

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/EC/64/98/IM

In the complaint between:

J L Lamont	First Complainant
P S Botes	Second Complainant
W A du Plessis	Third Complainant
J M T Perks	Fourth Complainant
H G Scholtz	Fifth Complainant
G J van Heerden	Sixth Complainant

and

BKB Group Pension Fund	First Respondent
Alexander Forbes Consultants & Actuaries (Pty) Ltd	Second Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF
1956**

Introduction

- 1. This complaint arises out of the restructuring of the BKB Group Pension Fund (hereinafter “the fund”) with effect from 1 January 1998, part of which entailed the purchasing of pensions by the fund on behalf of its existing pensioners.**
2. The complainants are all retired members of the fund for whom pensions were purchased by the fund with the registered insurer of their choice with effect from the date of restructuring,

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and who allege that they have been treated unfairly and unreasonably by the fund and its administrators Alexander Forbes Consultants and Actuaries (Pty) Limited (hereafter “Alexander Forbes”), to the extent that they have each suffered personal financial loss.

3. The complaint has been lodged with the respondents who have each responded in writing. Further documentary evidence and written submissions have been obtained from the parties by my senior investigator, Ian McDonald. Copies of additional relevant documents were also obtained by Mr McDonald from Old Mutual, the underwriter of the Galaxy Underwritten Life Annuity, the registered insurer selected by the complainants.
4. Based on the extent of these written submissions and the comprehensive report presented to me by Mr McDonald, I am satisfied that all the parties have had adequate opportunity to comment on the allegations of the complaint and responses, to the extent that the provisions of Section 30F of the Act have been complied with.

Background to the complaint

5. During mid-1997 the trustees of the fund, under the guidance of Alexander Forbes, decided to outsource the provision of pensions by using the pensioner reserves held by the fund to purchase individual annuities on behalf of its current pensioner members, effective from 1 January 1998.
6. In order to introduce an element of individual investment choice, pensioners were given the option of having a with-profit annuity purchased with Sanlam, the current underwriter of the fund, either in the name of the fund or in their own name, or alternatively of having a living annuity purchased in their own name with any registered insurer of their choice.
7. These options and their consequences were advised to pensioners in writing and by way of personal presentations given by the Principal Officer of the fund, Mr A Gouws, assisted by

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Ms J Palframan representing Alexander Forbes. Each pensioner was required to complete the necessary application form indicating the choice made and to return the completed form to the principal officer by 28 November 1997.

8. At the presentations, which were attended by the complainants, pensioners were advised, among other things, that by purchasing a living annuity in their own name they would be carrying their own investment risk, subject to the volatility of the investment market to which their investments would be linked, and that they would have no further claim whatsoever against the fund. They were also advised that they could use the services of an agent/broker of their choice to assist them in selecting a suitable annuity provider. However, the principal officer recommended the use of Alexander Forbes Executive Financial Consultants (hereinafter "EFC"), as it was felt that the fund would be able to exercise leverage with EFC in the event of any difficulties arising, due to the fund's existing relationship with the Alexander Forbes Group.
9. Of 104 pensioners, 50 elected to deal with EFC and were represented by Mr J Holdsworth. The remaining 54 Pensioners employed their own financial advisers, resulting in a total of 40 different brokers acting as consultants overall. The complainants were among those who elected not to consult Mr Holdsworth, but rather to take advice from their own personal financial advisers.
10. Old Mutual's Galaxy Underwritten Life Annuity was the investment vehicle chosen by 62 of the pensioners, the remainder being spread among 9 other insured annuity products. The complainants were all among those who selected the Galaxy product, their election forms and applications being completed and submitted timeously.
11. It is a well known and accepted fact in the industry that, because transfers of pension fund assets of this nature are subject to the requirements of section 14 of the Act and in particular the requirement that the transfer cannot be finalised until the Registrar has issued a

