaint to the previous trustees. The trustees who require notice of the complaint are, Botha, Jager, Rosen, Mol, Kamionsky,

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Murewa, Stofferfoht, Le Grellier, Lepar, and Smilh. As the complainants seek relief against the previous trustees, it is important that service of the complaint to them is confirmed and that they are granted an opportunity to respond to the complaint.

- 4.5 As regard the decision to rebuild the funds' data, this was done because the data relating to members' investment up to the end of February 2008 was potentially inaccurate. A firm of auditors (Deloitte & Touche) was tasked with verifying the accuracy of the members' information up to the end of January 2008 and commenced the rebuild in July 2010. The previous trustees took legal advice from their attorneys before implementing their decision. The decision and the reasons thereof were communicated to members on 1 November 2010. This was further disclosed to the members by the trustees on 28 January 2011.
- 4.6 The trustees who made the decision to effect a rebuild of the funds' data resigned on 10 February 2011. The new board of trustees was appointed from 10 February 2011. The new board considered the need for the rebuild exercise and had no reason not to endorse the decision made by the previous board of trustees. Aon have instructed the auditors to continue with the rebuild process from February 2008 through to date at its own cost.
- 4.7 The parties who are potentially liable for the maladministration of the funds' records which caused the need for the rebuild exercise are Dynamique, Mr Tony Kamionsky, Aon and any former trustees who contributed to the maladministration. The funds are pursuing legal proceedings against Dynamique, Mr Tony Kamionsky (in his capacity as a director of Dynamique and a former trustee) and Aon in order to recover the cost of the rebuild process. The funds are considering taking legal steps to recover the cost from other former trustees of the IF Funds. The

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current board is reviewing the actions of the trustees who held office before and after July 2008. The submissions by the funds in its particulars of claim before the High Court against the previous and current administrators of the funds and Mr Kamionsky are being defended by the parties involved. It would thus be pre-mature for this Tribunal to make any determination in this regard.

4.8 As regards the indemnity insurance, the funds have an indemnity insurance which initially ran from 1 August 2010 until 31 July 2011. The period has been revised to run from 1 June 2011 until 31 May 2012. The policy indemnifies officers of the funds, such as the trustees and administrators against claims made against them by members who have suffered losses as a result of their negligence. The policy also provides cover for theft, fraud, dishonesty and computer crime. The cost of the rebuild exercise is not a claim covered by the portion of the policy dealing with theft, fraud, dishonesty and computer crime. The funds are also unable to claim compensation from the insurers for the cost it incurred in effecting the rebuild process. This cost was borne by the funds' members. It is hoped that the recovery process will offset a portion of the losses suffered by the members.

4.9 The respondents contend that they assume that the relief sought against the funds has been sought in error as the funds are not cited as respondents. There is ambiguity in the relief sought by the complainants in that the complainants sought to recover the cost of the rebuild exercise and losses. The complainant did not provide any grounds for claiming losses in addition to the rebuild cost. The members' shares can only be credited against a commensurate or pro-rata increase in the assets underlying their investments. Only upon the recovery of monies lost can members' assets be increased.

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[5] DETERMINATION AND REASONS THEREFOR

Preliminary Issues

Locus standi

5.1 The complaint was lodged by the complainants' attorneys, Jonathan Mort Inc, in its capacity as a legal representative of the employers and the members involved in this matter. The complainants' legal representative provided this Tribunal with a letter which indicates that they were authorised to lodge this complaint. This Tribunal is satisfied that Jonathan Mort Inc represents the affected employers and members and that the complainant falls within the definition of a "complainant" in section 1 of the Act. The complaint also falls within the ambit of a "complaint" as defined in the Act.

The citation of the IF Funds as respondents

5.2 The attorneys representing the IF Funds state that no relief can be sought against the IF Funds as the complainants did not cite the funds as respondents. It also states that the complainants do not seek any relief against the IF Funds.

5.3 However, this Tribunal requested a response from the IF Funds on 17 May 2011 and 21 June 2011 as the issues raised in the complaint relate directly to the funds. This Tribunal also requested the Principal Officer of the funds on 17 April 2012 to indicate whether she wishes to file any further response on behalf of the funds in addition to the response received by this Tribunal. However, she advised that the response received by this Tribunal also constitutes a response on behalf of the funds. Thus, the IF Funds have been joined as respondents in this matter

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and were given an opportunity to respond to the complaint in terms of section 30F of the Act.

Section 30H(2) of the Act

- 5.4 The submissions indicate that the funds instituted legal proceedings against their administrator (Aon) on 28 January 2011 in order to recover the cost of the rebuild exercise. The particulars of claim indicate that the legal proceedings relate to an alleged breach by the administrator of its administrative agreement with the funds in relation to, *inter alia*, keeping of records, ensuring that there was adequate fidelity cover, and failure to arrange audits of the funds.
- 5.5 Section 30H(2) of the Act precludes this Tribunal from investigating a complaint if before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation. The submissions indicate that although there were legal proceedings prior to the lodging of this complaint, the subject matter at the High Court is not the same as the complaint before this Tribunal. The complaint before this Tribunal relates to the alleged failure of the funds or their board of trustees to comply with their fiduciary duties in relation to the administration of the funds. It also relates to an unlawful use of the members' fund credits to pay for the cost of reconstructing the funds' data. The legal proceedings against the administrator relate to its alleged failure to comply with its administrative agreements with the funds and concerns the recovery of costs.
- 5.6 Thus, the jurisdiction of this Tribunal is not excluded in terms of section 30H(2) of the Act as the subject matter of the dispute and the parties involved in both the High Court and this Tribunal are not the same.

Wills

The merits

5.7 The issue that falls for determination is whether or not the board of management of the IF Funds acted properly in terms of the fund's rules and the Act in using the members' fund values to fund the cost of the rebuild exercise. It is necessary to refer to the IF funds' rules in order to determine whether or not the board acted properly.

The funds' rules

5.8 In terms of rule 2.6.19 of the IF funds' rules, a members' fund credit consists of his or her contributions, the employers' contributions that are allocated for retirement funding, plus amounts transferred to the funds from a previous fund, expenses (whichever is applicable) and investment returns. Rule 2.6.15 of the funds' rules defines "expenses" as follows:

"EXPENSES" means the costs that cover administration services, consulting services, costs in respect of INSURED DEATH BENEFITS and INSURED DISABILITY BENEFITS, and any other costs that the TRUSTEES may regard as "EXPENSES" from time to time."

5.9 Thus, the IF funds' rules define what costs can be deducted as expenses from the contributions. In terms of the rules, costs include the expenses in respect of administration services and the insured death and disability benefits. Although the definition of expenses above allows the trustees to deduct any other costs they may regard as expenses, this does not give them an unlimited power to use the member's fund credit or contributions allocated to their member's fund value to fund any cost resulting from the negligent conduct of the board. It also does not cover costs resulting from maladministration of the funds which resulted in the members suffering loss on their fund credits in the funds.

Walt

5.10 The facts indicate that the decision of the previous board of trustees of the funds to use 2.5% of the members' fund credits to fund the cost of the rebuild process does not fall under any of the authorised costs as defined above. The decision of the previous board was subsequently endorsed by the current board of trustees which was appointed on 10 February 2011. The board was not authorised in terms of the IF funds' rules to use the members' contributions to fund the cost of the rebuild process. The 2.5% that was deducted from the members' fund values does not fall under administration costs or the costs of the insured risk benefits. The members were financially prejudiced in that their fund credits were reduced under circumstances not authorised by the funds' rules.

5.11 In terms of the Act, an investment reserve account may only be used for smoothing purposes (see definition in the section 1 of the Act). The IF funds or its board acted *ultra vires* the Act in utilising the investment reserve account for the payment of expenses that are not covered by the contributions received. Although expenses may be deducted from the investment reserve account, these should be expenses or costs authorised by the funds' rules. Therefore, the deduction of the members' contributions allocated to their member individual accounts or fund credits was not lawful (see *Norton v Investment Solution Pension Fund* [2007] 3 BPLR 361 (PFA) at 371E.G). The trustees are only authorised to do what is set forth in the funds' rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D).

The maladministration of the IF Funds

5.12 The submissions indicate that the decision to engage the services of auditors to rebuild the funds' data and records was necessitated by the fact that the fund data was questionable and not accurate. The rebuilding of the funds' data had to be done at individual member level. The decision

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to rebuild the funds' data was taken in July 2010 when the funds were administered by Dynamique. The funds' administration was taken over by Aon from 1 February 2008. It appears from the facts that Dynamique did not keep proper records or administer the funds in accordance with its agreement with the funds. This is evident from a pending legal proceeding against its director to recover the cost of the rebuild exercise. Aon also purchased the administrative books of Dynamique without conducting a proper due diligence. As a result of its failure to act with care and due diligence, it inherited the administrative problems from Dynamique.

5.13 However, the ultimate responsibility for the proper management of the funds rests with their board of trustees (see rule 6.1 of the funds' rules). In terms of rule 6.6.1 of the rules, the object of the board is to direct, control and oversee the operations of the funds in accordance with applicable laws and the rules. This includes the duty to act in the interest of members, to take measures to protect the assets of the funds and to ensure that proper records essential for the efficient administration of the funds are kept (see rules 6.7.1.13 and 6.14.1).

5.14 A board of trustees owes a fiduciary duty to the fund and to its members. A registered fund is entrusted with the control of property with which it is bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations (see *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894C-D and *Estate Kemp and Others v McDonald's Trustees* 1915 AD 491 at 499). Sections 7C and D of the Act codified some of the common law fiduciary duties of the board of trustees.

5.15 The apposite portion of section 7C(1) and (2) reads as follows:

"The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund."

Wills

(1) In pursuing its object the board shall-

- (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected ...;
- (b) act with due care, diligence and good faith."

5.16 Section 7D, in turn, reads as follows:

"The duties of a board shall be to-

- (a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;
- (b) ensure that proper control systems are employed by or on behalf of the board ..."
- (f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws."

5.17 In terms of rule 6.9 of the funds' rules, the board may delegate its powers and duties to an administrator. However, the primary function of the board in relation to the business of a fund is to ensure that it exercises a rigorous oversight function over its administrators. In order for the board to exercise its oversight role properly, those to whom functions are delegated should be required to report back regularly on such delegated functions and with sufficient and relevant information to enable the board to make an informed performance assessment.

5.18 The duty to keep proper records in respect of members and the administration of a fund is of critical importance in the operation of a fund. Any failure to keep proper systems in place, books and records may

prejudice members.

5.19 The submissions indicate that the IF Funds did not have proper records of the funds and the members' fund values. This is the main reason why there was a need to appoint auditors to rebuild the funds' data and records. It appears that the funds lay the blame for the maladministration of the funds on the previous board of trustees, Dynamique and Aon. The poor administration of the funds resulted in a loss of R20 million of the funds' assets, which also translate into a loss by members on their fund credits in terms of the funds' rules. The responsibility was on the IF Funds through its board of management to ensure that the funds are administered properly and that proper and accurate records are being kept at all times. The changes in administrators or the fact that it delegated its functions to the administrators did not absolve the IF Funds of the duty to exercise a rigorous oversight function over the administrators. Therefore, the IF Funds failed to comply with their fiduciary duties of keeping proper records and of acting with due care, diligence and good faith in respect of the operation and administration of the funds. The funds through its board also failed to exercise a rigorous oversight function over the administrators.

5.20 The board also acted negligently in failing to ensure that the funds and the trustees have adequate indemnity cover in the event of gross negligence resulting in financial loss or liability. In terms of rule 6.17.2 of the funds' rules, the trustees have a duty to safeguard the funds against loss by insuring the fund against loss due to the gross negligence, dishonesty or fraud of any of the officials of the funds, including a trustee. The facts indicate that the funds and the board of trustees were not covered by the indemnity insurance that the funds have in respect of the financial loss incurred as a result of the costs of the rebuild process. It follows that any liability that is incurred by the funds will have to be recovered by the funds

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from the board of trustees and its administrators. The submissions indicate that the funds have already taken legal steps to recover the cost from Dynamique, Aon, Mr Tony Kamionsky and certain former trustees.

