THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 0156 of 2011

APPLEBY CORPORATE SERVICES (BVI) LIMITED

(As a Trustee of Clef Trust)

Claimant

-v-

CITCO TRUSTEES (BVI) LIMITED

Defendant

Appearances: Mr Michael Heywood and Mr Andrew Willins for the Claimant
Mrs Shân Warnock-Smith QC, Mr Kissock Laing and Mr Jeremy Child for the Defendant

JUDGMENT

(2013: 9, 11 December; 2014: 20 January)

(BVI discretionary trust – sole asset entire issued share capital of investment company – management of investments delegated to professional managers – managers disregarding contractual investment guidelines – funds invested by managers in speculative trading on margin – almost entire value of trust fund lost in consequence – duties of trustee holding majority shareholding in company whose assets represent the value of the trust fund – whether trustee under a duty to review performance of managers – **Bartlett v Barclays Bank Trust Co Ltd**[1] considered and applied - whether trustee exonerated by Trustee Act section 31(1) – meaning of 'willful default' – **In re Vickery**[2][3] distinguished – Trustee Act Sch 2 paragraphs 4(q)(i) and 8 considered – correct

[1] [1980] 1 Ch 515
[2] [1931] 1 Ch 572
[3] [1998] Ch 241 (CA)

approach to the assessment of equitable compensation – Court's power to award interest in equity)

[1] **Bannister J [Ag]:** In these proceedings, the current trustee of a BVI discretionary trust asks for an order requiring the former trustee (in effect) to reconstitute the trust fund by compensating the trust for losses which it claims were suffered by the trust as a result of the negligence of the former trustee. The former trustee is Citco Trustees (BVI) Limited. I will refer to it as Citco.[4] The current trustee is Appleby Corporate Services (BVI) Limited ('Appleby'). The trust was settled on 27 December 2000 by a deed made between Franklin Alejandro Marmorek ('Mr Marmorek') as Settlor and Citco as Trustee. The trust is called the Clef Trust. I will refer to it simply as 'the Trust.' The only assets of the Trust are (1) the entire issued share capital of a BVI registered company called Clef International Holding Limited ('the Company') and (2) the claim made in the present proceedings.

Background

[2] Mr Marmorek is of Argentine nationality and comes from a prosperous commercial/mercantile background. In 1995/6 the family realised its businesses for cash and Mr Marmorek's share of that was in excess of US$30 million. He appears to have managed that cash and any investments made with it on his own account until about the end of the decade. During that period he received advice on investment from a Mr Gabriel Wiegers, who when Mr Marmorek came across him was an employee of ABN Amro at its Buenos Aires office ('Mr Wiegers'). In about 1999 Mr Wiegers joined a firm of independent financial advisers in Buenos Aires called Consultatio and at the suggestion of Mr Wiegers Mr Marmorek became a client of that firm. During this period and before the establishment of the Trust, Mr Marmorek was kept in touch with the performance of his portfolio through regular meetings with Mr Wiegers.

[3] In about March 2000 Mr Marmorek decided to place part of his wealth (the figures are not clear, but perhaps as much as about US$10 million), then in the custody of UBS, into a special purpose limited company. He made it clear in his evidence that this decision was unrelated to his later decision to make use of a trust structure. The Company was the vehicle chosen for this purpose. Mr Marmorek was issued with 50% of its shares and his wife with the other 50%.

[4] At some stage in the latter part of 2000 Mr Marmorek decided that he wished at any rate a significant proportion of his wealth (part of which was by now held by the Company) to be put into trust. The main driver for this decision appears to have been personal tax

[4] as will appear, from time to time different steps were taken with regard to the Trust by various emanations of Citco. The fact does not, and has not been suggested to, affect the overall liability (or otherwise) of Citco BVI and, except for clarity of exposition, the distinction is ignored in what follows

saving, which is why Mr Marmorek did not become a beneficiary of the Trust as eventually established. Mr Marmorek also said that he wished his assets to be put in trust so that they would be safe for his widow and children if anything happened to him. I never quite managed to grasp why putting the assets into trust would be of particular benefit to Mr Marmorek's family in the event of his death, but, again, tax may have had something to do with the decision and in any case it does not really matter for present purposes.

