



Fiduciary duty in a wider context – more in demand than ever

Table of Contents

1. Meaning of fiduciary
2. History
3. Modern sources of fiduciary duty
4. Fiduciary duty – traditional
5. Who owes a fiduciary duty?
6. Breach of fiduciary duty
7. A changing world
8. Has fiduciary duty changed?
9. Fiduciary duty of trustees
10. Case study: investment of trust assets
11. Summary



Fiduciary - meaning

Latin “**fidere**” = to trust

Imposed on person or organisation who exercises some **discretionary power** in the **interests of another person** in circumstances that give rise to a **relationship of trust and confidence**

Typically asymmetrical relationships or some level of vulnerability

History

Crusades – medieval times

Hammurabi's Code 1790 BC: agent & principal

Matthew 6:24: “No man can serve two masters - for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.”

Confucius: “In acting on behalf of others, have I always been loyal to their interest?”

Roman law: defined as *a person holding the character of a trustee, or a character analogous of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires*

Anglo-American law and English Courts of Equity granted relief for abuse of confidence

Modern sources of fiduciary duty

Common law

Originally developed by courts

Some since incorporated into statute

Re-interpretation/new statutes

Civil law

Statutory provisions

Governmental and other guidelines

Fiduciary duty: traditional

Loyalty	Care
Act honestly	Act with due care, skill and diligence
Act in good faith	Act objectively
Act in best interests of beneficiary/client	Provide clarity
Balance conflicting interests of different beneficiaries	
Avoid conflict of interest - personal interest v fiduciary duty	

Stricter standard of behaviour than comparable duty of care in common law.
 Fiduciaries must conduct themselves "at a level higher than that trodden by the crowd"
Meinhard v Salmon 1928

Breach of fiduciary duty = breach of ethics

Who owes a fiduciary duty?

- Trustees
- Directors
- Attorney
- Agent
- Guardian
- Executor
- Financial advisers
- Financial planners
- Asset managers
- Doctors

Breach of fiduciary duty

- Sued for loss or damage
- Loss of licence
- Loss of credentials
- Reputational damage
- Fine/penalty
- Imprisonment

Breach of fiduciary duty: case law

De Vos Du Toit v Steinhoff Investment Holdings (Pty) Limited; De Vos Du Toit v Jooste
[2019] ZAWCHC 134; 30 Sep 2019

Moyo v Old Mutual Ltd
[2022] 3 All SA 795; 18 May 2022

Living Hands (Pty) Limited N.O. v Old Mutual Unit Trust Managers Ltd
[2022] ZAGPJHC 738

FIDUCIARY DUTY

OBLIGATION TO ACT IN SOMEONE ELSE'S BEST INTEREST



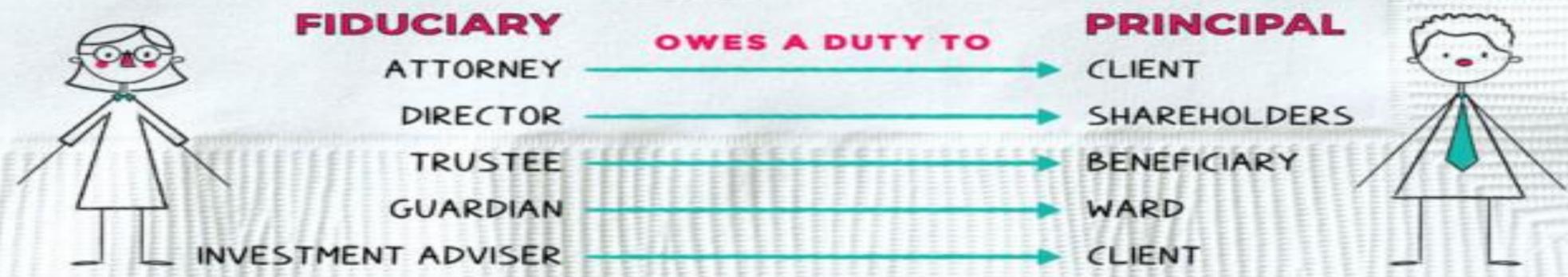
MUST ACT WITH



EXAMPLES

WHAT IF BREACHED?

- MAY BE SUED
- COULD LOSE CREDENTIALS
- IF CRIMINAL
↓
GO TO PRISON!