5.21 In light of the submissions, the IF Funds should be held liable to credit the members with the 2.5% contributions that were unlawfully deducted from the members' individual accounts and used to fund the cost of the rebuild exercise. The funds should compute the amounts of the 2.5% fund values that were deducted having regard to the investment returns earned by the funds during the period in question.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 It is declared that the IF Funds and their previous board of trustees were not authorised by the funds' rules and the Act to use 2.5% of the members' fund values to fund the cost of the rebuilding of the funds' data;

6.1.2 The IF Funds are ordered to recalculate the members' fund values and credit the members with the 2.5% fund values referred to above having regard to the investment returns earned by the funds during the period that the unauthorised deduction was made and remains outstanding;

6.1.3 The IF Funds are further ordered to notify the complainants and this Tribunal of the recalculated values within three weeks of the date of this determination.

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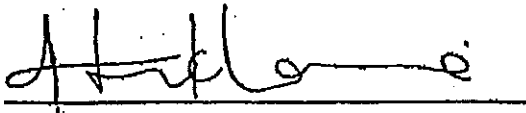
15-APR-2013 07:59 FROM Silas

TO Silas

P.016

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DATED AT JOHANNESBURG ON THIS 31ST DAY OF JULY 2012



**MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR**

**Co: IF Umbrella Pension and Provident Funds
C/o Dunster & Associates
P O Box 15519
VLAEBERG
8018**

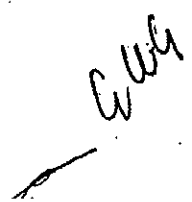
**Ref: Ren Dunster
Fax: 086 801 2142**

**Co: IF Funds
Private Bag x10016
RANDBURG
2128**

**Ref: Lindy Wingrove-Gibson; Principal Officer
Fax: (011) 475 5722**

**Registered office of the Funds:
Medscheme Park
Phase III, 17 Muswell Road
SOUTH BRYANSTON**

Section 30M filing: High Court



9L29

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: 2012/34384

P/H NO: 128

JOHANNESBURG, 05 February 2013
BEFORE THE HONOURABLE ACTING JUDGE MASHILE

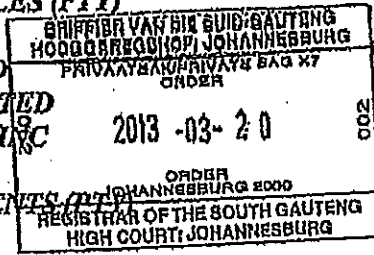
In the matter between:-

IF UMBRELLA PENSION FUND
IF UMBRELLA PROVIDENT FUND

1st Applicant
2nd Applicant

and

- | | |
|---|-----------------------------|
| LUKHAIMANE M.A. N.O. | 1 st Respondent |
| AFFIRM MARKETING SERVICES (PTY) LIMITED | 2 nd Respondent |
| BEEFMASTER (PTY) LIMITED | 3 rd Respondent |
| H BIRKENMAYER (PTY) LIMITED | 4 th Respondent |
| DR GEBKA, HELBIG & KLUG INC | 5 th Respondent |
| DR RITZ INC | 6 th Respondent |
| ETERNAL FLAME INVESTMENTS (PTY) LIMITED | 7 th Respondent |
| EXPECTRA 89 (PTY) LIMITED | 8 th Respondent |
| HESTICO (PTY) LIMITED | 9 th Respondent |
| HETTAS CC | 10 th Respondent |
| CONVISTA CONSULTING (PTY) LIMITED | 11 th Respondent |
| IDI TECHNOLOGY SOLUTIONS (PTY) LIMITED | 12 th Respondent |
| PROGRESSIVE PACKAGING (PTY) LIMITED | 13 th Respondent |
| WORLD CARGO SERVICES (PTY) LIMITED | 14 th Respondent |
| CONDUIT RISK AND INSURANCE HOLDING (PTY) LIMITED | 15 th Respondent |
| DELL COMPUTER (PTY) LIMITED | 16 th Respondent |
| THE BRAND UNION (PTY) LIMITED | 17 th Respondent |
| ULTRA LITHO (PTY) LIMITED | 18 th Respondent |
| NEWSCLIP MEDIA MONITORING (PTY) LIMITED | 19 th Respondent |
| MIXTEC CC | 20 th Respondent |
| PETROMARK (PTY) LIMITED | 21 st Respondent |
| DEHTEQ (PTY) LTD | 22 nd Respondent |
| WAVE LENGTHS 31 (PTY) LIMITED (t/a, INZALO COMMUNICATIONS) | 23 rd Respondent |
| PANORAMIC COMPONENTS (PTY) LIMITED | 24 th Respondent |
| CHICKEN MANAGEMENT SERVICES (PTY) LTD | 25 th Respondent |
| HANSEN TRANSMISSIONS (PTY) LIMITED | 26 th Respondent |
| SAINT ANDREWS BROKERS (PTY) LIMITED | 27 th Respondent |



1. Ca

- 2 -

**ENABLEMED (PTY) LIMITED
PRIMESERV GROUP LIMITED
THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS
JOBURG CHILD WELFARE SOCIETY
HERITAGE MANAGEMENT SERVICES
(PTY) LTD**

28th Respondent29th Respondent30th Respondent31st Respondent32nd Respondent

HAVING read the documents filed of record and having considered the matter:-

IT IS ORDERED THAT:-

1. The First Respondent's determination under reference number PFA/WE/6292/2011/SM dated 31 July 2012 made in terms of the Section 30M of the Pension Fund Act 24 of 1956 in respect of a complaint lodged by the abovenamed Second and Thirty Second Respondents is hereby set aside.
2. The complaint is remitted to the First Respondent to enable the complainants in the complaint to pursue relief against only the former trustees of the Applicants for breach of their statutory and fiduciary duties owed to the Applicants.
3. The Respondents or any other interested parties are permitted to supplement the complaint with any further submissions they wish to make to the First Respondent.
4. The Complainants are to serve a copy of the complaint, duly supplemented, on the relevant former trustees of the Applicants against whom they seek relief.
5. The former trustees of the Applicants are afforded a reasonable opportunity to file a written reply to the supplemented complaint.
6. The First Respondent is to reconsider the supplemented complaint and make a determination in terms of Section 30M of the Act.
7. There is no order as to costs.

BY THE COURT

REGISTRAR
/R

REPUBLIC OF SOUTH AFRICA	
JOHANNESBURG	
PHILIPPS STRAAT 111, JOHANNESBURG	
2013-09-20	
ORDER	
REGISTRAR OF THE SOUTH AFRICAN	
HIGH COURT, JOHANNESBURG	

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File

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The Pension Funds Adjudicator
P.O. Box 580
MENLYN
0063

Attention: Silas Mthuphe

Per email: silas@pfa.org.za

Dear Sir

IN THE MATTER OF AFFIRM MARKETING (PTY) LTD & OTHER PARTICIPATING EMPLOYERS, ENABLEMED (PTY) LTD & OTHER PARTICIPATING EMPLOYERS, EMPLOYEES OF AFOREMENTIONED EMPLOYERS WHO ARE MEMBERS OF THE IF UMBRELLA PROVIDENT FUND AND THE IF UMBRELLA PENSION FUND V GAIL LE GRELLIER, RENIER BOTHA, DAVID LEPAR, CLIVE STUART (FIRST RESPONDENTS) AND ANY FORMER TRUSTEES (SECOND RESPONDENTS)

1. I am responding to the complaint as one of the First Respondents. I was a trustee of the IF Umbrella Pension Fund and the IF Umbrella Provident Fund (the Funds) from 22 November 2006, during the period of administration by Dynam-ique Consultants and Actuaries (Pty) Ltd (Dynam-ique) up until 10 February 2011 (during the period of administration of the Funds by Aon South Africa (Pty) Ltd (Aon) when I resigned as a trustee of the Funds. My resignation followed on after the trustees had made a decision to rebuild the data of the Funds, employed Deloitte to perform the rebuild, and had instituted various actions against parties who were potentially liable to the Funds for the costs incurred. The intention behind the resignation was to ensure that a new board of trustees was put in place who could then review any action taken, continue with it, abandon it or institute new action.
2. My understanding of the complaint is that it is two-fold as set out in paragraph 5 of the complaint, i.e.
 - a. The Complainants allege that the decision taken by the trustees to rebuild the records of the Funds was an improper exercise of their powers, and
 - b. The Complainants allege they have sustained prejudice or may sustain prejudice in consequence of the maladministration of the Funds by the Respondents or agents appointed by them.
3. The Complainants refer to paragraphs (a) and (b) of the definition of complaint in the Pension Funds Act, 1956.

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C. L. L. L.
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4. I submit that the complaint does not fall within the definition of complaint and accordingly the Pension Funds Adjudicator does not have jurisdiction to hear the complaint. My reasons are as follows:

- a. The definition of complaint requires that a complaint must relate to a specific complainant.
- b. The participating employers are not complainants. As argued in the affidavit supporting the appeal against the decision of the Pension Funds Adjudicator in PFA/WE/6292/2011/SM attached hereto as "Annexure A" (the affidavit) they do not have an interest in the complaints. As argued in paragraph 75 of the affidavit it is only the contributions and not the benefit provided by the Funds that constitute part of the participating employers' employment promise. See conclusion in paragraph 76 of the affidavit.
- c. The members can also not be said to have suffered prejudice as a result of the decisions taken by the trustees. The members are only entitled to their fund credits in terms of the rules of the Funds. The definition of fund credit specifically provides for the deduction of expenses and ad hoc expenses. It is submitted that the costs of the rebuild fall within the definition of ad hoc expense and for that reason are excluded from the members' fund credits. As explained in paragraphs 57 to 68 of the affidavit, until the rebuild is concluded it cannot be clear if the members' fund credits are overstated or understated as a result of the incorrect and inaccurate member data. Until that happens no one can conclude that any member has been prejudiced as a result of a trustee decision to incur an expense to rebuild the funds. In any event a member has no right to the assets of a fund until he or she leaves the fund. The Funds themselves own their assets and have made certain decisions to institute legal proceedings against parties to reclaim the monies spent on the rebuild.
- 5. Despite the jurisdictional problems I will, below, set out my responses to the allegations referred to in paragraph 2, above. For the sake of dealing with the issues in the correct order, I will first deal with the allegation in 2.b. and then the allegation in 2.a.
- 6. As indicated in paragraph 2.b. above, the Complainants allege they have sustained prejudice or may sustain prejudice in consequence of the maladministration of the Funds by the Respondents or agents appointed by them. In paragraphs 26 to 29 of the complaint, the complainants recognise that trustees may delegate certain responsibilities to third party experts. In actual fact the trustees are obliged to delegate where they do not have the expertise. The trustees delegated the administration of the Funds to Dynam-Ique, an entity appropriately registered by the Financial Services Board in terms of section 13B of the Pension Funds Act, 1956. It is also stated in paragraphs 26 to 29 of the complaint that despite that delegation the trustees continue to have an oversight function. This is not disputed; in paragraph 30 of the complaint it is submitted that the averments made against Dynam-Ique and Aon in the respective particulars of claim "...must be imputed to the Respondents in consequence of their failure to perform their oversight function in respect of the administration of the IF Funds and the protection of the interests of the members."
- 7. In paragraph 33 of the complaint it is also stated that although the First Respondents may have had the power to incur the cost of the rebuild on behalf of the Funds and make the deductions from members' fund credits, this was an improper exercise of power because it

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resulted in the members of the Funds suffering the consequence of the trustees not performing an oversight function.

