Neutral Citation Number: [2019] EWCA Civ 158

Case No: A3/2018/1172

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Richard Spearman QC (sitting as a deputy judge of the High Court)
HC-2016-000142

Rolls Building, Royal Courts of Justice
Fetter Lane, London EC4A 1NL

Date: 15 February 2019

Before :

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HENDERSON
and
MR JUSTICE NUGEE

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Between :

RICHARD PEASE — **Claimant/Respondent**

- and –

HENDERSON ADMINISTRATION LIMITED — **Defendant/Appellant**

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Daniel Oudkerk QC and Adam Woolnough (instructed by **Simmons & Simmons LLP**) for the **Appellant**
Richard Leiper QC and **Zac Sammour** (instructed by **Michelmores LLP**) for the **Respondent**

Hearing date: 5 February 2019

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Approved Judgment

Mr Justice Nugee:

Introduction

1. This is an appeal from a decision of Mr Richard Spearman QC, sitting as a deputy judge of the High Court, given after the trial of an action in relation to an employment dispute. It raises one question of construction of the contract of employment under which the Respondent, Mr Richard Pease, was employed by the Appellant, Henderson Administration Ltd (**"Henderson"**), as an investment fund manager with the title of Director of European Equities from May 2009 to June 2015 (**"the Contract"**).

2. The Contract envisaged that Mr Pease might set up a fund referred to as a "European Special Situations OEIC" (**"ESS OEIC"**) while employed with Henderson, and provided that if he did so (i) he would if he resigned be permitted after leaving to replace the relevant Henderson Group company as manager of the fund (cl 3.6.1) and (ii) if he did so replace the manager he would procure payment to Henderson of 50% of the management fees generated by the fund in the next 12 months (cl 3.6.2).

3. **"OEIC"** refers to an Open-Ended Investment Company. In the event a fund called the European Special Situations Fund (**"the ESSF"**) was set up by Henderson and Mr Pease. It was not however itself established as an OEIC, but as a sub-fund under an umbrella OEIC which had other sub-funds.

4. In 2014 Mr Pease indicated he wished to leave Henderson and take the ESSF with him. Negotiations followed, the upshot of which was that the parties agreed that there would be a scheme of arrangement under which the investors in the ESSF would be asked to approve a transfer of its assets to a new OEIC with a new manager. This duly took place and Mr Pease's employment with Henderson terminated in June 2015. Mr Pease has however declined to procure the payment over of 50% of the management fees earned in the 12 months thereafter. His case is that he was contractually entitled to replace the manager of the ESSF; that the arrangement in fact adopted (the scheme of arrangement) was not the replacement of the manager of the ESSF but a transfer of assets to a different fund; and hence (i) Henderson was in breach of cl 3.6.1 of the Contract by not permitting him to replace the manager of the ESSF and (ii) nothing was payable to Henderson under cl 3.6.2 of the Contract. Henderson's case is that the scheme of arrangement was a means of replacing the manager of the ESSF that was compliant with cl 3.6.1 of the Contract and hence (i) that it was not in breach of cl 3.6.1 and (ii) that Mr Pease is himself in breach of cl 3.6.2 for failing to procure payment to it of 50% of the management fees generated by the fund in the next 12 months.

5. In the action Mr Pease initially sued Henderson for certain remuneration which had been withheld and which he claimed to be due to him; Henderson counterclaimed for payment of the 50% of the management fees said to be due to it under cl 3.6.2; and Mr Pease then claimed (very substantial) damages for Henderson's failure to allow him to replace the manager of the ESSF in breach of cl 3.6.1.

6. In his judgment (the neutral citation for which is [2018] EWHC 661 (Ch)) the Judge (i) upheld Mr Pease's claim for withheld remuneration; (ii) held that Henderson was in breach of contract in failing to permit him to replace the manager of the ESSF but

that Mr Pease had not established any recoverable loss for the breach; and (iii) dismissed Henderson's counterclaim (on the basis that the scheme of arrangement was not compliant with Henderson's contractual obligations under cl 3.6.1).

7. Henderson appeals the finding that it was in breach of cl 3.6.1 and the dismissal of its counterclaim under cl 3.6.2, with permission granted by Asplin LJ. This permission is limited to two grounds, namely Ground 1 which is to the effect that on the true construction of cl 3.6.1 Henderson was not in breach, and Ground 3 which is to the effect that for the same reason its counterclaim should not have been rejected. The only question before the Court of Appeal therefore is the question of construction of cl 3.6.1 of the Contract.

The Contract

8. It is convenient at this stage to set out the relevant provisions of the Contract. The Contract was provided to Mr Pease by Henderson (referred to in the Contract as *"the Company"*) in the form of a letter to him dated 5 June 2009 and was signed by him on that date, but records (in cl 1.1) that his employment commenced on 1 May 2009. By cl 9 Mr Pease was able to terminate his employment by 1 month's notice expiring on or after 31 December 2009.

9. The relevant clause is cl 3.6, which consists of cl 3.6.1 and cl 3.6.2 as follows:

> "3.6 European Special Situations Fund and New Star Hedge Funds
>
> 3.6.1 In circumstances where you have in 2009 while employed by the Company set up a European Special Situations Fund OEIC, and you subsequently resign from employment with the Company, you (or any entity which you set up or join) will, following the later of the date of termination of your employment and 1 February 2010, be permitted to replace the relevant Henderson Group company as manager of (a) the European Special Situations Fund OEIC and also (irrespective of whether you have in 2009 while employed by the Company set up a European Special Situations Fund) (b) the New Star European Hedge Fund and (c) the New Star European Leveraged Hedge Fund (all three together, the ***Funds***). For the avoidance of doubt, in circumstances where (i) you have while employed by the Company set up a 'mirror fund' to the European Special Situations Fund as a result of the fund raising exceeding the limits set or arising from a new source, or (ii) any of the Funds changes its name but in all other respects remains the same Fund, the provisions of this clause 3.6 shall continue to apply.
>
> 3.6.2 Where you (or any entity which you set up or join) replace any Henderson Group company as manager of the Funds in the circumstances set out in clause 3.6.1 above, you will procure payment to the Company (or other Henderson Group company nominated by the Company) of 50% of the Management Fees After Deductions generated by any such Fund in the 12 months following such replacement of the relevant Henderson Group company as

> manager (the ***First Replacement Year***). ***Management Fees After Deductions*** means the total fees received in relation to the management of the Funds after deduction of any management fee rebates and/or commissions and also less an amount in respect of the costs associated with running the Funds, subject to a cap equal to the amount that would have been deducted by the Company in respect of costs under clause 3.7.1 below had a Henderson Group company remained as Manager of the Funds for the First Replacement Year. You will promptly on request disclose to Henderson details of the managements [sic] fee rebates and/or commissions deducted from such total fees."