Napkin Finance

A changing world

- Increased focus on technology
- Climate change
- Focus on sustainable finance
- Social disruption caused by inequality
- Covid –virtual wills, online consultations/meetings
- Documents signed electronically
- Cash no longer king
- New asset classes: virtual assets – cryptocurrency/wallet/non fungible tokens/smart contracts
- Environmental, Social and Governance (ESG) issues

Has fiduciary duty changed?

“The concept of fiduciary duty is organic, not static. It will continue to evolve as society changes, not least in response to the urgent need for us to move towards an environmentally, economically and socially sustainable financial system.”

Paul Watchman

Honorary professor, School of Law, University of Glasgow

Has fiduciary duty changed?

United Nations 2016 The Fiduciary Duty in the 21st Century programme

Q: Is there a need to reframe or redefine fiduciary duty in a way relevant for 21st century investors?

- Review of law and policy on fiduciary duty since 2005
- 8 Countries considered
- Interviews > 50 stakeholders – investors, policymakers, lawyers, regulators
 - ❖ Mervyn King SC *Chair King Committee on Corporate Governance*
 - ❖ Rosemary Hunter *Deputy Executive Officer, Retirement Funds FSB*
 - ❖ Peet Maritz *Principal officer Transnet Pension Fund*
 - ❖ Anton Pillay *CEO Coronation Fund Managers*
 - ❖ Hannine Drake *Senior Associate Bowman Gilfillan*
 - ❖ Kirshni Totaram *Head Institutional Business Coronation Fund Managers*

Report 2019: fiduciary duty requires incorporation of environmental, social and governance (ESG) issues into investment analysis and decision-making processes

Has fiduciary duty changed?

European Commission High-Level Expert Group (HLEG)

Core concepts of fiduciary duty are as relevant to today's investment markets as ever, but investors with fiduciary duties must address fundamental questions such as:

- consider ESG issues in investment processes and decision-making?
- higher standards of ESG performance in companies in which they are invested?
- responsibility to support integrity and stability of financial system?
- how to respond to wider systemic risks – and opportunities – such as those presented by climate change?

2018 report recommends that EU Commission clarifies investor duties to better embrace long-term horizon and sustainability preferences

Fiduciary duty of trustees

Trust deed

Constitution of trust; trust will not be bound outside its provisions

Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA)

Legislation

- Constitution
- Trust Property Control Act (TPCA)
 - ❖ Section 9(1) Trustee shall act with care, diligence and skill reasonably expected of a person who manages the affairs of another
 - ❖ Section 9(2) Any provision in trust instrument will be void in so far as it would have effect of exempting trustee from, or indemnifying trustee against, liability for breach of trust where trustee fails to show degree of care, diligence and skill as per s 9(1)
- Income Tax Act, Alienation of Land Act, Companies Act

Fiduciary duty of trustees

Common law

- Roman Dutch commentaries
- SA case law
- Good practice

Fiduciary duty

- Always act in utmost good faith in affairs of trust
- Always act in terms of deed
- Act in best interest of all (incl future) beneficiaries
- Avoid personal advantage or benefit
- Avoid conflict of interest
- Don't use powers for improper use
- Accountability
- Preserve and enhance value of trust assets

Case study: investing trust assets

Trustee's primary duty = to act in best financial interests of beneficiaries and exercise duty of prudence when investing, unless terms of trust deed provide otherwise

Investments typically more conservative but growing trend to look at alternative options

Q: How to balance duty with new asset classes such as cryptocurrency or digital assets?

GBP 10,000 invested 1 April 2016	Value 1 April 2021
UK equity tracker fund	GBP 13,000
Bitcoin	GBP 1.4 million

Case study: investing trust assets

Risks

- Wallet keys could be lost
- Vulnerable to hacks or scams
- Money laundering
- Bitcoin's impact on environment
- Volatile asset class

Inherent conflict between preserve and enhance, BUT cannot ignore

Practical considerations

- Get necessary guidance or advice
- Does it reconcile with trust's investment strategy and risk profile?
- Does it reconcile with beneficiaries' needs?
- Diversification
- Proper due diligence
- Stick to reputable, well known ones
- Ensure proper custody
- Consider legal features re property law & tax

Case study: investing trust assets

Q: How to balance duty with ESG considerations?