[5] In order to arrange for the creation of the Trust, Mr Marmorek was put in touch by Mr Wiegers, then working for Consultatio, with Ms Sylvie Legionnet, of Citco's Uruguay office ('Ms Legionnet'). Largely, I think, because the Company was a BVI registered company, it was decided to establish the Trust in this jurisdiction, so that both the Trust and the Company would be domiciled in and governed by the laws of a single jurisdiction. For whatever reason, all the trust arrangements were in fact made between Ms Legionnet and personnel working out of Citco's Cayman Islands office ('Citco Cayman') and, once the Trust had been established, its files were kept there, rather than in the BVI. While the Trust was being set up, parallel arrangements were being made through Mr Wiegers to establish a Jersey CI trust for a large part of Mr Marmorek's remaining wealth. Those arrangements matured into the establishment of a Jersey trust called the Harmony Trust – I think at around the same time.

[6] At all events, documents were executed, all dated 27 December 2000, for the establishment of the Trust. The first was a Deed of Trust, made between Mr Marmorek as Settlor and Citco as Trustee. The Trust Fund was defined as (i) the property specified in the First Schedule; (ii) any later accretions; and (iii) any accumulations. The First Schedule (headed 'Trust Fund') listed one asset only - the entire issued share capital of the Company. There have been no accretions or accumulations, with the result that the Trust Fund, as defined, has at all times comprised only the shares in the Company. Shortly before execution of the Trust Deed, Mr Marmorek's wife transferred her 50% shareholding to Mr Marmorek. Mr Marmorek then transferred the entire issued share capital of the Company to Citco. The Trust is a fairly straightforward discretionary trust with the beneficiaries defined as Mrs Marmorek and the four children of Mr Marmorek. There was power for the Trustee to add to or remove persons from the class of beneficiaries (with the consent of the Protector, if any[5]) but the power has not, to date, been exercised.

[7] By clause 8(a) of the Trust Deed Citco was given all the powers and immunities set out in what is now the Second Schedule to the Trustee Act ('the Act'). Those powers include the power contained in what is now paragraph 4(q)(i) of the Second Schedule ('paragraph 4(q)') to delegate the management of investments.

[5] there has been none

[8] By an Investment Management Agreement ('the IMA'), also dated 27 December 2000 and entered into between Citco (1); the Company (2); and a party named as 'Alberto Gabriel Wiegers, Consultatio Independent Advisers' (defined as the 'Investment Manager') (3), it was recited (Recital A) that Citco was the trustee of the Trust; that it was empowered (Recital B) by the provision in the Act then corresponding to paragraph 4(q) to delegate management of all or part of the investment of the Trust Fund (as defined in the Trust); that (Recital C) the Company owned the Trust Fund; and that (Recital D) Citco and the Company wished to be provided with management services which the Investment Manager was willing to provide. As a matter of fact, the Company did not own the Trust Fund as defined in the Trust Deed. The Trust Fund as defined in the Trust Deed was the entire issued share capital of the Company, which was (or was about to become) vested in Citco. Neither Citco nor the Company needed the assistance of any investment manager in order to manage and invest the shares of the Company, because there was never any intention that they should be otherwise than held permanently by Citco. Nevertheless, the operative part of the IMA went on to provide that Citco and the Company appointed the Investment Manager to manage the investment of the Trust Fund (subject to the overall supervision of Citco). Subject to that qualification, the Investment Manager was given authority to manage the investment of the Trust Fund at its complete discretion, but within the terms of a Limited Trading Authority ('the LTA'). The IMA further provided that the activities of the Investment Manager were subject to the control and review of Citco and the Company. The provisions of the IMA could be varied, etc, only by writing.

[9] The LTA was scheduled to the IMA. It was executed by the Company and by the Investment Manager alone. Citco was not signatory to it. By the LTA the Company authorised the Investment Manager to open and operate in the name of the Company bank and brokerage accounts as might be agreed in writing and to enter into contracts with brokers and dealers for the sale and purchase of securities and similar property, including short sales. The document went on to provide that the Investment Manager was to manage the assets in accordance with an attached Annex. Subject thereto, transactions directly or indirectly involving commodities, derivatives such as futures and options, margin payments or nil or partly paid securities or which involved liabilities of any other nature were not permitted unless expressly authorised in writing by the Company. Withdrawals for any account, other than for reinvestment, were not authorised, nor were related party transactions. The final paragraph of the LTA provided that the authorisation granted was to remain in force until Consultatio received written notice from the Company to the contrary. Two managers at Citco Cayman's office signed for the Company and Mr Wiegers signed for Consultatio.