Facts

10. The facts can largely be taken from the judgment of the Judge, supplemented by the witness statement of Mr Bowers (one of Henderson's witnesses, whom the Judge described as manifestly knowledgeable, helpful and reliable and whose evidence he said he accepted without any significant reservation), and certain explanations given to us in the course of the hearing.

11. Before coming to the detail it is helpful to say a bit more about OEICs and the sub-funds housed within them. An OEIC, as already referred to, is an Open-Ended Investment Company. This is a recognised type of vehicle designed for the purposes of pooled investment, mainly for retail investors. An OEIC is a body corporate in the form of a company limited by shares and Mr Bowers explained in his witness statement that an OEIC can issue new shares (that is, to investors wishing to invest) and repurchase its existing shares (that is, from investors wishing to withdraw); that its shares vary in value in direct proportion to the variation of the fund's net asset value; and that the formation of OEICs is governed by the Financial Conduct Authority (**"FCA"**) under the Open-Ended Investment Companies Regulations 2001. An OEIC must have at least one director and the usual practice in the UK is to have a single corporate director, commonly referred to as the authorised corporate director (**"ACD"**).

12. An OEIC may contain several sub-funds with distinct investment strategies and management. Such a sub-fund is not a separate legal entity from the OEIC, but the OEIC that houses the sub-funds (referred to as an umbrella OEIC) will issue separate classes of shares in respect of each of its sub-funds. In this way an investor who chooses to invest in a particular sub-fund will have shares in the OEIC that reflect the value of that particular sub-fund. Typically sub-funds will be managed by different fund management desks within one asset management firm, and the investment strategies and share classes for each sub-fund will be described in the OEIC's prospectus from time to time.

13. The ACD of an OEIC assumes full responsibility for the operation of the OEIC, but may delegate the management of the investments to an investment manager pursuant to an investment management agreement. The investment manager will in turn give day-to-day responsibility for making investment decisions in relation to a particular sub-fund to one or more individual fund managers. An ACD may (but need not) also delegate the marketing of shares to a distributor pursuant to a distribution agreement.

14. Mr Pease himself is a very experienced fund manager. He joined New Star Asset Management (**"New Star"**) in 2001, where he launched and managed several funds. He was still there when Henderson acquired New Star on 9 April 2009. Henderson wanted him to stay on and manage funds for them. He was in two minds about it, but agreed to do so on the basis that he wanted to set up the ESSF, which he said that he would seed, and to be able to take the ESSF with him if he left. The Contract was negotiated by experienced lawyers on both sides and, as already referred to, was signed on 5 June 2009 but treated Mr Pease as having been employed since 1 May 2009.

15. Meanwhile from about early May 2009 Mr Pease and Henderson began work on launching the ESSF. The Judge's findings of fact include a finding that it was proposed that the fund, initially to be called the New Star European Special Situations Fund, would be housed under an umbrella OEIC; and that although Mr Pease had said in his witness statement that the ESSF was set up as a sub-fund of an existing Henderson umbrella OEIC "without reference to me", he accepted in cross-examination that he was a key man in the process and did know about the proposal. It was however expressly accepted by both counsel before us that at the time the Contract was signed the parties intended that a separate stand-alone ESS OEIC would be established to house the ESSF. This is consistent with the fact that cl 3.6.1 of the Contract is drafted so as to apply "where you have … set up a European Special Situations OEIC".

16. In the event the ESSF was launched on 1 October 2009 with seed money provided by Mr Pease and his friends. It was not however housed in a stand-alone ESS OEIC but set up as a sub-fund within an existing umbrella OEIC then called the New Star OEIC which Henderson had inherited when it had acquired New Star (subsequently renamed the Henderson OEIC with effect from 6 April 2010). At the time that the ESSF was launched as a sub-fund of the New Star OEIC, there were 7 other sub-funds housed under the same umbrella. By 2014 only one of these, the Henderson Global Financials Fund (**"the GFF"**) was still in operation.

17. A company in the Henderson group called Henderson Investment Funds Ltd (**"HIFL"**) became the ACD of the Henderson OEIC pursuant to an ACD agreement dated 6 April 2010. HIFL appointed another Henderson group company, Henderson Global Investors Ltd (**"HGIL"**), as Investment Manager of the sub-funds, including the ESSF, pursuant to an Investment Management Agreement also dated 6 April 2010. HGIL had discretionary authority to deal with the assets of the ESSF in pursuit of the ESSF's investment strategy as set out in the prospectus, subject to the supervision of HIFL. HGIL in turn sub-delegated day-to-day responsibility for making investment decisions in relation to the ESSF to Mr Pease. HIFL did not appoint another distributor but itself acted as distributor of shares (as it did across the range of Henderson's UK funds).

18. Under Mr Pease's management the ESSF enjoyed great success. By the end of 2013 the ESSF had more than £1 billion of assets under management and had repeatedly provided top decile returns to investors. It had generated very substantial management fees (of which Mr Pease was entitled to 50% under cl 3.7.1 of the Contract).

19. In February 2014 Mr Pease informed Mr Formica of Henderson that he was likely to leave Henderson and establish a new firm to manage the ESSF. On 31 March 2014 Crux Asset Management Ltd (**"Crux"**), a new fund management company set up to manage the ESSF, applied to the FCA for authorisation to carry on the activity of a fund management business. Mr Pease was indirectly the majority owner in Crux, owning 70% of the shares in Pease Co Ltd which in turn owned 75% of the shares in Crux.