8. As indicated in paragraphs 6 and 7 above, broad allegations of a failure of oversight are made with no evidence of such failure whatsoever. It is submitted that it is incumbent on the Complainants to prove that there was indeed a failure of oversight. They have not offered any evidence of this. In order to set the record straight in this regard, I would like to draw the Adjudicator's attention to the following timeline of events:
- a. I became a trustee of the Funds on 22 November 2006 during the Dynam-ique period.
 - b. The administration of the Funds was taken over by Aon with effect from 1 February 2008.
 - c. I shall only deal with the oversight function from 22 November 2006 to 1 February 2008 as it was only the pre-1 February 2008 period that was part of the rebuild authorised by the trustees of the Funds. Aon undertook to bear the cost of / fix the records post-1 February 2008.
 - d. According to the records of the Funds, regular meetings of the boards of the Funds were held on 22 November 2006, 22 March 2007, 16 August 2007 and 21 November 2007. A special meeting was convened on 5 July 2007 to discuss a specific complaint by a broker. A further special meeting was convened on 7 February 2008 to announce the purchase of the business of Dynam-ique by Aon.
 - e. At all the regular meetings of the board that I attended, there was robust questioning and monitoring of Dynam-ique with regard to the outstanding financial statements and administration issues. See details below.
 - i. At the first meeting that I attended on 22 November 2006 we were advised that a blanket extension was in place for the submission of audits. This blanket extension applied to the entire industry at the time as a result of new specific requirements that had been introduced around audits. It turned out in the industry in general that this blanket extension and the lateness of many financial statements because of the new requirements masked certain other administrative / accounting problems that were causing late financials. We were advised by a fellow trustee and employee of Dynam-ique, Tammy Murewa, that she was monitoring the progress of the audits of the Funds for the 2005/2006 year end and would ensure that they were completed as soon as possible. At that meeting we were also provided with administration reports which were interrogated, and we were advised of a new workflow system that was to be implemented that would result in better reporting. At that meeting we also gave guidance to Dynam-ique about compliance aspects that we required regular reporting on.
 - ii. At the second regular meeting that I attended on 22 March 2007 we were given an update on the progress of the annual financial statements and assured that queries were being resolved. This input was given by Tammy Murewa, a fellow trustee and employee of Dynam-ique. In this particular meeting the point was also raised around

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the fact that the rules of the Dynam-Ique Funds did not allow for firing of the administrator. Note this was not the case in the Funds, but I bring this to your attention to demonstrate awareness of the importance of being able to terminate an appointment as part of the oversight and monitoring function. Some dissatisfaction was again expressed about administration reporting, suggestions were provided and the trustees requested the presence of the head of administration at future meetings.

- iii. I do not have a copy of the minutes of the meeting held in August 2007. On 21 November 2007 the last regular meeting of trustees with Dynam-Ique as administrator took place. Again concerns were expressed about the lack of annual financial statements for the year ended 2006. Tony Kamionsky (chairman of the trustees and CEO of Dynam-Ique) now disclosed to the trustees that there was a stalemate with regard to the financials as a result of un-reconciled items stemming from the previous period of administration of those Funds by Integrated Futures. Both Renier Botha and I suggested that a forensic auditor be brought in to assist with the annual financial statements. We instructed Tony Kamionsky to get the financials completed as a matter of urgency. Regarding the administration reporting, Tony Kamionsky announced that a new principal officer with stronger administration skills should be appointed. He undertook to look for a new principal officer.
 - iv. On 7 February 2008 we met again and were advised of the purchase by Aon of the business of Dynam-Ique. This news was welcomed as, given the problems with the administration of Dynam-Ique, a new reputable international service provider was regarded by the trustees as a step forward for the Funds in terms of bringing them in line. Of course it is not possible to speculate what would have occurred had the purchase not have taken place, save to say that the trustees were indeed closely monitoring the situation. In my view, having seen a number of situations where administration problems occur, the most sensible and cost effective response is to work closely with the administrator in question to rectify the situation. The hasty termination of an appointment can be a costly exercise as a new administrator would always charge for any work re-done as a result of prior poor administration. There could also be increases in on-going fees, problems in handover etc. Of course if problems persist, trustees must invoke their power to revoke appointments.
 - v. At the meeting on 7 February 2008 we were given a detailed presentation by Ian Young of Aon – he was to become the new principal officer of the Funds and was the head of retirement administration at the time. Tony Kamionsky advised the trustees that the upside for the Funds included the financial backing that Aon had which he, as an individual, could not provide.
9. I shall now turn to the allegation contained in paragraph 2.a. above, i.e. that the decision taken by the trustees to rebuild the records of the Funds was an improper exercise of their powers. I also refer back to paragraph 33 of the complaint where the Complainant alleges that to make the deductions from members' fund credits was an improper exercise of power because it resulted in the members of the Funds suffering the consequence of the trustees not performing an oversight function. Firstly as indicated in paragraph 8 above, the trustees

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did perform an oversight function. Secondly and as stated in paragraph 49 of the affidavit, human error which may constitute negligence (in circumstances where this is in fact is the case) can never be a ground for finding that the Funds' decisions are unlawful. The legality of the decision to allocate the cost of the rebuild to member fund credits as an ad hoc expense of the Funds is extensively dealt with in paragraphs 34 to 49 of the affidavit and I draw the Adjudicator's attention to those. In addition, the following should be noted:

- a. ~~The trustees did not randomly without thought or advice make the decision to do the rebuild. Over a period of 2 years Aon worked on the Funds as administrator and, at different times, threw many different resources at the problems experienced by the Funds.~~
- b. On 26 May 2010 Aon presented a proposal from a service provider, Adendorffs, to the trustees. The chairman of the trustees at the time (Carel Smith) who was also employed by Aon advised that notwithstanding previous compromises by Aon, Aon required opening balances for each member signed off by the trustees as at 1 February 2008, effectively Aon was washing its hands off assisting the Funds with ensuring the accuracy of the opening balances and was telling the trustee that they needed to provide that information. At that meeting Ms Barton, a representative of Aon, also took the trustees through the results of a "dirty" ALM exercise that had been performed by Aon and pointed out the various problems. It must be concluded that it was Aon's opinion, as administrator of the Funds, that an asset liability matching / rebuild project was necessary.
- c. The trustees were concerned about the costs. In fact I specifically asked if we could forward Adendorff's proposal to a third party administrator to verify and comment on the costing. The chairman of trustees (Carel Smith) specifically forbade that approach and said it would amount to a breach of confidentiality.
- d. A further trustee meeting took place on 1 June 2010, at that meeting it was agreed that myself and two representatives of Aon would visit a third party administrator and have a high level discussion with them around a rebuild of the Funds. Mr Stuart of Aon also agreed to draft and circulate terms of reference to be used for a re-quote by Adendorffs and a quote by Deloitte. All of this took place.
- e. A further meeting was held on 15 June 2010. At that meeting the chairman, Carel Smith, advised that he would not take part in any decision as he was employed by Aon, although he would support the majority vote on any decision. At that meeting the trustees resolved to appoint Deloitte. There were no significant differences in cost although my recollection is that Deloitte were slightly less expensive and their reputation as one of the big auditing firms was also taken into account in making the decision to appoint them.
- f. As indicated in paragraph 26 of the affidavit, the state of affairs of the Funds made it impossible for the trustees to carry out their duties, a decision had to be made in order to protect the Funds and the interests of the members. We could not allow the Funds to continue operating on the basis of inaccurate data and no annual financial statements.

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Page | 6

10. If the Adjudicator does not dismiss the complaint for the jurisdictional reasons set out in paragraph 4, I request that for the various reasons set out in paragraphs 8 and 9 above the Adjudicator dismisses the complaints referred to in paragraph 2 above.
11. Although it is not specifically referred to as part of the complaint, the Complainants refer to the PI cover and the fact that the trustees failed to claim or provide assurance that they would claim under that policy. Leaving aside the issue of non-payment of premiums by Aon (which was part of its administrative function) the wording of the policy is on a claims-made basis meaning that if there is no wrongful act, there is no claim, i.e. no negligence by an officer of the Funds, no claim. The Funds could not simply claim because they incurred the rebuild costs.
12. Please advise me should you require any further information from me.

Yours faithfully


GAÏLLE GRELLIER

 *AG*

9431



The Pension Funds Adjudicator
 P.O. Box 580
 MENLYN
 0063

Attention: Silas Mothupa

Per email: silas@pfa.org.za

Dear Sir

IN THE MATTER OF AFFIRM MARKETING (PTY) LTD & OTHER PARTICIPATING EMPLOYERS,
 ENABLEMED (PTY) LTD & OTHER PARTICIPATING EMPLOYERS, EMPLOYEES OF AFOREMENTIONED
 EMPLOYERS WHO ARE MEMBERS OF THE IF UMBRELLA PROVIDENT FUND AND THE IF UMBRELLA
 PENSION FUND V GAIL LE GRELLIER, RENIER BOTHA, DAVID LEPAR, CLIVE STUART (FIRST
 RESPONDENTS) AND ANY FORMER TRUSTEES (SECOND RESPONDENTS)

I refer to the attached response submitted on 1st May 2013 by Gail le Grellier and endorse it. She
 joined me as a trustee some eight months into my tenure as trustee. I have however some additions
 of my own to add to hers and will indicate to which paragraphs it relates to:

1. Paragraph 8.a I become an external (also referred to as an independent) trustee of the Funds on 13 March 2006 during the Dynam-Ique period. This would entail carrying out my fiduciary duties first and foremost by attending trustee meetings. This I have done without exception. I also came prepared to the trustee meetings after scrutinising documents and reports submitted by the administrator for the meetings and complained where it was missing in detail or not submitted. I believe that in defined contribution funds my focus for overseeing the soundness of the Funds should be focused on getting audited financial statements on time to examine for approval. In that way I will then be satisfied that the member accounts were correct. These efforts became clear with reference to the minutes below
2. Paragraph 8.c I deal with the oversight from 13 March 2006
3. Paragraph 8.d add: regular meetings from 13 March 2006, 27 September 2006

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4. Paragraph 8.e

- At the first meeting I attended the trustees requested a more robust administration report to be tabled at the next meeting to include an asset liability match for instance
- At the second meeting I attended on 27 September 2006, it was decided to change the auditors in order to make better progress with producing audited financial statements

(i) Read as my third meeting

(ii) Read as my fourth meeting

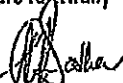
(v) Add: I believe the pressure brought by the external trustees demanding audited accounts made Tony Komlonsky realise that his administration cannot deliver and he had to find a way out

5. Paragraph 9.f The contract with Deloitte also entails preparation of audit files at each financial year-end. Without such files the audits could not be carried out

6. I submit that the complaint does not fall within the definition of complaint and accordingly the Pension Funds Adjudicator does not have jurisdiction to hear the complaint. The participating employers are not complainants. To that extent I submit the affidavit supporting the appeal against the decision of the Pension Funds Adjudicator in PFA/WE/6292/2011/SM where it was argued that they do not have an interest in the complaints. As argued in paragraph 75 of the affidavit, it is only the contributions and not the benefit provided by the Funds that constitute part of the participating employers' employment promise. See conclusion in paragraph 76 of the affidavit.

Please advise me should you require any further information from me.

Yours faithfully


Renier Botha

Cuba

CL 32

Pension Fund Adjudicator

K Matsi

Ref: PFA/GA/7289/2011/TCM/km

Email: kgomotsom@pfa.org.za

24 April 2013

Dear Mr. Matsi

Compliant in terms of 30A of the Pension funds Act, 24 of 1956: Christen BA v Dynamique SA Umbrella Provident Fund (first respondent); Dynamique SA Umbrella Pension Fund (second respondent); IF Umbrella Provident Fund (third respondent); IF Umbrella Pension Fund (fourth respondent) and Board of Trustees (fifth respondent):

Please be advised that I was never a Trustee of either the Dynamique SA Umbrella Provident Fund (first respondent) or the Dynamique SA Umbrella Pension Fund (second respondent) and hence your schedule attached to the compliant listed as Annexure A is factually incorrect.