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certificate to the fund to the effect that all the requirements of section 14 have been satisfied, there is a considerable delay between the effective date of the transfer and the actual date on which assets are transferred. This period of delay can, and usually does, extend for several months. It follows, therefore, that the value of the assets held by the fund and awaiting transfer can, and do, change in the interim period, depending on economic circumstances. Equally, the terms and conditions available from the transferee product can change in the interim, particularly where these are linked directly to fluctuating investment market conditions. Unfortunately, such changes in value are rarely, if ever, equal and opposite, due to the differing nature of investment portfolios and it is almost inevitable that there will be a difference in the value of members' benefits before and after the event. Where members' benefits are guaranteed by the fund, such gain or loss, as the case may be, is borne by the fund. However, where the investment risk is borne by the members themselves, it is they who feel the impact of any fortuitous gain or loss. Perhaps an unsatisfactory situation but one which the industry has learned to live with.

12. In an attempt to stabilise the situation, and to protect the benefit expectations of both transferring and remaining members, it is common practice for funds to isolate the assets available for transfer and place these in a cash portfolio or some other appropriate vehicle where their capital value will be maintained over the period, regardless of market fluctuations. In this particular case the reserve values for transferring pensioners were calculated as at 1 January 1998 and Sanlam were instructed to move this money into a cash portfolio on the same day, until such time as the section 14 certificate had been obtained and the physical transfer could take place. Pensions that became due in the interim period were to be paid out of the fund.
13. In the meantime, during December 1997, Mr Holdsworth, in discussions with Mr Moray Norton, the National Sales Manager for Old Mutual Investment Services, had obtained agreement from them to accept investment by the fund in the Galaxy Product whereby, although ownership of the assets would remain with the fund, Galaxy would earmark the

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amounts invested for individual pensioners until such time as the section 14 requirements had been completed and the contracts could be issued in the names of the individual pensioners. This arrangement would effectively link the value of the transfer assets in respect of the pensioners concerned to the actual performance of the Galaxy products into which they were to be transferred, during the interim period, and prior to the actual transfer to the member taking place. It follows that such an arrangement could either be to the advantage or disadvantage of the members concerned, depending on the relative performance of the two investment vehicles during the period, which could not be predicted in advance.

14. Over the period from 5 January 1998 to 9 January 1998, Mr Holdsworth arranged for assets to be transferred from the fund to the Galaxy portfolio in respect of 49 of the pensioners on whose behalf he was acting as adviser.
15. On 27 January 1998, Mr Norton, assuming that the agreed arrangement should have applied to all pensioners who had opted for the Galaxy product, faxed Mr Holdsworth to enquire when Old Mutual would receive the transfers in respect of the remaining members for whom they had received applications but no money. In response, the next day, Mr Holdsworth advised Mr Norton that only those pensioners who had dealt through the EFC were to participate in the arrangement.
16. As a result of this response Mr J Bryant, Executive Officer at Old Mutual Investment Services, contacted the first complainant and other pensioners for whom they had not yet received transfers, and then took the matter up again with Mrs Palframan at Alexander Forbes, who confirmed Mr Holdsworth's statement. However, during the conversation Mrs Palframan agreed to set up a special meeting of the fund's trustees on 6 February 1998 to discuss the matter. At this meeting the trustees were advised of the special arrangement with Galaxy and that the complainants also wished to participate in it. The fact that these investments had shown better growth than the rate of return being obtained on the Sanlam

cash portfolio was also made known to them. The trustees then instructed Alexander Forbes to assist the other pensioners, through their brokers, to participate in similar arrangements.

17. On 16 February 1998 assets in respect of all the other pensioners for whom the necessary documentation had been completed were transferred to the various insurers of their choice. This included assets in respect of the six complainants, which were then invested by Galaxy at the unit price prevailing on 18 February 1998.

