The Gritty Reality of Social Investment: Thoughts from Internal Counsel

By | Charlotte Pritchard
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After the euphoria of hearing the words “investment committee have approved your investment proposal”, it can be hard to get excited about the paperwork.

Certainly, ‘documenting the deal’ is not the “sexy” side of investing. But as Internal Counsel at Big Society Capital, paperwork is an integral part of my job. Our Gritty Reality blog recently raised some interesting issues about the legal process and it got me thinking about my last three years heading up the legal team at Big Society Capital.

One thing I’ve noticed is that there is sometimes a reluctance to involve lawyers in investment transactions as they are seen as “too expensive”, they “add unnecessary complication”, and people say to me “you can act for everyone”. Some of this may be because of bad previous experiences but it has certainly challenged my assumptions of how much people know about the legal process and the value of having an engaged lawyer.

So, what do you need to think about?

Being clear with your advisors about what you want, asking for regular fee updates to track costs incurred, setting out the scope of work at the start to ensure a more accurate fee quote, and keeping everyone up to date with key events. To de-mystify some of this and help organisations set expectations with their lawyers, there have been several sessions on “how to instruct your lawyer” organised by us and others. One of the points made during these sessions and by the author of a recent Gritty Reality blog – is worth emphasising: be clear with your advisers about what you want and what might have changed.
Even if you don’t involve lawyers, discussing key issues and potential barriers at an early stage reduces the chance of a (often unwelcome) surprise along the way. Term sheets are a great way to frame the discussion and draw out points. It’s not ideal when everyone is keen to sign and celebrate and you discover that the consent of another party is required and that process takes months not days. The absence of clear terms can also lead to confusion, particularly if we think a transaction is different to the one that may have been briefed to another parties’ solicitors (which has happened before). Not to mention the increased legal costs incurred when simultaneously agreeing substantive points and re-drafting documents. Even simple things can make a real difference, for example checking when your next board meeting is so the transaction can be approved without a significant delay. I’ve known deals that have been delayed because a key signatory was on annual leave or documents required for closing haven’t been prepared.

At Big Society Capital we have made changes ourselves as the more deals we’ve done have thrown up new learnings. We have some specific requirements as a result of our mandate but we have made these more transparent. So, now you can expect a term sheet as part of your discussions with our investment team. We now include information on our website that explains how we build some of our governance and legislative requirements into the legal documents, as well as giving some more background to state aid, which is not something that we expect everyone to be familiar with.

One thing that comes up time and time again is why there isn’t a standardised investment document to reduce the time and costs involved. While on the face of it it may appear a good way to keep down costs and speed the process up, we don’t think you can do ‘one size fits all’ social investment. Social investment is an extremely collaborative process, leading to bespoke transactions, and the legal process reflects that. Even social impact bonds, a product you may consider to be standardised, have been designed in different ways. It is also a nascent market, which has so much potential for creativity, which we want to encourage. Where we can see commonality, we seek to streamline processes e.g. with the Growth Fund programme that we work on with Access.

I have been told that we are too robust in our approach and not robust enough. Striking the balance between having the appropriate investor protections, while ensuring that the transaction does not become so awkward that the investee cannot operate its business is a challenge that we continue to work on. Ultimately, great documents don’t mean much if the investment doesn’t happen!

By Charlotte Pritchard, Internal Counsel

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