In addition to this I resigned as a Trustees on the following two Funds namely the IF Umbrella Provident Fund (third respondent) and IF Umbrella Pension Fund (fourth respondent) earlier than reflected as September 2006 on your schedule marked Annexure A, accordingly please provide proof of my term of office according to your records:

In addition I was never party to, consulted by, or contacted in any way regarding the Trustees decision to discount the members' values by the 2.5% as referenced in the compliant.

Accordingly please confirm receipt of this letter and the contents thereof.

All my rights remain fully reserved.

Regards

CL Mol

Cc:

[REDACTED]

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QL33

Pension Fund Adjudicator

Silas Mothupe

Ref: PFA/WE/6292/2011/SM

Email: silas@pfa.org.za

10 May 2013

Dear Mr. Mothupe

Compliant in terms of 30A of the Pension funds Act, 24 of 1956: Dell Computer (Pty) Ltd. and others v IF Umbrella Pension Fund (first respondent); IF Umbrella Provident Fund (second respondent) and Board of Trustees (third respondents);

Please be advised I terminated by trusteeship in both above-mentioned funds in 2006.

In addition I was never party to, consulted by, or contacted in any way regarding the Trustees decision to discount the members' values by the 2.5% as referenced in the compliant.

Accordingly please confirm receipt of this letter and the contents thereof.

All my rights remain fully reserved.

Regards


L. Jager

GL 34

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

(PFA REFERENCE PFA/WE/6292/2011/SM)

In the matter between:

Affirm Marketing (Pty) Ltd and 26 others

Employer Complainants

Enabledmed (Pty) Ltd and 3 others

Employer Complainants

The employees of the abovementioned Participating Employers who are members of the Funds

and

**Le Greffier, Botha, Lepar and Stuart
(The former board of the IF Funds)**

The First Respondent

**Any former trustee of the boards of the IF Funds
Over the relevant period, whose identities
are unknown**

The Second Respondent

RESPONSE TO COMPLAINT BY TONY KAMIONSKY

1. This statement is filed by myself (Tony Kamionsky), I am one of the former trustees of the IF Funds and hence one of The Second Respondents.
2. This statement is filed in response to the Complaint PFA/WE/6292/2011/SM.
3. I have been excluded by the PFA from this complaint by virtue of my having entered into a without prejudice settlement agreement with the Funds and no

Walter

formal relief can therefore be sought against me. Notwithstanding this I wish to provide the PFA with comment and background for the benefit of the PFA, the Complainants and the Respondents. There is a considerable amount of pertinent information that only I am privy to.

- 4. I also wish to make suggestions on how the Complaint should be resolved.
- 5. The thrust of the Complaint is that members lost money due to the spending of R20m to rebuild the Funds. The Complainants further claim that the rebuild was as a result of maladministration by Dynam-Ique and that the former trustees are liable as they should have prevented this maladministration.
- 6. The Complainants have however provided no evidence whatsoever to support their allegation of maladministration and hence the claim that maladministration was the result of them losing money cannot possibly succeed. Similarly once the claimants haven't proved any maladministration there can be no claim against any former trustee in regard to an alleged failure to prevent maladministration.
- 7. The fact of the matter is that there was never any maladministration.
- 8. For a period of two years following the rebuild the Funds were challenged to provide evidence of maladministration but the Funds were never able to do so. Further the Funds had 2 clear opportunities in the formal proceedings to

Wills

come forward with evidence of maladministration but never did. More specifically:

- 8.1. In the Arbitration against Dynam-Ique the Funds chose to abandon the arbitration rather than come to arbitration to prove their allegations of maladministration;
- 8.2. In the High Court we had a trial date of 8 November 2012 but rather than coming to court to prove their case the Funds blocked this from being able to go ahead and it had to be postponed.
9. All claims against Dynam-Ique and myself have now also been withdrawn.
10. Therefore the opportunity for any party to claim or prove any maladministration has long come and gone and any party who would currently even elude to maladministration by Dynam-Ique would be irresponsible and would be guilty of defamation.
11. So given there was no maladministration why then did the Claimants lose R20m of their retirement monies?
12. The fact of the matter is that the R20m was wasted on a rebuild that was never required.

WJG

13. To the extent that there were any problems with the administration at the time of the rebuild those problems could have simply been fixed without going and redoing everything. To go redo everything when problems are found is totally unnecessary and totally the wrong response. It is far cheaper and far more sensible to just identify and fix the problems.
14. Further at no time in the two and a half years from the time AON took over the administration of the Funds till the time of the rebuild did the Funds raise any problems with Dynam-Ique. Had they done so then Dynam-Ique could have and would have fixed any problems free of charge.
15. Another issue is the excessive amount of R20m that was charged by Deloitte to do the rebuild. Even if a rebuild had been required (which it wasn't) then this could have been done by a cheaper provider at a far lower cost.
16. At this point I would like to comment on the report prepared by Deloitte documenting the problems they found during their rebuild. This is an important issue as certain people were hoping that this report would justify the decision to have done the rebuild. However not only did it not justify the need for the rebuild, the report was actually quite flattering to Dynam-Ique as:
 - 16.1. On a number of schemes there were no problems whatsoever found;

- 16.2. The average number of problems found per scheme was tiny in relation to the amount of transactions processed by Dynam-ique per scheme;
- 16.3. The most common problem identified was that supporting documentation could not be found;
- 16.4. All the problems that were found could have easily and cheaply been identified and fixed without the need to have redone everything.
17. So who then was responsible for recklessly spending R20m on a rebuild that wasn't required?
18. The three trustees who took the decision to do the rebuild were Gail Le Grellier, Renier Botha and David Lepar. Whilst there was another trustee at the time, Carel Smith, from what I understand he was not in favour of doing the rebuild. Clive Stewart was also a trustee but my understanding is that he joined after the decision to do the rebuild had been taken.
19. Therefore Le Grellier, Botha and Lepar are the people who were reckless and grossly negligent in spending R20m of member's money, without any consultation with members, on an unnecessary rebuild when they could simply have either:

- 19.1. Just brought the problems to the attention of Dynan-iqne and Dynam-iqne would have fixed the problems free of charge (even though Dynam-iqne was not operating as an administrator at the time they were still contactable and could easily have contracted the necessary resources to fix any problems); or failing this resolving the matter
- 19.2. Just fixed the actual problems instead of redoing everything; or failing this resolving the problem
- 19.3. Just had the records rebuilt at a far lower cost by sourcing a far cheaper provider.
20. It is not a defence for these Trustees to claim that Aon or an auditor told them they need to rebuild the funds. There is an onus on trustees to not be reckless when spending members money and they could have just followed the abovementioned options or if necessary even have brought in an independent person with good knowledge of pension fund administration to properly assess the situation and consider all the options.
21. It is also not a defence to say that the rebuild was required because the data was potentially not accurate. If there are any doubts about the data you can do inexpensive checks to determine whether it is accurate but going and redoing everything is definitely not the correct response.

22. At this point I now turn to another issue relating to the actions of Le Grellier, Botha and Lepar.
23. In the formal legal actions brought by Le Grellier, Botha and Lepar against myself they claimed there was gross negligence by a Trustee of the Funds and by a Director of Dynam-ique for not preventing the alleged maladministration.
24. However all the trustees on a fund are jointly and severally responsible and liable for any maladministration and all the directors of a company are similarly jointly and severally liable. Now Le Grellier and Botha were also trustees of the funds at the time the alleged maladministration took place and Lepar was also a director of Dynam-ique at the time.
25. Therefore the fact that these individuals excluded themselves from the claim and tried to shift all the blame to myself can only be described as morally reprehensible behaviour.
26. In addition to the exclusion of themselves being morally reprehensible it constitutes a gross breach of their fiduciary duties as they put their own interests before those of the members. Prior to bringing any legal actions they had an obligation to resign as trustees due to this material conflict of interest.

C. M. G.

27. At this point I turn my attention to the Trustee Liability Insurance that the Funds carried. There was more than sufficient insurance in place to cover this R20m loss so why then did the insurer not cover this loss?
28. The answer is that Le Grellier, Botha and Lepar were further grossly negligent as they hadn't paid the insurance premiums on these policies and hence the insurer just washed their hands of the claim on the basis that the policies had lapsed due to non-payment of premiums.
29. Throughout the process of the rebuild and throughout the process of this PFA Complaint the Funds have gone to great lengths to hide the truth about these indemnity policies from the members and from the PFA and the Funds have consistently tried to cover up the fact that the insurance premiums were not paid.
30. When I first started making enquiries about why the Trustees did not simply claim the R20m against the indemnity insurance policies the Funds attempted to block me finding out the truth by refusing to give me copies of the insurance policies and by instructing the insurer to not give me any information. I had to bring an application in the South Gauteng High Court to get copies of the policies and to get information from the insurer.
31. My High Court application was fortunately successful and it was then that I found out about the non-payment of the premiums on the insurance policies and the resulting lapses of the policies. The amazing thing was that even

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after this was exposed the Funds never apologised to members but instead tried to continue to divert the blame from itself by invalidly claiming that even if there was cover in place the policies would not have paid.

32. The Funds had an opportunity to put their case forward regarding the Indemnity policies and to answer the allegation of non-payment of premiums in the High Court on 8 November 2012 but chose instead to block this trial from going ahead and it had to be postponed.
33. Further the Insurer themselves confirmed in writing that the only repudiation reason not in dispute is that the premiums on the policy were not paid.
34. I now turn my attention back to the Complaint.
35. The Complainants allege that there was no communication from the Trustees prior to the commencing of the rebuild and that the Trustees had no right in spending R20m of their money on the rebuild.
36. On this point the PFA's Determination found in favour of the members, finding that it was illegal for Le Grellier, Botha and Lepar to have used the members money for the rebuild. The PFA's Determination was 100% correct in this regard.
37. So why then did the High Court set aside the PFA's Determination?

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38. The answer is that the High Court Appeal process was a farce and its outcome was predetermined even before the appeal began and the reason for this is twofold:

38.1. There was only one party involved in this appeal, that party being the Trustees who brought the appeal, The other parties who could have or should have been involved in the Appeal were:

38.1.1. The PFA, however the PFA as I understand it have a policy of not getting involved in the appeal process;

38.1.2. The members, however the members were blocked from opposing the appeal by the Trustees who acted as thugs and bullies by threatening any member who opposed the appeal with a cost order against them. It is really a most ridiculous situation that the trustees who bring the appeal can use member's money to fund the cost of the appeal but if members want to oppose the appeal they need to fund the cost out of their own pockets;

38.2. The affidavit in support of the appeal by the Principal Officer, Lindy Wingrove-Gibson, contained numerous statements that were either simply not true or deliberately omitted; for example:

Wills

38.2.1. She states that the Funds were not administered properly by the previous administrator; which as detailed above is not true;

38.2.2. She states that the trustees considered all the alternatives which again as detailed above is blatantly not true;

38.2.3. She deliberately doesn't go into the fact that the PFA ruled that the trustees were negligent in not having sufficient indemnity cover so as to hide from the court the non-payment of the premiums as detailed above.

39. In conclusion, for all the reasons detailed above I submit that the actions of Le Grellier, Botha and Lepar (who form part of The First Respondent) have been grossly negligent and morally reprehensible and it is because of these three individuals that the Complainants have lost R20m of their hard earned retirement monies.

40. I therefore suggest the following actions be taken against Le Grellier, Botha and Lepar:

40.1. They be held personally liable for the losses suffered by the Complainants;

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Page 12 of 12

- 40.2. They be banned from working in the retirement fund industry in the capacity of trustees or financial advisors;
- 40.3. They be referred to the Financial Services Board to review whether they are fit and proper to hold FAIS licenses.

