

Investment Disputes and
Institutional Investors
CIPFA Pensions Network
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Agenda

- Part One: What if it all goes wrong?
 - Investor classification and the Court's expectations
 - When will the Courts come to your rescue?
- Part Two: Prevention is Better than Cure
 - Investment Objectives and Restrictions
 - Expenses and Fees
 - Liability clauses
 - Termination and redemption

Part One: What if it all goes wrong?

Investor Classification and the Court's expectations

- Commercial reality of the contract: is there equal bargaining power?
- Unfair Contracts Terms Act 1977 Schedule 2

Reasonableness of Contractual Terms

- Misrepresentation Act 1967 s 3 and UCTA s11

Investor Classification: Court's expectations

Certain Limited Partners v Henderson PFI Secondary Fund II 2012

"The parties were of equivalent bargaining powers and were sophisticated commercial entities well able ... to consider the effect of the provisions of the agreements ... as the basis of investment and evaluate the risks undertaken."

When will the Courts come to your rescue?



- Is the language of the contract ambiguous?

“The investment strategy for the fund is to build a diversified portfolio of investments in operational PFI concession companies.”

The fund could also invest in companies *“which fall outside the investment policy.”*

“The claimants accept that this sub-clause, if read literally, has the effect of allowing the manager to invest in any assets at all ... It is submitted that this cannot be what is meant, because the effect would be to make a nonsense of the investment policy...”

This is simply not what the agreement says and there is no reason to read down the wording ... nor to import concepts of proportionality.”

Certain Limited Partners v Henderson PFI Secondary Fund II 2012

When will the Courts come to your rescue?



- What was the cause of the loss?
 - Negligence/misrepresentations are no good without causation:
 - **Rubinstein v HSBC 2011**
 - **Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd 2011**
 - *“We are capable of assessing the merits of and understanding (on our own behalf or through independent professional advice) and understand and accept the terms, conditions and risks of ... purchasing the Notes. We are capable of assuming and we assume the financial and other risks of ...purchasing the Notes.”*

When will the Courts come to your rescue?

Is an entire agreement clause reasonable?

- **Standard Chartered Bank v Ceylon Petroleum Corporation 2011**
- *“This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance.”*
- **Axa Sun Life v Campbell Martin 2011**

Part Two: Prevention is better than Cure

Investment Objectives and Restrictions

- Are they clear, precise and unambiguous?
- Do you and the manager/provider agree on what they mean?
- Do you revisit them to make sure they still reflect what is happening in practice and still appropriate?

Continuation of investment objectives



SPL Private Finance v Arch Financial Products 2014

“The investment objective of the fund is to provide investors over the medium to long term with capital appreciation through an economic exposure to a diverse range of investments.”

“The suggestion was that the mandate must be confined to investments which are “likely to” produce such a result ... This would be a wholly unworkable restriction upon the mandate of an investment manager.”

Första AP-Fonden v BONY Mellon

*“The Account shall be for the management of cash collateral supporting securities loans, the key objectives of which are to:
.... safeguard principal...”*

“As a matter of commercial sense, it is important that the authority of a lending agent... is clearly defined, for the protection of both parties. As BNYM says, a requirement to “safeguard principal” is too vague to be of contractual effect as part of the mandate.”

Fees and Expenses



- Are they qualified by reasonableness?
- Duplication of in-house fees?
- Is the manager responsible for determining its own fees or fee rebates?
- What rights do you have to object to a fee calculation?

Liability and exclusion clauses

- Negligence or gross negligence?
 - **Camerata Property Inc v Credit Suisse (Europe) Ltd 2011**
- Specific exemptions, e.g:
 - No liability for acting on professional advice: may create a liability gap
 - No liability for acting on instructions transmitted by electronic means
 - Requirement for a 'final' court determination before any judgement can be enforced

Termination and Redemption

Henderson again...

- Do you have the power to removing and replacing the management
- Does the replacement manager need to buy out the interest of the outgoing manager?
- Is there a real possibility of finding a replacement?
- Are there prohibitive break fees?
- Are gates reasonable to the asset class?
- What majority of investors need to consent?

Conclusions

- Read the documents!
- Get advice!
- Don't infer or imply language into contracts – button it down!
- Beware disclaimers!
- Use your bargaining power!

Contact details



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■ Regional desks and strategic alliances

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