The complaint

18. The complainants aver that they had duly and timeously exercised their election to purchase living annuities and had given notice of their intention to invest in Old Mutual's Galaxy Underwritten Life Annuity scheme. It was, therefore, incumbent upon the fund and Alexander Forbes to transfer their assets to Galaxy at the earliest opportunity, and that this should have been done on 5 January 1998 at the same time as the transfers were made on behalf of clients of Mr Holdsworth. The letter of undertaking issued by Old Mutual to the effect that the fund would effectively remain the owner of the Galaxy contracts until such time as the section 14 certificate had been issued removed the need to delay transfer, and the benefit of this arrangement should have been given to all pensioners, not only those dealing with EFC. In view of the fact that their assets were not transferred until 16 February 1998 and during this period the value of shares on the stock market had increased dramatically, the number of units they were able to purchase in the Galaxy fund was substantially reduced, to their detriment. They claim that they have been treated unfairly and unreasonably by the fund and by Alexander Forbes, and have suffered substantial damages in respect of their future pension payments.
19. The extent of the loss has been quantified by the complainants as follows:

Complaint

Number of

Rand Value

20.2 The fund gave effect to this proposal to those members who used the division of Alexander Forbes concerned with financial advising and semantically distinguished from the division providing financial advice. It is our submission that upon becoming aware of the proposed method and the reasoning therefor, the trustees for the benefit of all members of the fund were under a duty to treat all members fairly. The trustees seek to distance themselves from their obligations as Trustees on transfer of the investment portfolio to the relevant insurer in the fund's name in respect of those pensioners using the services of a division of the fund's administrators.

The investment in this form remains an investment by the fund and not the individual member. The trustees' administrators are duty bound to treat all members equally. Inasmuch as the procedure adopted was specifically designed to take into account the condition of the Stock Market at the time, until the section 14 certificates had been issued, the trustees were duty bound to protect the interests of all members, including specifically the complainants.

20.3 Regrettably the problem is exacerbated by the conduct of Alexander Forbes. Prior to 15th December 1997 Old Mutual, knowing the effective date of transfer was officially 1 January 1998 and that section 14 certificates may take 2 to 3 months for approval by the Financial Services Board, discussed the issue with John Holdsworth. According to the trustees, Mr Holdsworth is the financial broker employed by the division of its administrators (Alexander Forbes Consultants). It would appear that when Old Mutual were discussing matters with him he did not care to distinguish his role as an independent broker (as alleged by the fund) and as the representative of the administrators.

20.4 In a discussion prior to 15 December 1997 (Mr John Holdsworth and Mr Moray Norton) Old Mutual agreed to issue a letter of undertaking that the fund would

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effectively remain the owner of the Galaxy contracts until the section 14 transfers had been approved. Based on this undertaking (originally discussed with Mr Holdsworth) Alexander Forbes Administrators agreed to release the funds at the beginning of January 1998.

It is clear that Alexander Forbes Administrators (represented by Mr Holdsworth) had agreed to transfer the monies in respect of all Galaxy transferees on the strength of the undertaking by Old Mutual of 15th December 1997.

- 20.5 The trustees adopted a position that once the members had made their selection, they had severed their ties with the fund. This is contrary to the de facto position where the fund invested until the section 14 certificate and transfer was approved. During this period they remained obliged to ensure management and administration of the fund to the best advantage of all the members.
- 20.6 The attitude of Alexander Forbes demands censure. It, as an administrator, cannot conveniently claim that “another division” is responsible for investment as individual advisors. Their position is clearly evidenced by the statement that only those who dealt through Alexander Forbes would be treated to the advantage of the early investment.
- 20.7 The inconsistency in the treatment by the trustees, fund and the administrators meted out to the complainants as compared to those members of the fund who elected to continue their relationship with Alexander Forbes borders on unprofessional conduct, alternatively constituted at least an improper exercise of their administrative powers causing the complainants to suffer substantial prejudice in the circumstances.

The responses of the respondents

21. The separate responses received from the fund and Alexander Forbes are so similar that they could almost have been written by the same person. Both deny that they treated the complainants unfairly or unreasonably, and claim that at all times they acted reasonably and fairly within their powers. They also deny that the complainants have suffered any prejudice at their hands.
22. In support of this argument and to counter statements made by the complainants, the respondents jointly claim the following:

22.1 Pensioners were clearly advised that there would be delays in the process of transferring out of the fund and that if the living annuity in their own name was elected a section 14 certificate would have to be obtained before such a transfer could take place. This could not begin until the pensioners' agents/brokers of their choice gave the fund or Alexander Forbes (in their administrative capacity) proper instructions to transfer. Accompanied by the relevant documentation.