DATED AT JOHANNESBURG ON THIS THE 29th DAY OF APRIL 2013

T Kamionsky

TONY KAMIONSKY

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QL 35

IN THE TRIBUNAL OF THE PENSION FUND'S ADJUDICATOR**(PFA Reference: PFA/WE/6292/2011/SM)**

In the matter between:-

AFFIRM MARKETING (PTY) LTD & OTHERS**Employer/
Complainants**

and

LE GRELLIER, BOTHA, LEPAR & STUART**First Respondent****ANY FORMER TRUSTEE OF THE BOARDS
OF THE IF FUNDS OVER THE RELEVANT
PERIOD, WHOSE IDENTITIES ARE
UNKNOWN****Second Respondent**

**DELL COMPUTER (PTY) LTD'S
SUPPLEMENTARY COMPLAINT**

1. Dell Computer (Pty) Ltd ("*Dell*") was one of the original employer complainants in this complaint dated 28 April 2011. It is a participating employer in the IF Umbrella Pension Fund and the IF Umbrella Provident Fund ("*the IF Funds*"). The IF Funds launched an application in the South Gauteng High Court under case number 34384/2012 in which they sought an order setting aside the Pension Fund Adjudicator's ("*the*

M.D.

Adjudicator") determination under the present reference number dated 31 July 2012.

2. Dell opposed the application only for purposes of ensuring that the complaint against the first and second respondents was not dismissed. On 5 February 2013, the High Court granted an order setting aside the Adjudicator's determination and remitting the complaint to it to enable the complainants to pursue the relief sought against only the former trustees. The order also permitted the complainants to supplement the complaint and to serve same on the former trustees of the IF Funds. A copy of the court order is annexed hereto marked "X".
3. In an email dated 11 April 2013, the Adjudicator allowed Dell until 8 May 2013 to supplement the complaint. This document constitutes Dell's supplemented complaint.
4. The Adjudicator is referred to the response to the complaint filed by Tony Kamionsky ("*Kamionsky*") dated 29 April 2013. Kamionsky was a former trustee of the IF Funds. In paragraphs 18 to 26 of his response, Kamionsky asserts that Le Grellier, Botha and Lepar were the former trustees who were reckless and grossly negligent in authorising the rebuild of the IF Funds' records.
5. Dell agrees with Kamionsky's conclusion. This, however, does not exonerate Kamionsky who should be found equally responsible for the

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former trustees' breach of their fiduciary and statutory duties which they owed to the IF Funds.

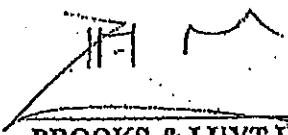
6. To the extent that Kamionsky's response conflicts with the complaint and the supplemented complaint, Dell denies same.
7. In its previous determination (which was set aside by the High Court on limited technical grounds), the Adjudicator correctly found that the former members of each of the IF Funds failed to comply with their fiduciary and statutory duties which they owed to the IF Funds.
8. It is submitted that the first and second respondents, being the former members of the Boards of each of the Funds, failed to comply with and discharge their fiduciary and statutory duties which they owed to the IF Funds as more fully set out in the body of the complaint dated 28 April 2011.
9. In the circumstances, it is submitted that the first and second respondents:
 - 9.1. must be found to be accountable for the maladministration of the IF Funds;
 - 9.2. must be found to be accountable for the maladministration of the IF Funds by the agents appointed by them;
 - 9.3. must be ordered to repay to the IF Funds the sum of R20 million together with interest at the prescribed rate of 15.5% per annum;

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Page 4

9.4. that the first and second respondents be jointly and severally liable for such indebtedness.

DATED at Cape Town on this the 7th day of MAY 2013.


BROOKS & LUYT INC
Suite 301C, Building 20
The Waverley Business Park
Wycroft Road
Mowbray
Cape Town
7925
Docex 226 Cape Town
Ref: DELL/pensionfund

Chels

" X "

Version Two / 04.02.2012

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 34384/2012

BEFORE THE HONOURABLE JUSTICE _____

In the matter between:

- | | |
|-------------------------------------|-----------------------|
| IF UMBRELLA PENSION FUND | First Applicant |
| IF UMBRELLA PROVIDENT FUND | Second Applicant |
| and | |
| LUKHAIMANE M.A. N.O. | First Respondent |
| AFFIRM MARKETING SERVICES (PTY) LTD | Second Respondent |
| BEEFMASTER (PTY) LTD | Third Respondent |
| H BIRKENMAYER (PTY) LTD | Fourth Respondent |
| DR GEBKA, HELBIG & KLUG INC | Fifth Respondent |
| DR RITZ INC | Sixth Respondent |
| ETERNAL FLAME INVESTMENTS (PTY) LTD | Seventh Respondent |
| EXPECTRA 89 (PTY) LTD | Eighth Respondent |
| HESTICO (PTY) LTD | Ninth Respondent |
| HETTAS CC | Tenth Respondent |
| CONVISTA CONSULTING (PTY) LTD | Eleventh Respondent |
| IDI TECHNOLOGY SOLUTIONS (PTY) LTD | Twelfth Respondent |
| PROGRESSIVE PACKAGING (PTY) LTD | Thirteenth Respondent |

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WORLD CARGO SERVICES (PTY) LTD	Fourteenth Respondent
CONDUIT RISK AND INSURANCE HOLDINGS (PTY) LTD	Fifteenth Respondent
DELL COMPUTER (PTY) LTD	Sixteenth Respondent
THE BRAND UNION (PTY) LTD	Seventeenth Respondent
ULTRA LITHO (PTY) LTD	Eighteenth Respondent
NEWSCLIP MEDIA MONITORING (PTY) LTD	Nineteenth Respondent
MIXTEC CC	Twentieth Respondent
PETROMARK (PTY) LTD	Twenty-first Respondent
DEHTEQ (PTY) LTD	Twenty-second Respondent
WAVELENGTHS 32 (PTY) LTD (T/A INZALO COMMUNICATIONS)	Twenty-third Respondent
PANORAMIC COMPONENTS (PTY) LTD	Twenty-fourth Respondent
CHICKEN MANAGEMENT SERVICES (PTY) LTD	Twenty-fifth Respondent
HANSEN TRANSMISSIONS (PTY) LTD	Twenty-sixth Respondent
SAINT ANDREWS BROKERS (PTY) LTD	Twenty-seventh Respondent
ENABLEMED (PTY) LTD	Twenty-eighth Respondent
PRIMESERV GROUP LTD	Twenty-ninth Respondent
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	Thirtieth Respondent
JO'BURG CHILD WELFARE SOCIETY	Thirty-first Respondent
HERITAGE MANAGEMENT SERVICES (PTY) LTD	Thirty-second Respondent

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DRAFT ORDER

Having read the papers filed of record, heard counsel and considered the matter,

IT IS ORDERED THAT:

1. The first respondent's determination under reference number PFA/WB/6292/2011/SM dated 31 July 2012 made in terms of section 30M of the Pension Funds Act 24 of 1956 in respect of a complaint lodged by the above-named second to thirty-second respondents is hereby set aside;
2. The complaint is remitted to the first respondent to enable the complainants in the complaint to pursue relief against only the former trustees of the applicants for breach of their statutory and fiduciary duties owed to the applicants,
3. The respondents or any other interested parties are permitted to supplement the complaint with any further submissions they wish to make to the first respondent.
4. The complainants are to serve a copy of the complaint, duly supplemented, on the relevant former trustees of the applicants against whom they seek relief.
5. The former trustees of the applicants are afforded a reasonable opportunity to file a written reply to the supplemented complaint.

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Version Two / 04.02.2012

6. The first respondent is to reconsider the supplemented complaint and make a determination in terms of section 30M of the Act.

7. There is no order as to costs.

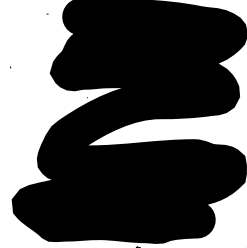
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BY ORDER OF COURT

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Renier Botha and Gail Le Grellier c/o
Gail Le Grellier



The Pension Funds Adjudicator
P.O. Box 580
MENLYN
0063

Attention: Silas Mothupe
Per email: silas@pfa.org.za

Dear Sir

**IN THE MATTER OF AFFIRM MARKETING (PTY) LTD & OTHER PARTICIPATING EMPLOYERS,
ENABLEMED (PTY) LTD & OTHER PARTICIPATING EMPLOYERS, EMPLOYEES OF AFOREMENTIONED
EMPLOYERS WHO ARE MEMBERS OF THE IF UMBRELLA PROVIDENT FUND AND THE IF UMBRELLA
PENSION FUND V GAIL LE GRELLIER, RENIER BOTHA, DAVID LEPAR, CLIVE STUART (FIRST
RESPONDENTS) AND ANY FORMER TRUSTEES (SECOND RESPONDENTS)**

1. We refer to the supplementary complaint submitted by Dell Computers (Pty) Ltd which was forwarded to us on 8 May 2013. We shall deal with each of the paragraphs in the supplementary response separately below.

2. Paragraph 1
No comment.

3. Paragraph 2
It is important to note that the Adjudicator was also ordered in the High Court order referred to, to serve the complaint on the respondents for their response. It is puzzling to us how Dell can rely upon statements made in the original determination when that determination was made without any response being sought from the respondents.

4. Paragraph 3
No comment.

5. Paragraph 4
No comment.

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6. Paragraph 5

We have noted Dell's reliance upon the response submitted by Tony Kamlonsky. They must be fully aware of his specific involvement in the funds, as CEO of the administrator and chairman of the board of trustees. They should note that in both capacities, he failed to share information with the independent trustees (i.e. trustees not employed by nor having an interest in the sponsor) regarding relevant circumstances within his administration company. Dell state that they agree with Kamlonsky's conclusions. We must infer from that they agree with his assertions referred to in paragraph 4 of their letter, i.e. those contained in paragraphs 18 to 26 of Kamlonsky's response. We would like to make the following points –

- Kamlonsky's entire response is premised on the fact that a rebuild was not necessary. Is this Dell's response or is Dell saying that the trustees were negligent in their oversight? If they are saying that there was a failure of oversight, they must accept that there were severe administration problems that required action. They cannot "have their cake and eat it".
- In the paragraphs that Dell refers to (paras 18 to 26 of Kamlonsky's response), Kamlonsky refers to the trustees actions in bringing action against him, alone and makes various accusations around that. The reasons for the trustees instituting action against him are well documented. Kamlonsky was in a very different position to the other trustees during the dynamic period of administration as he had back office knowledge of what was going on. I would like to suggest to the Pension Funds Adjudicator's office that they conduct their own investigation of the information that Kamlonsky's refused to bring to the attention of the trustees. Unfortunately it is not our information to share, but we do believe it is critical to gaining a full understanding of the circumstances surrounding these funds. Kamlonsky goes on to say that the trustees (Lepar, Botha, Le Greillier) should have resigned before bringing any action. Again that has been fully canvassed in our previous responses. We did resign shortly thereafter to allow for a new board to assess the action taken and amend, add to or cease any action.

7. Paragraph 6

This paragraph is difficult for us to understand. Perhaps Dell could clarify what they agree with and what they do not agree with.

8. Paragraph 7

Here Dell endorses a finding of the Adjudicator that was made without asking the former trustees to tell their side of the story. We cannot understand how they state that the determination was "accurate" when no evidence was provided in the original complaint and no response from the trustees was requested. Are they saying that someone is "negligent" simply because they are accused of being negligent and/or because circumstances did not give rise to a good result, i.e. additional costs had to be incurred in order to fix past mistakes? That logic is mystifying to us and not helpful at all in trying to assist the participating employers and members fully understanding the reasons behind the decision of the trustees to pay for a rebuild of the funds. Please also see below:

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M. D.