20. From July 2014 negotiations took place between Mr Pease and Henderson in relation to his right to replace the manager under cl 3.6.1 of the Contract. On 4 July 2014 Mr Pease shared with Henderson a note of advice he had received which indicated that cl 3.6.1 entitled him to replace HIFL as ACD of the Henderson OEIC. Henderson's position was that cl 3.6.1 was not specific as to the mechanism for replacement of the manager and the appropriate way to do this was by scheme of arrangement. By September Mr Pease was willing to accede to a scheme of arrangement but his position was that that was not in accordance with his contractual rights, and he reserved all his rights.

21. A side letter dated 29 September 2014 (signed by Mr Pease on 1 October 2014 and by Henderson on 3 October 2014) was then agreed which dealt with how the scheme of arrangement would be implemented. The letter provided for a company called Fund Partners Ltd (**"FP"**) to be appointed the ACD of "a new fund into which [the ESSF] will be merged" and for FP to delegate the investment management function to Crux. It also provided for the effective termination date of Mr Pease's employment to be the "Transfer Date", defined as the date on which "[the ESSF] transfers from HIFL to [FP]", and attached both an agreed letter to the FCA and an agreed draft press release to be issued by Henderson and Crux.

22. The agreed draft press release included statements that:

> "The [ESSF], currently managed by Richard [Mr Pease], will be transferred by a scheme of arrangement from Henderson to a third-party authorised corporate director, subject to obtaining regulatory and client approval…
>
> Richard Pease will remain an employee of Henderson until the transfer of the [ESSF] is given effect and throughout that period will continue to manage the [ESSF] during the transfer of the fund to Crux."

23. The agreed letter (sent to the FCA by Crux on 3 October 2014), signed by Henderson and Crux, referred to Henderson, HIFL and Mr Pease having agreed that:

> "a scheme of arrangement is the most appropriate means of transferring the management of the [ESSF] to Crux. Mr. Pease will remain employed by Henderson and manage the [ESSF] until the scheme of arrangement is completed, and when the authorised corporate director of the fund changes from HIFL to [FP], and Crux is appointed manager of the fund, Mr Pease's employment with Henderson will terminate, and he will be employed by Crux."

It also attached the draft press release.

24. On 14 October 2014 Crux was approved by the FCA to carry out the business of fund management. On 13 January 2015 the FCA approved the scheme of arrangement. On 18 March 2015 the investors in the ESSF were sent an information circular and notice of a meeting to be held on 28 May 2015 to approve the scheme of arrangement. (The meeting was referred to as a meeting of shareholders of the ESSF; this should no doubt strictly speaking have referred to shareholders of the Henderson OEIC who held shares of the classes related to the ESSF, but the sense is clear.) The scheme of arrangement, described as being for the merger of the ESSF, a sub-fund of Henderson OEIC, with the FP Crux European Special Situations Fund (**"the FP Crux ESSF"**), a sub-fund of FP Crux UCITS OEIC (**"the FP OEIC"**), was annexed: it provided for the property of the Merging Fund (the ESSF) to become part of the property of the Receiving Fund (the FP Crux ESSF), for the shareholders in the ESSF to be issued with New Shares in the FP Crux ESSF, and for their shares in the ESSF to be cancelled.

25. Although described as if it were a merger with an existing fund, a comparison of the "Main features" of each fund at Appendix 2 to the notice gave the respective fund sizes of the ESSF and the FP Crux ESSF as at 28 February 2015 at just over £1 billion for the ESSF and £ Nil for the FP Crux ESSF. That confirms (as was common ground before us) that the FP Crux ESSF was a newly established shell and the so-called merger was in truth just a transfer of the ESSF assets to an empty receptacle.

26. The scheme of arrangement needed a majority of 75% of those voting to be in favour. It was duly passed and it is agreed that on 6 June 2015 the merger or transfer to the FP Crux ESSF took place, and that Mr Pease's employment with Henderson terminated on 4 June 2015; we were not told why it terminated 2 days before the date of transfer, but nothing turns on the exact date.

27. The FP Crux ESSF was thereafter marketed to investors. A fund factsheet dated February 2016 issued by Crux referred to it as if it were the continuation of the ESSF. Thus under "Fund Facts" it said that the fund had been launched on 1 October 2009 and renamed the FP Crux ESSF on 8 June 2015; it displayed in graphic form the fund's cumulative performance since launch in October 2009 (with a footnote that "Previously the fund was Henderson European Special Situations Fund prior to the merger with the FP Crux European Special Situations Fund on 5th June 2015"); and under "Fund Manager Profiles" it referred to Mr Pease as having "managed the Crux European Special Situations Fund since launch in October 2009" (with a footnote that "Prior to 8 June 2015 it was the Henderson Special Situations Fund"). An undated extract from Crux's website similarly refers to the fund as launched in October 2009 and to Mr Pease as having managed it since its launch.

The Judgment below

28. The Judge dealt first, at [26]-[87] of his judgment, with Mr Pease's claim for certain management fees which had been withheld by Henderson (on the grounds that they could be deferred and then forfeited). He found in favour of Mr Pease, and there has been no appeal in relation to this claim.

29. He then turned at [88]-[110] to Mr Pease's claim that Henderson had failed to comply with cl 3.6.1 of the Contract. He found that Henderson had acted in breach because it

did not permit Mr Pease to exercise his right under cl 3.6.1 to replace the relevant Henderson Group company as manager (at [110]). The essential reasoning is found at [99] as follows:

> "In my view, it is clear that HIFL was the "relevant Henderson Group Company manager" for purposes of Clause 3.6.1. Accordingly, on the face of it, the entitlement conferred on Mr Pease by Clause 3.6.1 was to have HIFL replaced either by himself personally or by an entity that he set up or joined. As appears from the above synopsis, this could have been achieved by replacing HIFL as the ACD of the Henderson OEIC with a third party ACD, and then appointing Crux as the investment manager of the ESSF. It would have been necessary to follow that course, because there was no ACD (i.e. manager) of the ESSF alone, due to the fact that the ESSF had been set up under the umbrella of the Henderson OEIC and the Henderson OEIC contained an additional sub-fund (i.e. the GFF). It was therefore not possible to replace HIFL as the ACD of the ESSF alone. This was a product of the fact that Henderson chose to set up the ESSF as a sub-fund of the Henderson OEIC. It seems likely that the potential ramifications of the decision to structure matters in this way was not appreciated when the Contract was made, and indeed that Clause 3.6.1 would have been drafted differently if the parties had envisaged that no European Special Situations OEIC as such would be set up."