Risks

- ESG factors may be detrimental from financial perspective
- Beneficiaries may be ethically opposed to trust assets being invested in certain sectors or asset classes, e.g. tobacco, fossil fuels or munitions

Practical considerations

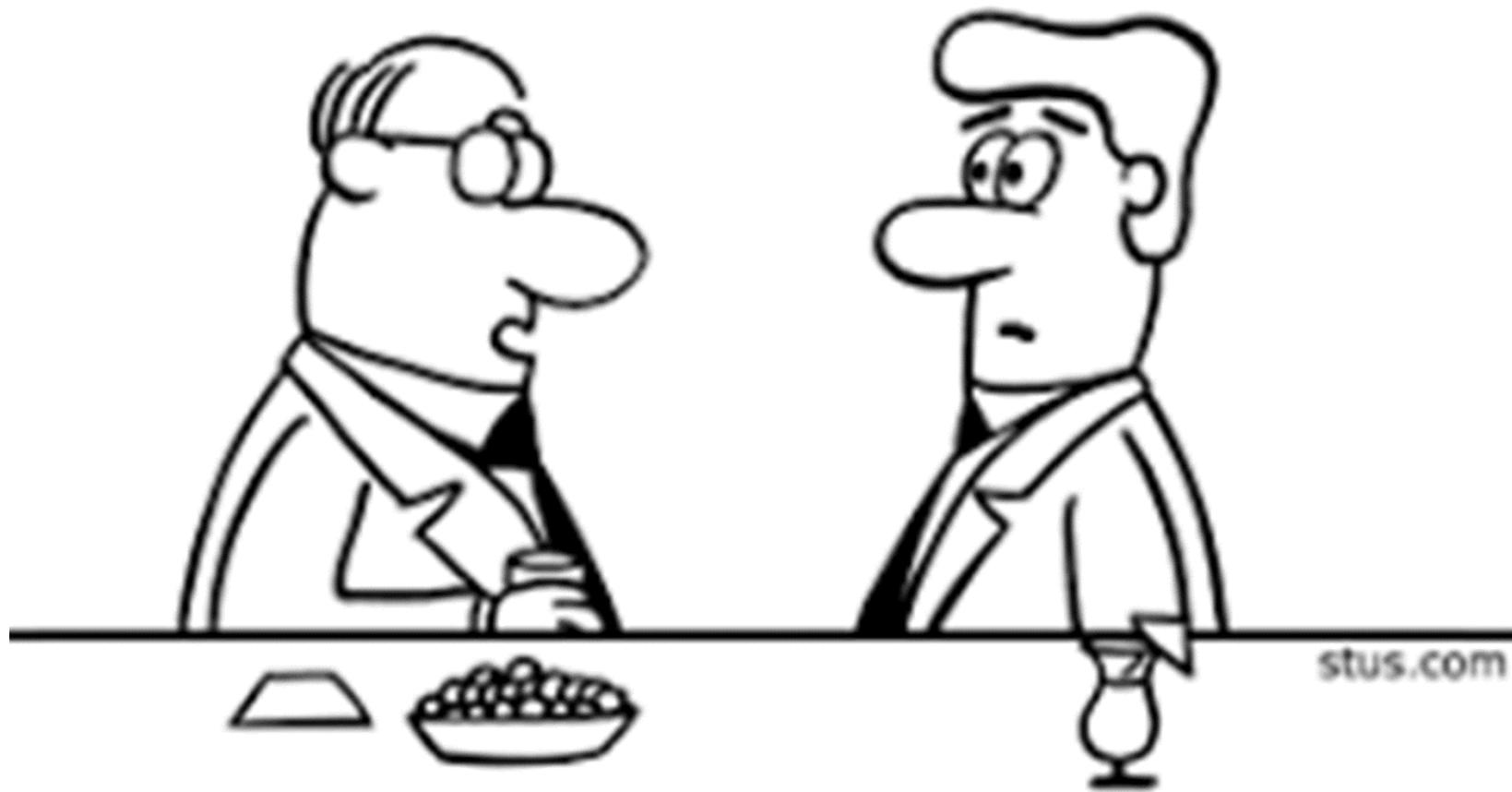
- Take ESG factors into account:
 - ❖ invest in fund that invests in energy firms that produce clean energy sources
 - ❖ invest in technology companies that make it easier for people in rural areas to have access to healthcare
- Consider ESG rating of investee company

Summary

Loyalty	Care
Act honestly	Act with due care, skill and diligence
Act in good faith	Act objectively
Act in best interests of beneficiary/client	Provide clarity
Balance conflicting interests of different beneficiaries	
Avoid conflict of interest - personal interest v fiduciary duty	

Added considerations

- consider new asset classes
- incorporate financially material ESG issues in investment decision making
- encourage high standards of ESG performance in investee companies



This "fiduciary" thingy really complicates pillaging a corporation.

