

SURREY COUNTY COUNCIL**PENSION FUND BOARD****DATE: 14 NOVEMBER 2014****LEAD OFFICER: SHEILA LITTLE, DIRECTOR OF FINANCE****SUBJECT: CLASS ACTIONS****SUMMARY OF ISSUE:**

This report outlines the possibility of procuring services surrounding US and non US Class Action monitoring and corporate litigation.

RECOMMENDATIONS:

It is recommended that:

1. The Surrey Pension Fund Board agrees to the signing up for the US and non US class action monitoring and securities and corporate litigation services with Grant & Eisenhofer P.A.
2. Decisions to instruct Grant and Eisenhofer P.A (and the Fund's existing firm of class action US attorneys) on any individual cases should be decided on their merits, taking into account all risks, with a decision made by the Director of Finance in consultation with the Pension Fund Board Chairman, Strategic Finance Manager and Director of Legal and Democratic Services.

REASON FOR RECOMMENDATIONS:

Compensation awarded by the courts for class actions can only be shared out amongst registered class action claimants. The sums involved for a major institutional investor can be significant. It is within the fiduciary duty of the Pension Fund Board to ensure that this compensation income stream is maximised.

DETAILS:**Background**

- 1 For some years, the Surrey Pension Fund has participated in the recovery of monies in respect of US companies only, where corporate fraud and/or mismanagement has been proved to have taken place, through securities litigation in the US courts. Under US law, investors who purchased shares on US markets, can take action through the US courts to seek compensation for losses suffered in all such cases of corporate fraud. The Surrey Pension Fund has an existing contractual relationship with Barrack, Rodos & Bacine (BR&B) with regard to litigation concerning US companies.

- 2 Some high profile corporate frauds have received worldwide media coverage, for example, Enron and WorldCom. Investors can suffer significant financial losses as a result of fraudulent activity arising from the deliberate failure by companies to disclose information that should have been disclosed. Not all frauds, however, involve such extreme examples of misappropriation of the company's assets.
- 3 All investors, whether institutional or private, who have suffered losses as a result of corporate fraud can register their claim as one of the 'class' of investors who have so suffered, hence the term class action. A key difference between the US and the UK is that under US law if a class action fails, the plaintiff investor is not liable for the legal costs incurred by the defendant company.
- 4 Class action claims can go back over a period of many years and, provided investors register their claim within the time limits laid down by the US legal system, UK institutional investors, such as the Surrey Fund, can benefit significantly from these class actions.
- 5 Failure to register an interest can be costly. Compensation awarded by the courts can only be shared out amongst registered claimants. The sums involved for a major institutional investor can amount to millions of US dollars. It is the fiduciary duty for institutional investors such as LGPS funds to ensure that all possible damages due to them under class actions in the US are pursued.

Cases Within the US

- 6 The Surrey Pension Fund has an existing contractual relationship with Barrack, Rodos & Bacine (BR&B), a US law firm specialising in securities litigation. BR&B has a proprietary monitoring system which identifies all those in which there is a potential claim. It monitors the progress of all claims until final settlement, which can take several years.
- 7 BR&B's service takes on the workload of monitoring the Pension Fund's entitlements from US class actions and is provided by BR&B free of charge. BR&B receives payment (awarded by the court) only if they are successful, as lead counsel, in a class action suit. BR&B are a conservative law firm, only seeking to be involved with the cases most likely to result in a justifiable payment of damages. They were joint lead counsel in the Worldcom case, in which \$6.13bn was recovered for investors. Many of their clients are US state pension funds and they currently have many other UK LGPS funds using the monitoring service.
- 8 Any investor who has suffered losses, and who purchased on a US market, can seek to be the lead plaintiff in such cases and, under US law, this right is awarded to the investor with the biggest loss amongst those seeking the role. The litigation process is very lengthy, invariably taking several years to reach a court decision or settlement out of court.