- Dell refers to "former members" not complying with their duties. We have assumed this means "former trustees".
- In paragraph 5.7 of the Adjudicator's original determination, she sets out the issue to be decided is whether or not the board of management acted properly in funding the cost of the rebuild from member fund credits. In paragraph 5.9 she makes a statement saying that the board did not have an unlimited power to deduct expenses resulting from negligent conduct of the board. It is not clear how she gets to the conclusion that there was negligent conduct of the board. The Adjudicator goes on to say in paragraph 5.19 that the current board of the funds lays the blame at the door of the board, Dynam-Ique and Aon. Perhaps it is from this that she concludes that the trustees were negligent. The reference to the board must be a reference to the decision by the board to take action against Kamlonsky in his capacity as director and trustee. In this regard, please refer above to the specific circumstances surrounding Kamlonsky which we have referred to above. In that same paragraph it is also stated that the board failed to exercise a rigorous oversight. The previous responses to this complaint have set out the various steps that we as trustees took to ensure that systems of reporting etc. were put in place so that rigorous oversight could take place.

9. Paragraph 8

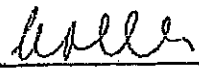
This is adequately dealt with above, but again we would like to point out that no evidence has been produced to prove this failure.

10. Paragraph 9

Notwithstanding the fact that we reject this submission in its entirety, we would like to request Dell to be accurate in their statements. Firstly the amount of R20 million as a rebuild cost across the four funds is inaccurate. Secondly if the reduced amount applies to the four funds, it cannot apply to the "IF Funds" alone. Thirdly perhaps Dell should further reduce this to reflect the fund in which they participate and even further to their portion of the fund. Of course this links in to the issue of jurisdiction. We submit that Dell is not a complainant as defined, see our responses submitted previously. The fact that we are continuing to respond to the allegations contained in these various documents should in no way be construed as us conceding the point of jurisdiction.

Please advise us should you require any further information from us.

Yours faithfully



 GAIL LE GRELLIER

 RENIER BOTHA

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IN THE TRIBUNAL OF THE PENSION FUND'S ADJUDICATOR

(PFA Reference: PFA/WE/6292/2011/SM)

In the matter between:-

AFFIRM MARKETING (PTY) LTD & OTHERS

**Employer/
Complainants**

and

LE GRELLIER, BOTHA, LEPAR & STUART

First Respondent

**ANY FORMER TRUSTEE OF THE BOARDS
OF THE IF FUNDS OVER THE RELEVANT
PERIOD, WHOSE IDENTITIES ARE
UNKNOWN**

Second Respondent

**DELL COMPUTER (PTY) LTD'S REPLY TO GAIL LE
GRELLIER'S RESPONSE**

1. Dell Computer (Pty) Ltd ("Dell") was one of the original employer complainants in this complaint dated 28 April 2011. It is a participating employer in the IF Umbrella Pension Fund and the IF Umbrella Provident Fund ("the IF Funds"). The IF Funds launched an application in the South Gauteng High Court under case number 34384/2012 in which they sought an order setting aside the Pension Fund Adjudicator's ("the

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Adjudicator") determination under the present reference number dated 31 July 2012.

- 2. In an email dated 10 May 2013, the Adjudicator allowed Dell until 15 May 2013 to reply to the response to the complaint filed by Gail Le Grellier ("Le Grellier"). Le Grellier was a former trustee of the IF Funds and is one of the 1st Respondents.
- 3. The Adjudicator is referred to the response to the complaint filed by Le Grellier dated 1 May 2013.
- 4. In paragraph 4c of her response, Le Grellier asserts that until the rebuild is concluded it cannot be clear whether a members' fund credits are over- or understated or whether a member has been prejudiced as the result of a trustee decision to incur an expense to rebuild the IF Funds data. It is not refuted that the trustees authorized the spending of R20 million to rebuild the IF Funds data. Whether the total value of the IF Funds is found to be understated or overstated, the total value of the understated or overstated amount will constitute an amount minus R20 million as a result of the expense incurred, having a prejudicial effect on each of the members.
- 5. In response to the averments made in paragraphs 6 – 8, Dell questions the veracity of the alleged oversight the trustees exercised. The trustees' failure in oversight is clearly evidenced by the decision to spend R20 million on the rebuild. If proper oversight was exercised it would have

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negated the need for a rebuild. The inaccurate and incomplete financial record keeping of the IF Funds data which resulted in the costly and protracted rebuild of the IF Funds data itself is prima facie evidence of the trustees' breach of their fiduciary duty to act in the best interest of the members of the IF Funds, and further a breach of the trustees' statutory duty to keep accurate and complete financial records for the IF Funds.

6. In paragraph 8c, Le Grellier admits the trustees' decision to authorize the rebuild. Le Grellier appears to go even further to state that AON undertook to bear the cost of/fix the records post 1 February 2008. Is it implied that AON would cover the costs of the rebuild if any portion was still outstanding post 1 February 2008 or rather as Dell understands the position to be that a 'clean' handover would have had to be made to AON on 1 February 2008 and the IF Funds had to have opening balances for each member signed off by the trustees as at 1 February 2008. Thus the rebuild cost would be for the account of the IF Funds and not AON. Le Grellier is requested to furnish information or documentation evidencing the alleged undertaking.

7. By Le Grelliers' own admission only Adendorffs and Deloitte were consulted on the rebuild. It is submitted that various alternatives should have been considered to mitigate the cost of the rebuild. In paragraph 9b, mention is made of the fact that there was no significant difference in cost

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between the 2 accounting firms for the proposed rebuild, yet no information in substantiation thereof is furnished. The reports alluded to in paragraph 16 of Tony Kamionsky's ("Kamionsky") response dated 29 April 2013, will shed light on the state of the financial record keeping of the IF Funds at the time the decision was taken to rebuild the IF Funds data at member level. Dell submits that the Adjudicator must consider and have regard to these reports and the resultant decision and necessity to rebuild the IF Funds data.

8. In contrast to what was alleged in Kamionsky's reply in paragraph 28, 30, 31 and 33, Gail Le Grellier in paragraph 11 of her reply has alleged that AON and not the trustees neglected to pay the PI cover insurance premiums. Yet again no information is furnished to substantiate same. The veracity of this allegation needs to be investigated by the Adjudicator. Dell deems it prudent that the Adjudicator firstly, questions and investigates whether the trustees or AON neglected to pay the premiums for the PI Cover, and secondly, whether the total amount of the cover was deemed to be adequate having regard to the size and total value of the IF Funds?

9. Dell has in its possession Minutes of a Meeting held at its Bryanston offices on the 1st of October 2012. The gravity of the meeting is evidenced by the positions held by the attendees. Dell was represented by Seth Angel (Sales Operations Manager), Juan Mostert (Chief Financial

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Officer), Brad Pulford (Country Manager), Roshana Reddy (Head of Human Resources) and Yolanda van Wyk (Head of Legal). Jaco Kok represented AON and Eric Joell represented Saint Andrews Brokers. In the Minutes of the Meeting Jaco Kok admits and alludes to an oversight by AON that the premiums were not paid in September 2010. A copy of the Minutes of the Meeting is annexed hereto marked "X". The Adjudicator is best placed to request copies of the policies from Camargue together with any correspondence evidencing the premiums not being paid and by whom, correspondence surrounding exclusion clauses in the policies specifically relating to the rebuild of the funds and any possible claims associated therewith.

10. Le Grellier's contention in her response under reply stating the legality of the allocation of the cost of the rebuild to member fund credits as an ad hoc expense is submitted to be incorrect. The cost of the rebuild cannot be couched in a matter that is consistent with the definition of an ad hoc expense as contained in the rules of the IF Funds.

11. It submitted that the trustees knew or ought to have known about the inaccurate record keeping and outstanding financials pertaining to their administration of the IF Funds at the time that the decision surrounding the proposed amendments to the rules of the IF Funds were taken, in particular the amendment registered on the 8th of September 2009, giving rise to the definition of ad hoc expenses. Shortly after taking office in

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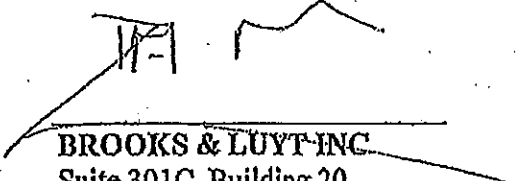
2006 Le Grellier and the fellow trustees' at the time, ought to have been, and must have been aware of the inaccurate and incomplete record keeping of the financials of the IF Funds. Similarly AON ought to have been aware of the inaccurate and incomplete record keeping of the financials of the IF Funds prior to the purchase of the administration business of the IF Funds as at 1 February 2008. The decision to rebuild the IF Funds data at member level only took place approximately 2 years after the purchase of the administration business by AON. The Adjudicator must furthermore ascertain whether there is any portion of the rebuild of the IF Funds data that is due in whole or in part as a result of an act or omission by AON after purchasing the administration business of the IF Funds. The amendment to the rules of the IF Funds giving rise to the definition of ad hoc expenses appears rather to be an attempt by the trustees to amend the rules of the IF Funds due the trustees' foreseeing the possibility of liability on their part and in order to attempt to justify the inclusion of the costs of the rebuild within the definition of ad hoc expenses.

- 12. Not only did the former trustees' breach their fiduciary and statutory duties which they owed to the IF Funds, but also having regard to the averments made by Le Grellier, AON also appears to have failed to comply with and discharge their fiduciary and statutory duties which they owed to the IF Funds, Dell implores to the Adjudicator to call for and

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have regard to all the ancillary documentation and information alluded to in the response from Kamionsky and Le Grellier in order for a just and equitable determination to be made against the correct parties, that firstly caused or contributed to the cost of the rebuild, and secondly, the non-payment of the premiums in respect of the PI cover.

DATED at Cape Town on this the 13th day of MAY 2013.


BROOKS & LUYT-INC
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Cape Town
7925
Docex 226 Cape Town
Ref:
DBLL/pensionfund/LeGrellier-
reply

CL 38

FROM: pfa 10:008660121422013/07/03 15:32:3 / #32019 P.001/021



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Please quote our reference: PFA/WE/6292/2011/SM.
BY REGISTERED POST

Affirm Marketing (Pty) Ltd
C/o Jonathan Mort Inc
3A Sir George Gray Street
Oranjezicht
CAPE TOWN
8001

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"); AFFIRM MARKETING (PTY) LTD AND OTHERS ("complainants") v IF UMBRELLA PENSION FUND ("first respondent"); IF UMBRELLA PROVIDENT FUND ("second respondent") AND FORMER TRUSTEES OF THE FUNDS ("third respondents")

[1] INTRODUCTION

1.1 The complaint concerns alleged maladministration of the first and second respondents by their former board of trustees by using the members' fund credits to fund the cost of reconstructing the funds' data and records.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The services offered is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

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1.2 The complaint was received by this Tribunal on 3 May 2011. On 17 May 2011, letters were dispatched to the first and second respondents giving them until 30 June 2011 to file their responses. A response on behalf of the first respondent, the second respondent and the current board of trustees of the funds was received on 3 August 2011. This Tribunal received a supplemented complaint on behalf of Dell Computer (Pty) Ltd on 8 May 2013 following a court order that was issued by the South Gauteng High Court on 5 February 2013, which allowed the complainants to supplement the original complaint. Responses were also received from the third respondents on 17 April 2013, 26 April 2013, 29 April 2013, 1 May 2013 and 27 May 2013.

1.3 After considering the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complaint involves a group of employers who participate in the first and second respondents ("herein after referred to as the IF Funds"). It also involves employees of the participating employers who are also members of the IF Funds. The IF Funds are pension fund organisations registered in terms of section 4 of the Act. The third respondents are former trustees of the IF Funds, namely, Tony Kamionsky, Gail la Grellier, Renier Botha, David Lepar, Brian Rosen, Lorraine Jager, and Clelio Mol.