The fund is not responsible for the fact that the pensioners who voluntarily chose to use EFC as their brokers had better overall returns than those who did not, in particular the complainants.

22.2 Alexander Forbes acts according to its mandate. Where acting as an administrator it is not mandated to give brokerage advice to individual pensioners and as such has no duty on them to do more than to advise that the benefits be safeguarded in the most prudent manner. Where EFC have been employed as a brokerage service, the duty to advise exists in respect of their clients only, i.e the pensioners who have

employed them as such. They are not obliged to give advice to pensioners who are not their clients, particularly where they have contracted the services of another broker.

The fund believes that Alexander Forbes, in its administrative capacity, has treated all pensioners equally.

- 22.3 The fund did treat all members of the fund fairly. They were all given individual investment choice and the option of choosing a broker. They were advised to use EFC. They were then all treated in accordance with any instructions received from them or their broker. The fund fulfilled its duty to the pensioners by ensuring that benefits were safe from depreciation.

With the implementation of individual member choice each pensioner mandated a broker to act on their behalf and assist them with investment choice. The selection of the agent/broker was not limited by the fund and was at the pensioner's personal behest. The fund cannot be liable to those pensioners whose choice of broker and/or investment did not perform to their satisfaction.

- 22.4 EFC (Mr Holdsworth) was not authorised to act on behalf of the fund. Mr Holdsworth's dealings with Old Mutual were strictly in his capacity as broker to his clients. Old Mutual was aware of this and as such issued the letter dated 15 December 1997 to Mr Holdsworth and not to Alexander Forbes as administrators of the fund. Based on the undertaking received from Old Mutual in respect of EFC's clients, Alexander Forbes agreed to release the funds in respect of those clients at the beginning of January. The balance of the pensioners'

funds could not be released until receipt of the section 14 certificate.

- 22.5 There was no duty on the trustees to instruct Alexander Forbes to approach other brokers and to assist them with a similar proposal. The trustees had a duty to protect the pensioners benefits, which was done by placing them in a cash portfolio. The trustees acted reasonably at all times and deny that the complainants suffered any prejudice.
- 22.6 Alexander Forbes did not change their position. They were not able to act on behalf of pensioners from whom they had no mandate. This also contradicts the principle of individual investment choice. On the instructions of the fund (from whom Alexander Forbes have a mandate) the administrators assisted the remaining pensioners' brokers in implementing the same proposal as EFC implemented.
- 22.7 The trustees did not adopt the position that once members had made their selection they had severed their ties with the fund in respect of the management and administration of the fund, but rather that where they had exercised individual investment choice the fund would not interfere with that choice.
- 22.8 Alexander Forbes acted within its respective mandates at all times. EFC had no authority to implement the proposal in respect of pensioners who were not their clients. Furthermore, had they done so and the Old Mutual Portfolios has suffered losses, EFC would be liable for those losses, as it would have acted without authority.

The fund treated each pensioner in accordance with his/her individual

investment choice. This treatment cannot be said to be inconsistent and they cannot be held liable for any losses incurred as a result of those choices.

23. The respondents conclude by denying that either of them acted unprofessionally or improperly, or that the complainants suffered any loss attributable to either. They ask that the complainant's complaint be dismissed with costs.

The issues for determination

24. There are three main issues and several sub-issues material to the complaint that arise as a result of the actions of the various parties involved, during the period between the time the decision to transfer assets was taken and the ultimate issuing of the section 14 certificate by the Registrar.