Cases Outside the US

- 9 With regard to the possibility of engaging in cases outside of the US, it should be noted that there are significant differences between the systems in the US and the UK, most notably, the legal framework for dealing with cases where investors have suffered financial losses as a result of alleged fraudulent activity by companies in which they have invested.
- 10 Whereas BR&B will engage in class actions with only US companies, an alternative law firm Grant & Eisenhofer P.A. (G&E) will provide services for both US and non-US class actions. Such an appointment will enable officers to consider current, prospective UK cases.
- 11 To secure the G&E's US and non US corporate fraud and class action monitoring service free of charge from G&E, the Surrey Pension Fund would be required to authorise the Fund's global custodian (Northern Trust) to provide G&E with access to the Fund's transaction records for previous years, records of current holdings and all future dealings.
- 12 With regards to costs in US cases, G&E will be entitled to full reimbursement of costs and expenses from any successful award of damages. This is awarded by the US court. With regard to failed cases, no costs will be borne by the Surrey Pension Fund. For non-US class actions (which includes the UK), G&E will advance all costs and expenses which are incurred in the investigation and litigation of each case where G&E and the Surrey Pension Fund have agreed to commence litigation. If there is no award by the court, the Surrey Pension Fund will have no financial obligation in connection with the prosecution of the lawsuit, nor will it incur any expenses. All costs are met by G&E.
- 13 It is proposed that individual cases should be decided on their merits, taking into account all risks, with a decision made by the Director of Finance in consultation with the Chairman, Strategic Finance Manager and Director of Legal and Democratic Services.

CONSULTATION:

- 14 The Chairman of the Pension Fund Board has been consulted and has offered full support for the appointment of a second law firm in order to facilitate the class action process for both US and non US firms.

RISK MANAGEMENT AND IMPLICATIONS:

- 15 With regard to the risk of unanticipated costs being incurred by the Fund, officers will ensure that the legal documentation will have the necessary due diligence applied prior to the commencement of any case. The Fund will be required to be protected from any external costs connected with a case. With regard to reputation risk, each case will need to be considered on its own merits. For example, recent opportunities for the Council to engage in class actions against the Royal Bank of Scotland were considered and declined on the basis that the reputational risk associated with litigation against a recovering UK bank owned by the UK Government was too great.

FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 16 There are no expected costs as a result of engaging in class actions against US and non US companies with BR&B and G&E.

DIRECTOR OF FINANCE COMMENTARY

- 17 The Director of Finance is satisfied that all material, financial and business issues and possibility of risks have been considered and addressed and that engaging in such class actions will provide the possibility of additional income to the Surrey Pension Fund, satisfying the Fund's fiduciary responsibilities.

LEGAL IMPLICATIONS – MONITORING OFFICER

- 18 The Monitoring Officer notes that G&E will represent the Pension Fund in any class action case on a “no-win, no fee” basis, so no additional costs will be borne by the Fund in engaging their services. In the event that litigation is being pursued in the English Courts, G&E would need to instruct a law firm in England to conduct the matter on their behalf and again G&E would be responsible for their costs. The Monitoring officer will provide advice to the Director of Finance when making any specific decision to engage in a class action and will also assist in due diligence on agreements with G&E. The Strategic Finance Manager has advised that BR&B and G&E are the only two firms currently working in the UK LGPS sector in these types of cases.

EQUALITIES AND DIVERSITY

- 19 Engaging in class actions will not require an equality analysis, as the initiative is not a major policy, project or function being created or changed.

OTHER IMPLICATIONS

- 20 There are no potential implications for council priorities and policy areas.

WHAT HAPPENS NEXT

- 21 The following next steps are planned:
- Due diligence on the legal agreements with G&E.
 - Assessment of future class action opportunities on a case by case basis.

Contact Officer:

Phil Triggs, Strategic Finance Manager (Pension Fund and Treasury)

Consulted:

Pension Fund Board Chairman

Annexes:

List the annexes attached to this report.

Sources/background papers:

None

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