He then said (at [100]) that it was common ground that this course was not followed.

30. He then (at [111]-[124]) addressed an argument by Henderson that by agreeing to the scheme of arrangement Mr Pease was agreeing to a clarification of the way in which the ESSF would be dealt with in accordance with cl 3.6.1, or to a variation of the Contract. He rejected these contentions, and permission to appeal this aspect of his judgment was refused by Asplin LJ.

31. After rejecting some other points raised by Henderson, the Judge (at [137]-[188]) considered Mr Pease's claim for damages for breach of cl 3.6.1 and held that none of his claimed losses had been established.

32. He then (at [189]-[200]) considered Henderson's counterclaim under cl 3.6.2 of the Contract. He held that his earlier holdings (that the scheme of arrangement was not an effective exercise of Mr Pease's rights under cl 3.6.1 and that Mr Pease was not estopped from denying this) were dispositive of this issue and that Henderson's counterclaim failed.

33. He therefore (1) held that Mr Pease's claim for management fees succeeded; (2) awarded Mr Pease nominal damages for Henderson's breach of cl 3.6.1; and (3) dismissed Henderson's counterclaim for breach of cl 3.6.2.

Summary of parties' arguments

34. Mr Daniel Oudkerk QC, who appeared for Henderson, submitted that the Judge had erred in finding that there had been a failure to comply with cl 3.6.1. The purpose of cl 3.6.1 and cl 3.6.2 was that Mr Pease should be able to take the ESSF with him

when he left, on terms that he shared the first year's management fees with Henderson. The effect of the scheme of arrangement was that Mr Pease had indeed taken the ESSF with him when he left. It was now managed by Crux. Henderson had in this way permitted him to replace the relevant Henderson company (whether this was HIFL, HGIL or indeed the Henderson OEIC) as manager of the ESSF, and this was sufficient to mean that there had been no failure to comply with cl 3.6.1, and that Henderson was entitled to 50% of the Net Management Fees under cl 3.6.2.

35. Mr Richard Leiper QC, who appeared for Mr Pease, submitted that the Judge was right. The relevant Henderson Group company which was the manager of the ESSF was HIFL (being the ACD of the Henderson OEIC). Mr Pease's entitlement under cl 3.6.1 was to replace HIFL. That meant replacing HIFL as ACD of the Henderson OEIC. Henderson had not permitted him to do that, and so had neither complied with cl 3.6.1, nor was entitled to payment of 50% of the Net Management Fees under cl 3.6.2.

36. These submissions were supported on each side by various other arguments which it is not necessary to set out here, and which I will refer to below as appropriate.

Do cl 3.6.1 and 3.6.2 refer to the ESSF?

37. At first blush it is not obvious that cl 3.6.1 and cl 3.6.2 apply at all. Leaving aside the reference to the New Star European Hedge Fund and Leveraged Hedge Fund (which do not feature in the judgment and can be assumed not to have had any relevance in practice), cl 3.6.1 applies by its express terms "in circumstances where you have … set up a European Special Situations OEIC", and cl 3.6.2 applies "where you … replace any Henderson Group company as manager … in the circumstances set out in clause 3.6.1 above." It is clear, and common ground, that although this was contemplated at the time of the Contract, Mr Pease did not set up an ESS OEIC, by which was meant a stand-alone OEIC to house the ESSF. On the express terms of cl 3.6.1 and cl 3.6.2 therefore neither clause would appear to have any application at all.

38. Neither party however relied on this point. That is understandable given their respective stances in the litigation. Henderson wished to rely on cl 3.6.2 to pursue its counterclaim for the management fees. Mr Pease replied by relying on cl 3.6.1 to pursue his claim for damages for breach of it. Before the Judge therefore it was not disputed that cl 3.6.1 should be treated as applying to the ESSF, which Mr Pease *had* set up in 2009 while employed by Henderson. The Judge came to the same view. He appears to have thought that Mr Oudkerk had submitted that cl 3.6.1 was not engaged because no ESS OEIC had been established – although Mr Oudkerk told us that that was never his position at trial – but rejected the submission (at [92]) on the basis that it was the intention of the parties to focus on the ESSF, and that the ESS OEIC and ESSF were referred to interchangeably in the clause. That is not an obvious conclusion from the wording and I have some doubts about it. We did not, however, receive any argument that he was wrong. Although it would now be in Mr Pease's interest to argue that cl 3.6.2 did not apply at all, I can see that he would be in some difficulty doing so given that he had argued the contrary below and had himself relied on the fact that cl 3.6.1 applied in support of his claim for damages. Moreover, Mr Pease had been paid 50% of the net management fees earned by the ESSF under cl

3.7.1 of the Contract while employed by Henderson which he might not have been entitled to if the ESSF were not one of the Funds referred to in cl 3.6.1.

39. At one stage of the hearing it looked as if we might need to resolve whether we were bound by a concession from counsel on a question of construction, but in the end I do not think this is necessary. This is because the Judge went on (at [94]) to say that he would if necessary have accepted a submission by Mr Leiper that the parties agreed by conduct to vary the Contract so as to replace references to the ESS OEIC with references to the ESSF. That turns on the facts and for understandable reasons Mr Leiper has not suggested the conclusion is wrong, let alone appealed it. In those circumstances I consider that we are bound to hear the appeal on the basis that cl 3.6.1 and cl 3.6.2 are to be taken as referring to the ESSF rather than to an ESS OEIC, whether, as the Judge thought, as a matter of construction, or as a result of the Contract having been varied to that effect.