[10] The document which the parties accepted at trial to be the Annex referred to in the LTA emerged rather late in the proceedings. It takes the form of a letter, purportedly dated 27

December 2000, addressed to Citco by Consultatio. I must set out the body of the letter in full:

> Below please find the investment guidelines for [the Company]. These guidelines were discussed with and agreed to by the settlor and are hereby submitted for the trustees' approval.
>
> The assets in the name of [the Company] held at Salomon Smith Barney will be managed on a discretionary basis by Consultatio. Mr Antonio Lanusse, Managing Director and Chief Investment Director of Consultatio, and Mr Gabriel Wiegers, Director of Consultatio Independent Advisors, will be directly involved in the management of these assets.
>
> Consultatio will invest [the Company's] assets in three asset classes with the following allocation, as per attached chart:[6]
>
> a. **50% Investment Grade Bonds (High Grade).** We define Investment Grade Bonds in accordance with Moody's and Standard & Poors agencies' definition of these bonds, that is from BB up to AAA.
>
> b. **25% Non-Investment Grade Bonds (High Yield).** This includes all emerging markets bonds, Brady Bonds and Secondary US Corporate Bonds, as well as so-called "AAA" corporate bonds from those countries not defined as Investment Grade risk.
>
> c. **25% Equities – World.** We only invest in those equities that are publicly traded in major world Stock exchanges (i.e. AMEX, NYSE, NASDAQ, EASDAQ, etc.).
>
> d. **Options.** We will only buy or sell covered options as part of our equity strategy.
>
> Our investment style seeks to be 95% invested. However, we are not required to be fully invested in any asset class at all times. Should market conditions become unfavorable in a certain asset class, we will always seek 'flight to quality' via Investment Grade alternatives. For example, at this time we are underweight in world equities and overweight in Treasuries and other investment grade bonds. We will tend to move to an Investment Grade bond, rather than remain excessively in cash or 'defensively' in equities. Our covered options strategy is used mainly as an investment vehicle to reduce volatility in equities as well as exposure to drastic changes in market conditions.

[6] no such chart featured in the evidence

> Under this agreement, Consultatio is only authorized to act as investment advisor and asset manager of all the assets held in the account in the name of [the Company] with Salomon Smith Barney. *Consultatio is NOT authorized to give instructions to SSB or any other third party to transfer assets out of the account.*
>
> Occasionally, the settlor may wish to request that the investment guidelines, objectives and assets allocation be reconsidered. In this instance, the settlor will write to the trustees asking them to consider making a decision on the requested alterations.
>
> We trust that this addresses all the issues you may have. Please feel free to contact us anytime should you have any questions or need further information.

[11] The Annex was signed by Mr Wiegers and Mr Antonio Lanusse, who appears to have been Consultatio's Managing Director at the time ('Mr Lanusse'), on behalf of Consultatio and by Mr Marmorek as Settlor. Mr Lanusse appears to have been the individual actually managing the investments for the Trust. Mr Wiegers was described by Mr Marmorek as more of a relationship man.

[12] In my judgment, these documents (the IMA, the LTA and the Annex) taken together amount to an agreement between Citco and the Company on the one hand and Consultatio on the other for the management by Consultatio on a qualified discretionary basis of the assets then held in the name of the Company at Salomon Smith Barney. I had asked myself whether these arrangements amounted to a delegation by Citco pursuant to paragraph 4(q)[7], since the assets placed under the management of Consultatio were not, strictly speaking, assets of the Trust. Neither Counsel would accept that that was more than a purely technical distinction. On reflection, I think that they were right. Under the IMA Citco explicitly reserved rights of overall supervision and control over the underlying assets, making any distinction between assets held legally by Citco in its capacity as Trustee and the underlying securities held by the Company, upon which the Trust Fund depended for its value, artificial. In my judgment, the effect of the IMA was a delegation by Citco, as well as by the Company, of management of the Trust's assets within paragraph 4(q) (or section 24 of the Act).