The three main issues are:

- 24.1 Did the fund, and Alexander Forbes on its behalf, act at all times in the best interests of all the pensioners equally, or did they afford special treatment to a select group of pensioners, to the detriment of the other pensioners, including the complainants? Did they exercise their powers in terms of the rules of the fund and the Act improperly at any time resulting in prejudice being suffered by the complainants?
- 24.2 What is the relationship between the fund and Alexander Forbes in their capacity as appointed administrator, and EFC (in particular Mr Holdsworth) who were appointed as financial advisor by certain pensioners, and the other brokers who were consulted by other pensioners, including the complainants?

- 24.3 The third main issue has not been raised directly by the complainants but is central to and has a direct bearing on the other issues raised. Did the fund and its administrators in fact have the power and the authority in terms of its rules and the Act to take the action they did in transferring assets and earmarking these for specific pensioners, prior to receiving the necessary certificate from the Registrar in terms of section 14 of the Act?
25. Addressing this last issue first, I am happy that the necessary power and authority did exist. Section 14 of the Act concerns the transfer of business, being assets and liabilities, from the fund to another person, and says that no such transfer shall be of any force until, among other things, the registrar has forwarded a certificate to the principal officer of the fund to the effect that all the requirements of sub-section 14(1) have been satisfied. In the arrangement in question, however, there was no transfer of assets or liabilities prior to obtaining the necessary certificate. The fund merely purchased contracts of insurance from Galaxy in its own name, as an investment. Benefits continued to be paid from the fund in terms of its rules pending receipt of the certificate.

As far as the rules of the fund are concerned the investment powers vested in the trustees are wide and varied. In particular, in terms of rules 20.1.2.

The trustees shall have full power, subject to the provisions of the Act and the requirements of the Registrar, to receive, administer and apply the moneys of the fund and in their absolute discretion to lend, invest, put out at interest, place on deposit, make advances, or otherwise deal with the moneys of the fund upon such security and in such manner as they may from time to time determine and to realise, vary reinvest or otherwise deal with such securities and other investments as they from time to time determine.

Then in rule 20.1.3

The trustees shall have the powers to effect policies of insurance with one or more

Registered Insurers for the purposes of investing the fund's moneys in order to meet the cost of providing benefits in terms of these rules and/or to insure, in whole or in part, the death benefits payable in terms of these rules.

And then in rule 20.1.7

The trustees, if they see fit, shall have the power to transfer the assets of the fund or a part thereof to another approved pension fund or to take transfer of the assets or a part thereof of another approved pension fund or of a provident fund approved as such by the revenue authorities and to take cession of policies of insurance issued on the lives of members.

It is clear then, that the trustees did not exceed their powers in terms of the rules in making this special arrangement, nor was it in contravention of the Act.

26. As far as the second issue is concerned, it is claimed by the fund that Alexander Forbes Consultants and Actuaries is appointed by the fund solely as its administrators and advisers. EFC, on the other hand, is a different division of the Alexander Forbes Group with different personnel with different skills, and one of its employees, Mr Holdsworth, was employed as a personal financial adviser by a number of pensioners, in the same way and with the same mandate as all 40 brokers employed by pensioners at the time. None of these brokers were appointed by the fund.
27. The complainants, however, claim that no distinction was made between Alexander Forbes as consultants to the fund and Mr Holdsworth as adviser to those pensioners who sought his advice. They contend that to all intents and purposes the two are the same, and actions taken on the instructions of Mr Holdsworth should have been applied to all pensioners, not just to those for whom he was acting in a personal capacity. In particular, the special arrangement made with Galaxy should, in their view, have been applied to all those pensioners who elected to have their pensions purchased from the Galaxy Underwritten Life Annuity

Portfolio, including the complainants, automatically and simultaneously. This view is given credence by the statements of Messrs Norton and Bryant at Galaxy, both of whom claim that they understood that Mr Holdsworth was acting on behalf of the fund, rather than for individual members, when the special arrangement was agreed to.