Effect of reading cl 3.6.1 as referring to the ESSF

40. Reading cl 3.6.1 as referring to the ESSF, rather than to an ESS OEIC, does however cause this difficulty. If Mr Pease had set up an ESS OEIC as contemplated, cl 3.6.1 could have operated quite simply. On this hypothesis, I do not doubt that the "manager" of the OEIC would have been the ACD of the OEIC as there would have been no competing candidate, and that Mr Pease's entitlement to replace the manager could have been simply and efficiently given effect to by permitting him to appoint a new ACD of the OEIC of his own choosing. Since *ex hypothesi* the only fund in the OEIC would have been the ESSF, this would have had the effect of giving him control of the ESSF without any knock-on difficulties for Henderson, or for investors in other sub-funds. In this way he could leave Henderson's employment and take the ESSF with him with a clean break.

41. As soon however as the ESSF was set up not under its own OEIC but as one of several sub-funds under an umbrella OEIC, this simple solution ceased to be capable of being operated in the same way. The Judge sets out in some detail at [98] the evidence from Henderson (that is from Mr Bowers) as to the practical consequences of various possible mechanisms for achieving a transfer of management of the ESSF. He does not say anywhere that he rejects any of this evidence. Moreover, there is on the face of it no reason to doubt what Mr Bowers says and it seems cogent and coherent, and in the light of the Judge's general acceptance of Mr Bowers' evidence without significant reservation, I conclude that he did indeed accept it.

42. The effect of this evidence is that whether one regards the manager of the ESSF that Mr Pease was entitled to replace as the ACD of the umbrella OEIC (HIFL) or as the investment manager of the ESSF (HGIL), no clean break between Henderson and Mr Pease could be effected by the simple expedient of appointing someone in its place. If, as Mr Pease maintained was his entitlement, he was permitted to replace the ACD of the Henderson OEIC with a new ACD (who would then appoint Crux as investment manager of the ESSF), it would mean that the GFF, a Henderson fund to which Mr Pease had no rights, would be housed in an OEIC whose ACD was now his appointee. This would have been according to Mr Bowers (in words cited by the Judge) "impractical, fraught with legal, regulatory and reputational risks and … contrary to the best interests of the investors in the GFF": it would have required a

new investment management agreement between the new ACD and HGIL as investment manager of the GFF (and HGIL would remain subject to the supervision of the new ACD), as well as a new distribution agreement with a Henderson company as distributor to enable the latter to market GFF shares to investors. It also would have meant explaining to the GFF investors that their Henderson fund was now housed in an OEIC under the control of a company that was not a Henderson company. In other words it would have been very far from a clean break, and it is difficult to think that it would have been acceptable either to Henderson or to Mr Pease himself as a permanent solution, quite apart from what the FCA might have thought about this fractured responsibility for the OEIC and its sub-funds.

43. If however the manager of the ESSF was regarded as HGIL and Mr Pease was permitted to replace HGIL as investment manager with Crux, this would leave the ESSF housed in the Henderson OEIC, necessitating a new investment management agreement between HIFL as ACD of the OEIC and Crux, as well as either a distribution agreement enabling Crux to market ESSF shares (that is strictly shares in the Henderson OEIC of the relevant class), or an arrangement for HIFL to market ESSF shares for the benefit of Crux (and in competition with its own funds). Crux would also remain subject to the supervision of HIFL as ACD. Again this would not be a clean break and it is difficult to think it would have been any more acceptable to Mr Pease or to Henderson.

44. The only way to avoid these consequences (unless Mr Pease were to take the GFF as well as the ESSF, which Henderson was under no obligation to let him do and which Mr Bowers thought, no doubt justifiably, would not be in the best interests of the investors in the GFF) was to separate the ESSF and the GFF and house them in separate OEICs. As already explained, although it appears to be a common use of language to refer to investors in a sub-fund such as the ESSF or GFF as having "ESSF shares" or "GFF shares" and as being "shareholders" in the ESSF or GFF, the ESSF and GFF are not separate legal entities and investors do not acquire shares in the ESSF and GFF; they acquire shares of the appropriate class in the OEIC which houses them. It follows that if one of the sub-funds in an umbrella OEIC is to be moved to a different OEIC, this requires the shareholders to give up their shares in the existing OEIC in return for shares in the new OEIC, transferring the assets from one to the other. This is of course exactly what the scheme of arrangement did.

45. In practical terms therefore the only way to achieve a neat separation between Mr Pease's interests and Henderson's interests was to have a scheme of arrangement under which either the ESSF was moved to a new non-Henderson OEIC and the GFF was left in the Henderson OEIC (as happened), or the GFF was moved to a new Henderson OEIC and the ESSF was left in the existing OEIC with a new ACD appointed.

46. I have already referred to the fact that we must proceed, whether as a matter of construction or because the Contract was varied by the parties, on the basis that cl 3.6.1 and cl 3.6.2 are to be read as referring to the ESSF in place of an ESS OEIC. The parties are therefore to be taken as having agreed this, either initially or subsequently. They have not however faced up to the practical difficulties of what this entails when the ESSF is housed in an umbrella OEIC with other Henderson sub-funds, and have not made any express provision in the Contract for how these

potential difficulties are to be dealt with.

47. That forms the context for the question of construction which we have to resolve, namely what is meant by Mr Pease being "permitted to replace the relevant Henderson Group company as manager of [the ESSF]"?

Principles of construction

48. There was no substantial dispute between the parties as to the principles applicable to the construction of contracts. They have been restated authoritatively by the Supreme Court in a number of decisions, notably in *Arnold v Britton* [2015] UKSC 36 at [14]-[23] per Lord Neuberger and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [10]-[14] per Lord Hodge. I see no advantage in seeking to summarise the principles there referred to, which are well-known. I will only therefore draw attention to a few points.

49. First, although the task of the Court is to ascertain the objective meaning of the language the parties have chosen, this is not a literalist exercise but takes place by focusing on the meaning of the words in their documentary, factual and commercial context: *Arnold v Britton* at [15], *Wood v Capita* at [10]. Second, this process of construction is a "unitary exercise" which involves an "iterative process" of checking each suggested interpretation against the provisions of the contract and investigating its commercial consequences: *re Sigma Finance Corp* [2009] UKSC 2 at [12] per Lord Mance, *Arnold v Britton* at [77], *Wood v Capita* at [11]. Third, textualism and contextualism are both tools which can be used by the Court to ascertain the objective meaning of the language, and the extent to which each will assist the Court will vary according to the circumstances: *Wood v Capita* at [13].

