

ARTHUR COX

Pension Trustee Governance IIPM – 26 March 2015

Philip Smith



[The pension manager/pension scheme trustee] ... spending nothing, leads the life of mules, who often, carrying on their backs a heavy and precious load of gold, only eat hay. (Lucian): *Alciato Emblem 86: Source in Greek Anthology 11.397 (trans Paton, IV, 261)* **ARTHUR COX**

Topics

- Defining governance
- Duties being considered (and those not considered)
- Developments in DC governance – what do the regulators think
- Some recent case law developments
- Introducing the Companies Act 2014 considerations for pension trustee companies

Scope of discussion

- Historical aspects – court and principles of equity
- Rooted in trust law – confirmed by the Pensions Authority
- Become increasingly topical particularly in DC
- Pensions Authority consultations in 2014

Scope of discussion (cont'd)

- Not discussing asset governance (see IAPF guides)
- Not discussing corporate governance and issues around social investing and shareholder activism/responsibility
- What should pension trustees be concerned about as 'governance' basics

Defining governance

- General definitions:

*Doing the right thing, at the right time,
in the right way.*

Honesty, care , duty, prudence

“governance of a pension scheme should incorporate the process whereby a trustee board equips itself with the appropriate tools, information, advice and guidelines for the responsible management of the pension scheme and its assets.” (IAPF 2003)

Defining governance

‘Governance’ refers to how an organisation is run, directed and controlled. Good governance means an organisation will design and put in place policies and procedures that will make sure the organisation runs effectively.

But good governance is not about rules. It is an attitude of mind. It is about the ethical culture of the organisation and the behaviour of the people on the governing body. This Governance Code aims to make sure that CVC organisations meet their responsibilities and run their organisations efficiently and effectively

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Defining governance



Key duties

- Duty to avoid conflicts of interest/loyalty
- Duties of confidentiality
- Duty to administer the trust
- Duty to act for the proper purposes of the trust
- Duty not to profit from the trust
- Duty to act in members' “best interests” ?

Duty to avoid conflicts



Political cartoon c. 1900, showing the United States Congress as *Buridan's ass* (the two hay piles version), hesitating between a Panama route or a Nicaragua route for an Atlantic-Pacific canal.

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Managing conflicts

- Recognise the conflict
- Take advice
- Consider the implications
- Choose from the following:
 - *Resignation*
 - *Absence*
 - *Delegation*
 - *Abstention*
 - *Continuing to act*
 - *And where relevant, and possible, disclosure*

Managing conflicts: duties of confidentiality

- How many duties?
- Concept of conflict of loyalty – group companies, unions
- Obligations to scheme; obligations to employer
- Do confidentiality agreements help?

Managing conflicts - why?

Not just good governance

More than good governance

- protect reputation and integrity of conflicted individuals;
- protect integrity of trustee decision making process

These are in the company/employer's interests

Going back to the definitions: ... *good governance is not about rules. It is an attitude of mind. It is about the ethical culture of the organisation and the behaviour of the people on the governing body.*

Duty to administer the trust

- Go back to definitions – doing the right thing, in the right way, at the right time.
- The Pension Regulator's 8th Survey (449 interviews)
- Self assessment - “very effective boards”
 - “TKU” policy and documented trustee training
 - Hold quarterly meetings
 - Act to identify and manage potential conflicts of interest
 - Receive an assurance report from the administrator
 - Have a process in place to identify pension liberation fraud
 - Identify risks – have internal controls
 - Review SIP[P]

Duty to act for proper purposes

- Review the trust deed and rules
- Bear in mind that future remuneration structure is a matter for the company/employer, not the trustee per se
- Overlap with duty to administer the trust
- Overlap with conflicts of interest – employer as trustee

Rise of DC scheme “governance”

- Pensions Authority's recent synopsis and Trustee Handbook
- IORPS II
- UK developments
 - Code of practice no.2013 (11/13)
 - Autoenrolment
 - Contract based provision
 - Member directed investment
 - Independent Governance Committees (04/15) for contract based arrangements

Risk management - “at the right time”

- Internal controls/audit
- DC contribution/admin processes
- Certificates of compliance from advisers and administrators
- Risk measurement – risk registers – risk mitigation lists
- Continuous process – default funds (1 or 3); “risky” bonds
- Continuous education
- Gap between “safe” drafting and “prudent” practice

Recent (2014) case law

- *Element six* – not inappropriate to consider external factors (such as the arrangements being made for employees outside the scheme)
- *Omega Pharma* – not unreasonable to select a basis higher than MFS for determining the shortfall in scheme funding where no engagement by the company
- *MNRPF v Stena Line (UK)*– there is no standalone duty to act in members' best interests. This is a shorthand way of saying that schemes must be administered (i.e. powers and duties must be exercised) for their proper purposes

Summary

- Not about the regulations
- Focus on the basics
- Right thing
- Right time
- Right way



The Companies Act, 2014

- Review the memo and articles – do they need amendment to take account of Companies Act changes?
- Consider becoming a DAC with restricted objects.
- Prepare for change of name
- Check director rotation and other administrative provisions



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Thank you

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