2.2 The IF Funds were initially administered by Dynamique SA Consultants and Actuaries (Pty) Ltd ("Dynamique") until 31 January 2008 when Aon South Africa (Pty) Ltd ("Aon") took over the administration of the IF Funds.

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The transfer of the IF Funds' administration occurred after Aon purchased the administration books of Dynamique in 2008. During July 2010, the former board of trustees of the IF Funds appointed Deloitte and Touche to conduct a member level rebuild of the data and records of the funds from inception of the funds (1 January 2004) until 31 January 2008. This was necessitated by the fact that the data held in respect of the IF Funds was questionable and not accurate. The cost of the rebuild exercise amounted to approximately R20 million. This translated into an individual cost for each member of the IF Funds of 2.5% of their fund credits.

2.9 Upon receiving communication of the boards' decision to rebuild the funds' data in November 2010, the complainants indicated their dissatisfaction with the decision to use the members' fund credits in order to fund the rebuild exercise.

[3] COMPLAINT

3.1 The complainants state that the decision to rebuild the IF Funds' data occurred as a result of maladministration of the funds. The maladministration of the funds relates, *inter alia*, to reinvestments not being credited to members' accounts, switches between investments not being correctly recorded, inaccurate recording of monies being deposited into the bank accounts of other funds and a lack of monthly and annual audits. The complainants submit that the particulars of claim against the director of Dynamique that were filed at the South Gauteng High Court indicate that Dynamique breached its administration agreement with the IF Funds. The particulars of claim state that there was a failure to ensure that the IF Funds investments were made in accordance with the Act and the Financial Advisory and Intermediary Services Act 37 of 2002. This is due to the fact that the administrator failed to keep proper records, failed to perform monthly and annual audits, assets and liquidity requirements were

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not maintained and the sale of Dynamique's fund administration business to Aon was not adequately disclosed or dealt with in terms of section 13B(5)(a) of the Act.

3.2 The complainants assert that the former board of trustees also failed to comply with its fiduciary duties provided in sections 7C and 7D of the Act. Although the board is entitled to delegate its functions to administrators, it remains responsible for the actions of such service providers who act as agents of the funds. The delegation of duties does not amount to a transfer of oversight function of the board, nor does it amount to an abdication of responsibilities entrusted to the board.

3.3 They contend that the third respondents have not accounted for the loss suffered by the members in that their fund credits were reduced by 2.5% to fund the rebuild exercise. There is a further potential loss in that the costs of the rebuild exercise may not be recovered. There is also no assurance that the cost of the rebuild exercise will be met from the professional indemnity insurance cover held in respect of the IF Funds.

3.4 In the supplemented complaint, Dell Computer (Pty) Ltd submits that the former trustees who should be held liable for the maladministration of the IF Funds are Tony Kamionaky, Gail le Grellier, Renier Botha, and David Lepar. It submits that they should be held accountable for the cost of the rebuild exercise and the loss suffered by the members in this regard.

[4] RESPONSES

Response on behalf of the IF Funds

4.1 Dunster and Associates filed a response on behalf of the IF Funds and the current board of trustees. It indicates that the IF Funds and the current

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board of trustees were not cited as respondents by the complainant and as a result, no relief can be sought against the funds.

- 4.2 It states that the decision to conduct a rebuild of the funds data was taken in July 2010 by the previous trustees of the funds, namely, Gail la Grelfier, Renfer Botha, David Lepar and Carel Smith. The liability of the former trustees should be limited to those who were in office up to 1 February 2008 as the 2,5% contribution for the cost of the rebuilding exercise is computed up to this date. Aon took over the administration of the funds from Dynamique on 1 February 2008. The previous board of trustees and the former trustees individually are separate entities from the IF Funds.
- 4.3 As regard the decision to rebuild the funds' data, this was done because the data relating to members' investments up to the end of February 2008 was potentially inaccurate. A firm of auditors (Deloitte and Touche) was tasked with verifying the accuracy of the members' information up to the end of January 2008 and commenced the rebuild exercise in July 2010. The previous trustees took legal advice from their attorneys before implementing their decision. The decision and the reasons thereof were communicated to members on 1 November 2010. This was further disclosed to the members by the trustees on 28 January 2011.
- 4.4 The former trustees who made the decision to effect a rebuild of the funds' data resigned on 10 February 2011. The new board of trustees was appointed from 10 February 2011. The new board of trustees considered the need for the rebuild exercise and had no reason not to endorse the decision made by the previous board of trustees. Aon have instructed the auditors to continue with the rebuild process from February 2008 through to date at its own cost.
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4.5 The parties who are potentially liable for the maladministration of the funds' records which caused the need for the rebuild exercise are Dynamique, Mr Tony Kamionsky, Aon and any former trustees who contributed to the maladministration. The funds are pursuing legal proceedings against Dynamique, Mr Tony Kamionsky (in his capacity as a director of Dynamique and a former trustee) and Aon in order to recover the cost of the rebuild process. In its response received during May 2013, the funds advised that they have settled their litigation against Tony Kamionsky and Dynamique. It indicates that an amount of R1 million was paid to the funds in settlement of the civil claim. However, it states that no legal action have been instituted against the former trustees after weighing the possibility of recovery of any loss and the cost implication of the civil action. It submits, however, that it is proceeding with its legal action against Aon.

4.6 As regards the indemnity insurance, the funds have an indemnity insurance which initially ran from 1 August 2010 until 31 July 2011. The period has been revised to run from 1 June 2011 until 31 May 2012. The cost of the rebuild exercise is not a claim covered by the portion of the policy dealing with theft, fraud, dishonesty and computer crime. The IF Funds are also unable to claim compensation from the insurers for the cost it incurred in effecting the rebuild process. This cost was borne by the funds' members.

Responses from the third respondents (former trustees)

Tony Kamionsky

4.7 He states that he has been excluded from the complaint after concluding a settlement agreement with the IF Funds and as a result, no relief can be sought against him. He asserts that the complainants have not provided

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any evidence of maladministration of the funds. He indicates that there was no maladministration of the funds and that R20 million was wasted on a rebuild that was never required. However, he submits that the former trustees, who should be held liable for recklessly spending R20 million to fund the rebuild exercise are Gail le Grellier, Renier Botha and David Lepar. He states that the cost could have been reduced by identifying and correcting specific problems rather than doing a complete rebuild of the funds' data. He concludes that the former trustees named above did not pay insurance premiums on the indemnity policies and hence the insurer refused to pay for the cost of the rebuild exercise.

Gail le Grellier and Renier Botha

- 4.8 Gail le Grellier and Renier Botha submitted essentially the same response. They confirm that they were trustees of the IF Funds from 22 November 2008 to 10 February 2011. They state that the complaint does not amount to a "complaint" as it does not relate to a specific complainant. The participating employers in the funds do not have an interest in the complaint. The members also have not suffered any prejudice as they are only entitled to their fund credits in terms of the funds' rules.
- 4.9 They aver that the complainants made broad allegations of a failure to exercise an oversight function over Dynamique against them without any evidence. The trustees exercised oversight function over Dynamique during several trustees' meetings that were held from 22 November 2008 to 1 February 2008. They state that the decision to use the member's fund credits to fund the cost of the rebuild exercise was an ad hoc expense as defined in the funds' rules. The state of affairs of the IF Funds also made it impossible for the trustees to carry out their duties and as a result, a decision had to be made to protect the funds and the interests of

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members. The IF Funds could not continue operating on the basis of inaccurate data and no financial statements.

David Lepar

4.10 Mr David Lepar submits that he served on the former board of trustees from 9 July 2008 to 10 February 2011. Thus, he states that he cannot be held liable for the decisions of the former board of trustees that were taken prior to 9 July 2008 or after 10 February 2011.

Brian Rosen, Lorraine Jager and Claire Mol

4.11 Mr Brian Rosen states that he resigned from the former board of trustees in 2008 and thus, any issue that arose relating to the funds after this date does not involve him. Lorraine Jager and Claire Mol also submit that they resigned from previous board of trustees in 2008 and were not party or consulted regarding the trustees' decision to use the member's fund credits to pay for the cost of rebuilding the funds data.

[6] DETERMINATION AND REASONS THEREFOR

Preliminary issues raised by former trustees, Gail la Gréllier and Renier Botha

Complaint as defined in the Act

6.1 Gail la Gréllier and Renier Botha submit that the employers involved in this complaint do not have an interest in the complaint and the issues raised do not relate to a specific complainant. The definition of a "complainant" in section 1 of the Act includes an employer who participates in a fund. The definition of a "complaint" in section 1 also includes allegations of maladministration of a fund or an allegation that a decision of the fund or

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any person purportedly taken in terms of the fund rules was excessive or amounts to improper exercise of powers. It also includes allegations that a complainant has sustained or may sustain prejudice as a result of maladministration of the fund. Thus, the participating employers in this complaint fall within the ambit of a "complainant" as defined in section 1 of the Act and the issues raised amount to a "complaint" as defined in the Act. A complainant does not have to wait until he suffers loss or prejudice before lodging a complaint before this Tribunal.

6.2 Thus, the technical points fail to be dismissed.

Tony Kamionsky, Dynamique and Aon

5.3 It is noted that Tony Kamionsky and Dynamique concluded an out of court settlement with the IF Funds on 20 March 2013 in terms of which he paid the funds R1 million rand in settlement of a claim for alleged maladministration of the IF Funds. This Tribunal was provided with a copy of the settlement agreement between the parties. In terms of the settlement agreement, all disputes and civil claims between Tony Kamionsky, Dynamique and the IF Funds were settled. The IF Funds also agreed to withdraw all actions and civil claim against Tony Kamionsky and Dynamique.

5.4 The funds also advised that summons have been issued against Aon in the South Gauteng High Court for maladministration of the funds. The submissions indicate that the civil claim against Aon commenced on 20 January 2011 before the initial complaint was received by this Tribunal on 3 May 2011. Thus, it will be premature for this Tribunal to pronounce on the liability (if any) of Aon relating to the administration of the funds whilst there is pending civil claim against it. In order to avoid two parallel rulings relating to the same issue, the High Court should be allowed to

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adjudicate the civil claim against Aon. Section 30H(2) of the Act also precludes this Tribunal from adjudicating any complaint if before lodging the complaint proceedings have been instituted in any civil court in respect of the same subject matter.

High Court order

5.5 It should be noted that this Tribunal issued a determination in this matter on 31 July 2012 in terms of which the IF Funds were ordered to recalculate the member's fund values and credit them with the 2.5% that was used to fund the cost of the rebuild exercise. However, the IF Funds filed an appeal in terms of section 30P of the Act and the South Gauteng High Court issued an order on 6 February 2013 ordering that the complainant should pursue relief only against former trustees of the funds for breach of their statutory and fiduciary duties.

5.6 This Tribunal sent letters to all known former trustees affording them an opportunity to file responses to the initial complaint and the supplemented complaint as required in terms of section 30F of the Act. Thus, in light of the court order, the current complaint is only directed against the former trustees of the IF Funds to the exclusion of Tony Kamionsky, Dynamicque and Aon.

The merits

5.7 The issue that falls for determination is whether or not the previous board of trustees of the IF Funds acted properly in terms of the funds' rules and the Act in using the members' fund credits to fund the cost of the rebuild exercise.

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The funds' rules

5.8 The complainants are bound by the funds' rules as their claim is derived from the fund rules (see section 13 of the Aol). Their claim can only succeed if they can show that the former board of trustees did not act in terms of the funds' rules. The first and second respondents, as registered funds, are also bound to act in terms of their registered rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA)).