28. The question of who acts for whom, and with what authority, is at the centre of many a dispute in the financial services arena, and even seasoned professionals differ in their views, so it should not surprise us that there is confusion among the lay consumers of these services. It is apparent from the statements made in their submissions that there was at least some misunderstanding of these roles and responsibilities. But it is also clear that there was no direct intent to mislead on the part of the fund or its administrators, and indeed there was nothing to be gained by doing so.
29. Confusing though the financial services business may be to the man in the street, it does have its structure, and its codes of ethics, whether written or not. In an organisation of the size and nature of the Alexander Forbes Group it is necessary to not only compartmentalise, but to take extreme care to protect customer confidentiality between internal divisions, as well as externally. As a result, a culture of compartmentalising people and information develops and becomes second nature. Normal procedure, then, would be to isolate the information received as regards confidential quotations, instructions and special arrangements for individual pensioners from each of the 40 brokers concerned, including their own in-house brokers, and not to communicate these to other pensioners. Hence the position taken by the fund and Alexander Forbes as administrators that, rightly or wrongly, having given each pensioner the freedom to consult his or her own personal adviser, only instructions from that adviser would be acted upon.
30. It is not surprising that the complainants did not understand this process or indeed that they question its validity, but I am surprised at the reaction of Old Mutual Galaxy who being part of a similarly large and diversified group must, and do, take similar actions internally to

compartmentalise information, for the protection of customer confidentiality. They, and in particular their senior officials involved in this arrangement, should have been aware of the divisionalised nature of Alexander Forbes, and of the fact that Mr Holdsworth acted separately from the fund administrators. The fact that their letter of undertaking was addressed to Mr Holdsworth personally rather than to the fund itself only serves to confirm the separation. I am inclined, therefore, to give rather less weight to their views, except to acknowledge the fact that it was their actions on 27 January 1998 querying the existence of a number of applications for which no transfer had been made, that brought these arrangements to the attention of the complainants, and raised the question of their participation with the trustees, through Alexander Forbes as the administrators.

31. The question still remains, therefore, as to whether the complainants, in the understanding that Alexander Forbes and EFC are one and the same entity, were entitled to assume that they should have been included in the arrangement automatically. This question needs to be addressed in the context of the wider duties and responsibilities of the fund, its trustees and its administrators, to act equitably and fairly in the best interest of all its members, without favour at all times. Which brings me to the first main issue raised in 24.1 above.
32. To arrive at an answer to this question it is necessary to consider each action taken by the parties, as outlined in the various written submissions.
33. Perhaps it is appropriate to deal firstly with the question of who is responsible. The complainants cite both the fund and Alexander Forbes as respondents, and in so doing see them as separate parties with separate duties and responsibilities. This is also clear from the way that certain allegations are addressed against one party by name, and not the other. On the other hand as mentioned previously, the responses from the fund and Alexander Forbes are virtually identical and they obviously see themselves as synonymous. Alexander Forbes being an extension of the fund and its trustees, in terms of the contract appointing them as administrators, which outlines their duties and responsibilities.

The fact of responsibility can, in such circumstances, only be determined in relation to specific actions, and even then is only material in the determination of any relief that may be granted. I will therefore assume the fund to be responsible except where otherwise specified.

34. It is common cause that sufficient information was given to all pensioners, including the complainants, in writing and by way of personal presentations, to explain the options available to them and on which to reach an informed decision. In addition they were advised of possible delays, due to the need to obtain a section 14 certificate and that they could seek advice on the selection of annuity provider from any agent/broker of their own choice. The principal officer recommended the use EFC as brokers. There is some doubt as to whether sufficient was said in these initial presentations to differentiate between Alexander Forbes as administrators of the fund and Alexander Forbes EFC as individual financial advisers. From their actions, however, it is clear that the complainants were aware of their options and they chose to employ the services of their own financial advisers, outside the Alexander Forbes Group, not only in the selection of provider but also in the preparation and presentation of the necessary documentation. In making this selection they passed a message to Alexander Forbes, by implication at least, that they did not want their advice, and that they wanted the fund to take instructions from their chosen broker only. We must remember that the fund was dealing with 104 pensioners using 40 different advisers. It was not unreasonable for them to assume a “wait to be told” approach.
35. Transfer values were recalculated as at 1 January 1998, the effective date of transfer, and in order to protect their capital value from the effects of a fluctuating investment market the fund placed the relevant assets in a cash portfolio. A

common practice of trustees and administrators wishing to safeguard the interests of their members. This also indicates a concern for the possibility that market linked investments

could go down in value.