50. These principles are necessarily stated at a high level of generality. Certain more specific points were relied on by the parties which I will deal with as appropriate below.

Did the ESSF transfer to the FP OEIC?

51. By its terms cl 3.6.2 only applies where Mr Pease (or any entity which he sets up or joins) "replaces any Henderson Group company as manager of the Funds". Since the only relevant Fund is the ESSF, this requires Henderson to establish that the manager of the ESSF has been replaced.

52. Mr Oudkerk says it has. The ESSF is now under the control of Crux (and housed in the FP OEIC under the control of FP). It does not matter whether the manager of the ESSF is to be regarded as HIFL (as ACD of the Henderson OEIC) or as HGIL (as investment manager of the ESSF). (His further suggested alternative of the Henderson OEIC itself can I think be ignored, as I do not see that the Henderson OEIC could sensibly be described as the manager of the ESSF). Whether the manager was HIFL or HGIL, it has been replaced. He was able to point in support to statements in the Judge's judgment at [100]-[101] that:

> "100. As appears from the above synopsis, the ESSF was merged (or in Mr Bowers' words the ESSF was moved or transferred) through the mechanism of the Scheme of Arrangement into a new OEIC.
>
> 101. That process produced the end result that the ESSF moved to a new OEIC and, as the third party ACD of that new OEIC delegated management of the ESSF to Crux, that management was then carried out by an entity which Mr Pease had set up or joined."

53. That raises the question whether the fund that is now being managed by Crux (the FP Crux ESSF) is, or includes, the same fund as the ESSF. Mr Leiper says that it is not, and that what happened was that the assets of the ESSF were transferred, not that the ESSF was itself transferred to a new OEIC.

54. That requires identifying what a sub-fund such as the ESSF is. Mr Leiper said that sub-funds were treated as separate entities. They had their own segregated portfolios of assets, their own management, their own investment policies and their own pricing, and they were regulated by the FCA under "COLL" (the Collective Investment Schemes sourcebook). While he accepted that they were not entities with separate legal personalities, he said that they were separate entities recognised by the law, being authorised and approved by the FCA.

55. We were not shown COLL, or any other material explaining how sub-funds are regulated. But in the absence of any more detailed explanation, I am not persuaded that these features mean that a sub-fund is a separate entity in any meaningful legal sense. The basic meaning of a fund is a collection of assets, often held for particular purposes or on particular terms. In the case of a sub-fund housed within an umbrella OEIC, my understanding is that the assets belong to the OEIC (although they are no doubt registered in the name of a nominee), and that the sub-fund is a description of a separate collection of assets held by the OEIC for the particular purposes set out in its prospectus, namely to be invested following the particular investment policy applicable to that sub-fund, and on terms that investors can acquire shares in the OEIC referable to that sub-fund. But I do not understand in what sense the sub-fund is a recognised legal entity – it is in these circumstances to my mind a description of a collection of assets belonging to an OEIC which is held and managed and otherwise dealt with on particular terms.

56. Where therefore a scheme of arrangement transfers the entire assets of a sub-fund to be housed in a new OEIC, I do not myself see in what way this differs in legal terms from the transfer of the sub-fund itself. In the present case the scheme of arrangement provided (at cl 6.1) that the property of the Merging Fund (the ESSF) should become part of the property of the Receiving Fund (the FP Crux ESSF). In fact, as explained above, there were at the time no other assets in the FP Crux ESSF, which means that the FP Crux ESSF after the merger held the same assets as the ESSF had. All that had changed was that instead of the fund being a sub-fund of the Henderson OEIC, it was now a sub-fund of the FP OEIC with a different name. The terms on which investment in it was offered to investors may have also altered slightly (although the list of "Main features" at Appendix 2 to the notice circulated to investors shows that there were in fact very few differences in the terms offered to investors). But the assets were the same, and I do not see why it cannot be said that the FP Crux ESSF

was the same fund as the ESSF, albeit housed in a different OEIC, given a different name and under different management. I do not therefore think that there is anything wrong with the way the Judge expressed it at [100]-[101] of his judgment, referring to the ESSF moving or transferring to the new OEIC. That seems to me an entirely natural and accurate description of what the scheme of arrangement did.

57. It is also consistent with the way in which the parties themselves referred to the scheme of arrangement in the agreed side letter dated 29 September 2014, the draft press release and the letter to the FCA (paragraphs 21 to 23 above); and to the way in which the FP Crux ESSF was in fact marketed to investors as having been launched in October 2009 and managed by Mr Pease since then (paragraph 27 above). Documents such as these no doubt cannot be determinative of the correct analysis but the fact that Henderson and Mr Pease, both of whom were experienced in the business of fund management, referred to the transfer of the ESSF to Crux, confirms that there is nothing outlandish in describing the FP Crux ESSF as the same fund as the ESSF under different management.

58. Mr Leiper placed some reliance on what the Judge said at [103] of the judgment as follows:

> "In fact, as Mr Leiper submitted, the manager of the Henderson OEIC has not changed: the Henderson OEIC remains in place, HIFL remains its ACD, its delegated investment manager remains HGIL, and the ESSF remains on the FCA's register."

59. The Judge does not however expand on the last point. We received some explanation from counsel but the detail remained obscure. The scheme of arrangement provided (at para 10.1) that on the scheme becoming effective "the ACD shall proceed to terminate the Merging Fund", but Mr Oudkerk told us that the ESSF, as a sub-fund of the Henderson OEIC, had not in fact been terminated but was kept in existence in order to wind up certain residual matters such as where foreign dividends had been subject to withholding tax. We were not given the details of these arrangements or any indication of whether they had been of any significance in practice. Nor were we told what the practical significance was of the fact that the ESSF remained on the FCA's register. The impression I have however is that the residual existence of the ESSF as a sub-fund of the Henderson OEIC is not of importance – Mr Oudkerk's skeleton referred to it as the "husk of a sub-fund" – and in my view it does not affect the substance of the matter which is that the ESSF was transferred to the FP OEIC and that the FP Crux ESSF is in substance the same fund in a different OEIC.