5.9 In terms of rule 2.6.19 of Amendment No. 2 of the IF Funds' rules, a members' fund credit consists of his or her contributions, the employers' contributions that are allocated for retirement funding, plus amounts transferred to the funds from a previous fund, less funds transferred to the expense reserve account in respect of ad hoc expenses, plus transfers from the expense reserve account and investment returns. The IF Funds' rules define "expenses" as follows:

"EXPENSES" means the ongoing monthly costs that cover administration services, consulting services and premiums in respect of INSURED DEATH BENEFITS and INSURED DISABILITY BENEFITS."

5.10 The rules also define "ad hoc expense" as follows:

"AD HOC EXPENSE" means costs and expenses, other than EXPENSES, that are not necessarily payable monthly and are not necessarily capable of being predetermined and will include, *inter alia*, fees, taxes and levies paid and accrued to service providers, the regulatory authorities, TRUSTEES, premiums in respect of professional indemnity and fidelity guarantees insurance, and audit fees."

6.11 In terms of rule 4.6.1 of the funds' rules, expenses and ad hoc expenses

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will be borne by the funds. The rule also states that expenses will be funded by the contributions made by the employers to the funds whilst the cost of *ad hoc* expenses will be deducted from the member's fund credit on such basis as may be determined by the trustees from time to time.

5.12 Thus, the IF Funds' rules define what costs can be deducted from the members' fund credit as *ad hoc* expenses. In terms of the rules, *ad hoc* expenses include costs and expenses that are necessarily payable monthly and are not capable of being predetermined. It is clear that the costs of *ad hoc* expenses are funded by deductions from the members' fund credits.

5.13 The IF Funds are defined contributions funds, which means that the benefits payable to members upon their exit depend on the underlying investment performance of the funds and is thus subject to the vagaries of the financial markets (see *Masingi v Pick 'n Pay Provident Fund* [2002] 1 BPLR 2085 (PFA) at 2087D-F). Thus, a member is not guaranteed any fund credit as the value thereof is determined upon the date of exit. A member's fund credit also does not include transfers to the expense reserve account in respect of *ad hoc* expenses. It appears from the funds rules that the deduction of the costs for the rebuild process can be categorised as audit fees, fees or levies paid to service providers or creditors of the funds. It may also include fees that are not necessarily payable monthly and are not capable of being predetermined.

Maladministration of the funds by the former trustees

5.14 Although the definition of *ad hoc* expenses allows the trustees to deduct such costs from the members' fund credits, this does not give them an unlimited power to use the member's fund credits to fund any cost resulting from their negligent conduct. It also does not cover costs

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resulting from maladministration of the funds which resulted in the members suffering an unwarranted loss on their fund credits. The facts indicate that the decision of the previous board of trustees of the funds to use 2.5% of the members' fund credits to fund the cost of the rebuild process was a result of maladministration of the funds. The members were financially prejudiced in that their fund credits would be lesser than they would have been had the former trustees managed the funds properly. The other prejudicial factor is that the IF Funds are not able to compute and pay correct benefits to members upon their exit due to incorrect data.

5.15 The submissions indicate that the decision to engage the services of auditors to rebuild the funds' data and records was necessitated by the fact that the fund data was questionable and not accurate. The rebuilding of the funds' data had to be done at individual member level. The decision to rebuild the funds' data was taken in July 2010 when the funds were administered by Aon. The funds' administration was taken over by Aon from Dynamique on 1 February 2008. It appears from the facts that Dynamique did not keep proper records or administer the funds in accordance with its agreement with the funds. Aon also purchased the administrative books of Dynamique without conducting a proper due diligence. As a result of its failure to act with care and due diligence, it inherited the administrative problems from Dynamique.

5.16 However, the ultimate responsibility for the proper management of the funds rests with their board of trustees (see rule 6.1 of the funds' rules). In terms of rule 6.6.1 of the rules, the object of the board is to direct, control and oversee the operations of the funds in accordance with applicable laws and the rules. This includes the duty to act in the interest of members, to take measures to protect the assets of the funds and to ensure that proper records essential for the efficient administration of the funds are kept (see rules 6.7.1.13 and 6.14.1).

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5.17 A board of trustees owes a fiduciary duty to the fund and to its members. A registered fund is entrusted with the control of property with which it is bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations (see *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 884C-D and *Estate Kemp and Others v McDonald's Trustees* 1916 AD 401 at 499). Sections 7C and D of the Act codified some of the common law fiduciary duties of the board of trustees.

5.18 The opposite portion of section 7C(1) and (2) reads as follows:

"The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund."

(1) In pursuing its object the board shall-

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected ...;

(b) act with due care, diligence and good faith."

5.19 Section 7D, in turn, reads as follows:

"The duties of a board shall be to-

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board ..."

(c) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws."

Walter

5.20 In terms of rule 6.9 of the funds' rules, the board may delegate its powers and duties to an administrator. However, the primary function of the board of trustees in relation to the business of a fund is to ensure that it exercises a rigorous oversight function over its administrators. In order for the board to exercise its oversight role properly, those to whom functions are delegated should be required to report back regularly on such delegated functions and with sufficient and relevant information to enable the board to make an informed performance assessment. The submissions indicate that the IF Funds do not have proper records and data. This prevents the funds from having accurate records regarding the members' fund values. This is the main reason why there was a need to appoint auditors to rebuild the funds' data and records.

Personal liability of former trustees

5.21 The Financial Institutions Act 28 of 2001 imposes certain duties on trustees. Section 2(a) of that Act requires a trustee, in the control and administration of a fund, to observe the utmost good faith and exercise proper care and diligence. Failure to comply with these duties constitutes a criminal offence which, on conviction, may result in a fine not exceeding R10 000 or imprisonment for a period not exceeding 10 years or to both such fine and imprisonment. In addition, the trustees could be liable to the financial institution or beneficiary thereof for any damage suffered by the institution or beneficiary as a result of such failure (see section 10 (2)).

5.22 There can be no doubt that these provisions were intended also for the kind of situation with which this Tribunal is confronted. Firstly, the Financial Institution Act imposes the section 2(a) duties on an "official... of a financial institution...who controls or administers any funds of the institution... held by or on behalf of the institution for any beneficiary." A "financial institution" is defined with reference to the Financial Services

Calley

Board Act, 97 of 1990 which in its definition of "financial institution" includes a pension fund.

5.23 As trustees of the board of management of the complainant, the members of the former board of trustees are all officials of the financial institution as defined. As trustees of the funds, the board controls and administers monies paid into the fund and each trustee can be held personally liable for any financial loss caused to the funds due to maladministration (see *Mes v Art Medical Equipment Pension Fund (Now Liquidated) and Others (2)* [2005] 4 BPLR 332 (PFA) at paragraphs 20-22). Section 2(a) of the Financial Institution Act requires that they should perform these duties with care and diligence.

5.24 It follows that the trustees that were in office when the decision was taken to rebuild the funds data in July 2010 must be held personally liable to compensate the IF Funds for the financial loss occasioned by the rebuilding of the funds' data by reason of their failure to exercise their duties of proper care and diligence in the management of the funds.

5.25 It appears that the liability of the former trustees should be limited to those who were in office from 1 February 2008 to July 2010 as the 2.5% fund credits that were deducted to fund the cost of the rebuilding exercise is computed up to this date. These will include Gail le Greiller, David Lepar, Renier Botha, and Carel Smith. There were other former trustees including Lorraine Jager, Claire Mol and Clive Stuart who joined the former board of trustees after the decision to rebuild the funds' data was taken and resigned in 2006. Thus, they were not on the board of trustees when a decision was taken to rebuild the fund's data and when the IF Funds were administered by Dynamique.

5.26 As regards Tony Kamlonsky, it should be noted that the amount of

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R1 million rand that he paid on his behalf and Dynamique in settlement of all civil claims against him for alleged maladministration is negligible having regard to the amount of financial loss suffered by the IF Funds and members as a result of the rebuild exercise. A reasonable settlement should have taken into account the financial prejudice to members and the IF Funds. However, this Tribunal takes into cognisance that the IF Funds have concluded a settlement agreement with Tony Kamionsky and Dynamique, which is binding on the parties concerned.

Apportionment of financial loss

5.27 The issue of the personal liability of former trustees is compounded by the fact that the few trustees that were identified cannot be held solely liable to compensate the IF Funds for their financial loss. This is due to the fact that various parties contributed to the financial loss as a result of the rebuilding of the funds' data. These include Dynamique and Aon. As indicated above, Dynamique together with Tony Kamionsky have paid an amount of R1 million to the funds in settlement of a civil claim against them for alleged maladministration of the funds. The funds have also instituted a civil claim against Aon for maladministration of the funds. Thus, the personal liability of the former trustees should be less the amount of R1 million paid to the funds by Tony Kamionsky and Dynamique.

5.28 In terms of our common law, persons who jointly administer the affairs and property of others like trustees, can be held jointly and severally liable for loss caused by maladministration (see *Gross & Others v Pentz* 1998 (4) SA 617 (A) 629F-630D). Therefore, the former trustees who were responsible for managing the IF Funds in July 2010 when a decision was taken to rebuild the funds' data should be held personally liable for the financial loss occasioned by the rebuilding process.

Walt

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 It is declared that the previous trustees of the IF Funds, which include Gail la Grallier, Renier Botha, David Lepar, and Carel Smith, did not manage the IF Funds properly and as a result, caused financial loss to the funds and ultimately to the members;

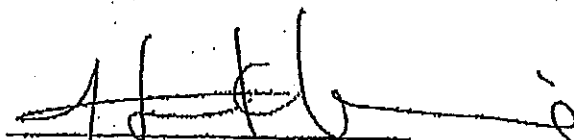
6.1.2 The IF Funds are ordered to compute the amount of the financial loss to the funds and members occasioned by the rebuilding of the funds' data, having regard to the investment returns earned by the funds, within four weeks of this determination;

6.1.3 The members of the former board of trustees identified in paragraph 6.1.1 above are personally (jointly and severally) ordered to pay the IF Funds the amount of the financial loss as computed in paragraph 6.1.2 above, less the amount of R1 million rand already paid by Tony Kamlonsky and Dynamique, within six weeks of this determination; and

6.1.4 The former trustees are further ordered to notify the IF Funds and this Tribunal of the payment as stated in paragraph 6.1.3 above, within seven weeks of the date of this determination.

FROM: pfa IO:00866012142 2013/07/03 16:48:28 #32019 P.019/021

DATED AT PRETORIA ON THIS 3RD DAY OF JULY 2012



MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

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8018

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Co: IF Funds
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FROM:ptn 10:00088012142 2013/07/03 10:46:01 #32810 P.020/021

20

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FROM: pla IO:000880121022013/07/03 15:47:12 #32910 P.021/021

21

Section 30M filing: High Court

Complainants were represented by: Jonathan Morl Inc

The first and second respondents were represented by: Dunster and Associates

Dell Computer (Pty) Ltd was represented by: Brooks Luyt Inc

No legal representation for the third respondents

F 10/11

Keith Setaka

From: Johann Basson
Sent: Thursday, December 05, 2013 11:20 AM
To: Keith Setaka
Subject: FW: Le Grellier and 3 Others/PFA Adjudicator and 32 Others - Case no. 49616/13

Johann Basson

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From: Johann Basson
Sent: 05 December 2013 11:19 AM
To: Johann Basson
Subject: FW: Le Grellier and 3 Others/PFA Adjudicator and 32 Others - Case no. 49616/13

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From: Ren Dunster | Dunster & Associates [<mailto:ren@dunster.co.za>]
Sent: 14 August 2013 08:29 AM
To: Johann Basson
Cc: Hunter Thyne; Shireen Patel; Ahmed Mokdad
Subject: RE: Le Grellier and 3 Others/PFA Adjudicator and 32 Others - Case no. 49616/13



Dear Johann,

1. Thank you, I confirm receipt and service by email on behalf of the 32nd and 33rd Respondents.