36. Up to this point at least, the fund and its representatives had acted entirely properly and equally in the best interest of all the pensioners, and nothing to the contrary is alleged by the complainants. However, it is the next set of actions, or non-actions as the case may be, that are central to the complaint and must be assessed in terms of their affect on the complainants and the benefits they were ultimately to receive.
37. Mr Holdsworth requested the fund to transfer the value in respect of those pensioners for whom he was dealing into the Galaxy portfolio, in terms of an arrangement and undertaking laid out in their letter to Mr Holdsworth dated 15 December 1997. The fund agreed to do this, and assets were transferred over the period 5 to 9 January 1998. Assets in respect of all the other pensioners, including the complainants, were retained in the Sanlam cash portfolio.
38. The complainants argue, with the benefit of hindsight, that the fund should have transferred their assets at the same time, and by not doing so caused them to suffer considerable financial loss. To assess the validity of this argument it is necessary to consider what authority and responsibility the fund actually had in this respect. What options were available to it.
39. Firstly, the fund had to consider whether it had the power and the authority to take such action. It has previously been determined that it had.
40. Then it had to consider whether taking such action was in the best interests of the members concerned. It could not know whether transferring the assets sooner rather than later would have been to the advantage or disadvantage of the members, as this would depend on whether the Galaxy portfolio performed better or worse than the Sanlam cash portfolio, over the period. It did not know at that stage, how long the period might be. However,

having allowed the members to take advice from their own financial advisers, it was incumbent on the fund to accept the instructions of one of these advisers as having come from his clients, and act accordingly. It would not have been reasonable for the fund to accept the instructions of one of 40 advisers and apply these to all the members, regardless of whether or not they felt the outcome might be advantageous or disadvantageous. They certainly had no reason to assume that there would be an advantage. The question of whether the instruction came from the broker who happened to work in the Alexander Forbes stable or whether it came from one of the other 39 brokers involved is immaterial. The fund had no authority to apply it across the board.

41. The issue is somewhat blurred by the fact that the instruction came from a division of Alexander Forbes, and that the complainants, having elected the same annuity provider, ultimately found that the earlier transfer turned out to be advantageous. This outcome could not have been anticipated in advance. As pointed out by the respondents in 22.8 above, had the fund transferred all the complainants assets at the earlier date without their specific instructions, and had the Galaxy portfolio dropped in value over the period, then the complainants would have sought to hold the fund liable for the loss sustained.
42. Perhaps it could be said that Alexander Forbes on behalf of the fund should have asked the other pensioners whether they would like to participate in the earlier transfer, pointing out the potential risks involved. But here again, as suggested in 29 above, in view of the fact that so many pensioners had elected to consult their own advisers, it was perhaps not unreasonable for Alexander Forbes to sit tight and wait for instructions. Even if they had contacted all the brokers, it would not necessarily have resulted in the assets being transferred any earlier than they in fact were, as such an exercise would have been time consuming, particularly over the holiday period.
43. When the complainants and Old Mutual did raise the issue with the fund, on 27 January 1998, a meeting of the trustees was scheduled for 6 February 1998, the outcome of which

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was that the remaining assets were transferred on 16 February. The time-scale of these events is in my experience, not unreasonable. The fact that the market had changed in the meantime resulting in Galaxy units becoming more expensive was not the responsibility of the respondents, but merely fortuitous.

44. In conclusion, therefore, I find that the actions taken by the respondents were at all times fair and reasonable in terms of their powers and responsibilities and in the light of the facts known to them at the time. They did not act unfairly against the complainants, or to their detriment.
45. For the reasons given above, the complainants' complaint is dismissed.

Dated at Cape Town this 1st day of October 1999.

John Murphy

Pension Funds Adjudicator