60. As I understood it, Mr Leiper was disposed to accept that his argument depended on the FP Crux ESSF being a different entity from the ESSF. I will however go on to consider the way in which he said cl 3.6.1 had to be construed.

Did cl 3.6.1 require Henderson to permit Mr Pease to have a new ACD of the Henderson OEIC appointed?

61. Mr Leiper's argument supported the analysis of the Judge at [99] of his judgment (paragraph 29 above). This is that (i) the "manager" of the ESSF was HIFL, the ACD of the Henderson OEIC, there being no ACD of the ESSF alone; (ii) Mr Pease was

therefore entitled to replace HIFL as ACD of the Henderson OEIC; and (iii) this was not done.

62. Mr Leiper presented this as the plain meaning of the language in the Contract. He relied on the principle that if the language of a contract is clear, the Court cannot reject it on the basis of commercial common sense simply to allow a party to resile from what turns out to be a bad bargain, or to escape from what was a very imprudent term for one of the parties to agree to even without the wisdom of hindsight. I do not doubt the principle, which has the authority of Lord Neuberger in *Arnold v Britton* at [19]-[20] and was referred to by Jackson LJ in this Court in *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWCA Civ 990 at [39]-[42]. If therefore cl 3.6.1 had said in terms that if Mr Pease set up an ESSF as one of the sub-funds of an umbrella Henderson OEIC, he would be permitted to replace the ACD of the Henderson OEIC when he left, the Court would have to give effect to it, however inconvenient the practical consequences to Henderson.

63. But cl 3.6.1 does not say this in terms. What it says, substituting, as I have accepted we must, "the ESSF" for the reference to "the ESS OEIC", is that Mr Pease "will be permitted to replace the relevant Henderson Group company as manager of the ESSF". It can immediately be seen that this language does not say anything about Mr Pease's right to replace the ACD of the Henderson OEIC as such, or indeed anything about the Henderson OEIC at all. The Judge only gets to the conclusion that it entitles Mr Pease to replace the ACD of the Henderson OEIC by a process of reasoning that, expressed quite briefly in [99] of his judgment, is to the effect that as the ESSF does not have a separate ACD, the only way to replace HIFL as manager of the ESSF is to replace HIFL as ACD of the Henderson OEIC.

64. It is at this point in the analysis that it is helpful to recall the guidance in the authorities that construction is an iterative process which requires checking a suggested interpretation against its commercial consequences. If one does this, and considers the commercial consequences of reading Mr Pease's entitlement to replace the manager of the ESSF as entitling him to replace the ACD of the Henderson OEIC, then it is apparent that this is, picking up Mr Bowers' evidence, fraught with practical difficulties for the reasons given above. I accept that this is not by itself a reason to reject this interpretation if it is clear and compelled by the language, but it is a reason to consider whether the language is indeed clear and compelling.

65. For myself, I do not think it is. It relies on analysis on the proposition that because HIFL, being the ACD of the Henderson OEIC, is the manager of the ESSF, the only way to replace it as manager of the ESSF is to replace HIFL as ACD of the Henderson OEIC. I will assume, as Mr Leiper submitted, that the Judge was right that the manager of the ESSF was HIFL as it retained overall responsibility for the ESSF as one of the sub-funds of the Henderson OEIC (despite having delegated the, or at any rate one of the, most important functions, that of managing the investments, to HGIL). But even on this assumption the proposition begs the question whether there may not be other ways of replacing HIFL as manager of the ESSF. As Henderson LJ observed in the course of argument, there is nothing wrong with a contract specifying a result that has to be achieved without specifying the means.

66. Once the clause is seen in this light, I think that the argument that the language of the

Contract compels the conclusion that Mr Pease was permitted to replace HIFL as ACD of the Henderson OEIC is undermined. I have already said that if the parties had set up a stand-alone ESS OEIC and Mr Pease's right had been to replace the relevant Henderson company as manager of that OEIC, the obvious way of giving effect to that right would be for him to replace the ACD of the OEIC, the ACD being the manager of the OEIC (paragraph 40 above). But once the parties are to be taken as having agreed that Mr Pease's right was not in terms to replace the manager of the OEIC, but to replace the manager of the ESSF, I do not see that the Contract mandates only one route to achieve that end. As Mr Bowers' evidence explained, and as the Judge accepted, there were a number of different mechanisms for effecting a transfer of management (see paragraphs 41 to 45 above). I do not myself see that the Contract compels Henderson to adopt one of these mechanisms for replacing the management of the ESSF (that is by replacing HIFL as ACD of the Henderson OEIC) over another. It entitles Mr Pease to replace the manager of the ESSF, but does not specify how that is to be achieved. This is a function of the fact that the Contract, initially drafted by reference to replacement of the manager of a stand-alone ESS OEIC, has to be applied to the rather different situation where Mr Pease's entitlement was to replace the manager of the ESSF, one sub-fund of an umbrella OEIC, and that although the parties are to be taken as having agreed this, either initially or by variation, they have not agreed or specified in the Contract how this is to be done.

67. Indeed they have not even identified which Henderson company is to be regarded as the manager of the ESSF. The Judge found it was HIFL, which retained overall responsibility for the OEIC. This may be right: Mr Leiper told us that the ACD of an OEIC is treated as the manager of the OEIC's funds under the relevant OEIC Regulations (although we have not been shown the Regulations), and that under the terms of the Henderson OEIC's prospectus the management fees were payable to HIFL (although Mr Oudkerk told us that even if paid through HIFL they were ultimately received by HGIL). HGIL however is also an obvious possible contender for that description, as HGIL was responsible for investment of the funds, which one would have thought the most significant practical aspect of managing a fund such as this in the interests of investors. On the view I take, it does not matter which is right, the relevant point for present purposes being that the parties have not addressed the question what it means in practical terms to replace the manager of the ESSF, or even started to do so by addressing who the manager is.

68. In these circumstances in my judgment the Contract did not require Henderson to permit Mr Pease to replace HIFL as ACD of the Henderson OEIC. What it did was to require Henderson to permit Mr Pease to replace the manager of the ESSF, whether that be regarded as HIFL or HGIL, without specifying the mechanism by which that result was to be achieved.

69. As Mr Oudkerk submitted, that brings into play the general principle that where an obligation can be performed in different ways, it is generally for the party obliged to perform the obligation to choose the method of performance: *Lewison, The Interpretation of Contracts* (6th edn, 2015) at §8-09, *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 at 729 per Lord Devlin, *Mora Shipping Inc v Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069 at [44] per Clarke LJ. As the latter citation indicates, this is ultimately a question of

interpretation of the contract in question rather than a rule of law, but I see no reason why that principle should not apply here. Mr Leiper said that both the *Reardon Smith* case and the *Mora* case concerned contracts which gave the obligor an express choice between doing A or B, which was not the case here; but the principle seems to me to be equally applicable where the obligor is obliged to do X but there are two or more ways (A or B) in which to achieve that result.

Did Henderson permit Mr Pease to replace the manager of the ESSF?

70. If that is right, the remaining question seems to me straightforward. The question is whether Henderson permitted Mr Pease to replace the manager of the ESSF. Once one accepts, as I have accepted, that the FP Crux ESSF is to be regarded as the same fund as the ESSF, then the question answers itself. It is now managed by Crux under the FP OEIC with FP as ACD. Whether the relevant Henderson Group company was HIFL or HGIL, the effect of the scheme of arrangement was that they have both been replaced. The answer to the question whether Henderson permitted Mr Pease to replace the manager of the ESSF is therefore that it did, and that it does not matter that the method it chose to achieve that result was the scheme of arrangement.

71. I should briefly however refer to some other points relied on by Mr Leiper. He said that Mr Oudkerk's interpretation required departing from (or scrapping) the precise language of the clause and denuding Mr Pease of his rights on the basis of an assertion that the commercial purpose of the clause was to permit Mr Pease to take the fund with him when he left. As I have sought to explain I do not accept that the construction I favour involves scrapping or departing from the language of the clause in favour of a supposed commercial purpose. What it involves is interpreting the language of the clause, in its commercial and factual context, as not mandating any one specific mechanism for Henderson to deliver the rights which it conferred on Mr Pease.

72. Mr Leiper said that the clause entitled Mr Pease to replace the manager of the ESSF "in its existing form". But as the Chancellor pointed out in argument, that language is not to be found in the Contract. In practical terms the ESSF could not continue in its existing form, that is as a sub-fund of an umbrella OEIC which also housed the GFF, without causing significant difficulties. In those circumstances I see no reason for implying such a term into the Contract, and every reason not to. If one is looking for what the Contract impliedly requires, it is that Mr Pease can assume management of the ESSF so that his interests can be separated from those of Henderson, not that they should remain intertwined.

73. Mr Leiper said that there were practical disadvantages to Mr Pease in using the scheme of arrangement, namely (i) that it required investor approval; (ii) that he had to pick up all the costs; and (iii) that it added, on the Judge's findings, another 4 months to the process. But the Contract is silent about Mr Pease being entitled to choose the most quick and efficient and least costly mechanism. As set out above (paragraph 45), it seems very likely that the only sensible solution in the end would be to house the ESSF and GFF in separate OEICs. That would need a scheme of arrangement to move one or the other to a new OEIC. Where the Contract is silent on the point, I do not see that it required Henderson to move the GFF (something that Mr Bowers says would have been contrary to the best interests of the investors in the

GFF) rather than permit Mr Pease to move the ESSF. It was Mr Pease who wanted to take the ESSF with him and have Crux appointed to manage its investments. So long as Henderson permitted that to happen – and for the reasons I have given in my judgment it did – I do not see that it was in breach of contract in requiring that the ESSF be transferred out of the Henderson OEIC rather than transferring out the GFF. As Mr Oudkerk said in his short but effective reply, it is not easy to see why the burden of disentangling the two funds should fall in effect on the investors in the GFF, who had no interest in the question whether Mr Pease replaced the manager of the ESSF, rather than on Mr Pease (and the investors in the ESSF) who did.

74. I have now considered the main points advanced by Mr Leiper in his submissions. For the reasons I have sought to give, in my judgment none of them affects the conclusion that Henderson did permit Mr Pease to replace the manager of the ESSF through the mechanism of the scheme of arrangement.

Conclusion

75. I would allow the appeal, set aside the finding that Henderson was in breach of cl 3.6.1 of the Contract, and uphold Henderson's counterclaim under cl 3.6.2.

76. We heard no submissions on the quantum of the counterclaim. The Judge (at [197]) recorded Mr Oudkerk's submission that, based on Mr Pease's disclosure, Henderson was entitled to £3,973,126 together with interest, but he did not expressly say that he found that that was the correct figure and at [200] referred to "further issues as to the level of fees that Henderson is due under Clause 3.6.2", which are not, as far as I can see, specified in the judgment or identified in the material before us.

77. If the Chancellor and Henderson LJ agree with me on the substantive question, I would therefore direct that unless the parties are able to agree the quantum of the claim, the proceedings be remitted to the High Court for an account to be taken of what is due to Henderson.

Lord Justice Henderson:

78. I agree with both judgments.

Sir Geoffrey Vos, Chancellor of the High Court

79. I agree entirely with Nugee J's careful judgment and the disposal that he proposes.

80. In my view, the judge's error was to misunderstand the quite radical consequences of the parties having agreed in the litigation (and of his finding of a variation by conduct) that "European Special Situations Fund OEIC" in clause 3.6.1 should be read as "European Special Situations Fund". As Nugee J has explained, we cannot re-open that agreement, and must construe the Contract on the somewhat artificial basis that it was drafted as providing for Mr Pease to be "permitted to replace the relevant Henderson Group company as manager of the ESSF", when in fact it was not. At the time of the Contract, all parties accepted that it was intended to establish an ESS OEIC, but for whatever reason that never occurred.

81. In these circumstances, as it seems to me, the judge did not give adequate consideration to the nature and status of a fund, as opposed to an OEIC. They are quite different creatures as Nugee J has explained. Henderson was indeed replaced as the manager of the ESSF by the scheme of arrangement. Accordingly, Henderson performed its obligation under clause 3.6.1.