[13] There is in evidence a set of email exchanges between Ms Legionnet and Mr Ainger, of Citco Cayman, extending over a period between 25 July 2001 and 20 September 2001, which appears to show that steps were then being taken to establish what were described as investment objectives for the Trust. They include an undated and unsigned page of investment guidelines, naming Consultatio, Mr Lanusse and Mr Wiegers, but not

[7] or, although not pleaded by Citco, under section 24 of the Act

the client whose investments they were intended to cover. Someone unknown at some time unknown has written the words 'CLEF TRUST' in manuscript in the top right hand corner of the document. I shall refer to the document, purely for convenience, as 'the 2001 guidelines.' What is curious about this exchange is that, as appears from the Annex, investment guidelines for the Trust had been agreed and signed up to as recently as 27 December 2000, and yet no party to the June/September email exchanges seems to have pointed that out or to have been surprised by so early an attempt to agree their replacement. I asked Mr Marmorek whether he was sure that the Annex had been signed on 27 December 2000. He was adamant that it had. So it is somewhat of a mystery why some six months later the question of investment guidelines was (apparently) being revisited.

[14] The point is important because the 2001 guidelines included a statement that:

> *The asset allocation is monitored on a monthly basis by the settlor who will in turn, request any changes in our investment style, via the trustees.*

These words are relied upon strongly by Citco as relieving it of any duty which it might otherwise have had to monitor the state from time to time of the Company's investments.

[15] Mr Marmorek denied that he was party to any discussion concerning investment guidelines as evidenced by the 2001 email exchange. Apart from that, the 2001 guidelines, although providing for investment in three asset classes (and the use of covered options), gave no quotas for the distribution of the Company's assets within those classes. It looks as though it must have been for that reason that Mr Ainger, who was looking after the Trust's file in Citco's Cayman office, reacted, when Ms Legionnet sent him what she described in her email as a draft received from Mr Wiegers on investment objectives for the Trust (which may or may not have been the same document as the 2001 guidelines), by asking in what proportions the investments were proposed to be held between the various classes. There is no document in evidence which answers that question. Indeed, and apart from the Annex itself, there is no executed version of any document even remotely resembling the 2001 guidelines in evidence. It was the evidence of Mr Robert Thomas, formerly the Managing Director of Citco Cayman, but who had worked for Citco in the BVI between 2000 and 2003 ('Mr Thomas') that had a document in the form of the 2001 guidelines been executed, it would be on the Trust's files. It is true that by an email of 20 September 2001 Mr Ainger told Ms Legionnet that some unidentified investment guidelines sent to him by Consultatio were in order, but if what was sent to Mr Ainger on that occasion differed in any way from the Annex, there is no evidence to show that that was so. In particular, there is no evidence that it was ever agreed or understood that Mr Marmorek would monitor asset allocation on a monthly basis. In my judgment, the only investment guidelines which

have been proved in this case are those contained in the Annex, which say nothing about Mr Marmorek monitoring asset allocation on a monthly, or indeed on any other basis.

[16] Even if there had been such an understanding, it would, in my judgment, have made no difference to any liability on the part of Citco. Even if it were the fact (Mr Marmorek denies it and there is no evidence to contradict what he says) that Mr Marmorek monitored, or even had agreed to monitor, the asset allocation on a monthly basis, that would not have relieved Citco of any trustee's duty of care, which it owed, not to Mr Marmorek, but to the beneficiaries of the Trust.

Things go wrong

[17] It appears that by June 2005 Mr Wiegers and Mr Lanusse had left Consultatio. It is assumed by Misss Sanna-Lisa Valtanen, who was called by Appleby to give expert evidence on the management of the Company's investments, that they had set up in business together as Core Capital and as such advised an entity called Global Wealth ('Global'). The position is not entirely clear, but certainly after 30 June 2005 monthly portfolio statements were received from Global Wealth addressed to the Company, care of Citco's Cayman office. While in a section of the Joint Experts' Report[8] with which the Court has been provided Miss Valtanen assumes that after the change there was no investment agreement in place and criticizes Citco for not seeing to it that there was one, Counsel in argument proceeded on the footing[9] that there had been some implied or *de facto* novation which substituted Core/Global for Consultatio but which otherwise left things exactly as they had been on 27 December 2000, with the rights and liabilities then established remaining unchanged. That seems to me to be the correct analysis and I shall adopt a similar approach.

[18] As I have said, from June 2005 onwards monthly[10] portfolio statements were sent to the Company, care of Citco's Cayman office, by Global. Each of those statements contained elaborate tables showing cash flow, cash balances, income, and details of investments held, bought and sold. The front page of each monthly portfolio statement contained a table headed 'Your Portfolio at a Glance,' which set out 'Net Equity This Period' together with a line showing the comparative figure for the end of the previous period. An investor could thus see at a glance what his fund was worth (or said by Global to be worth) and compare that to what it had been worth the previous month. On the second page of each monthly statement could be found a pie chart purporting to show how the fund was broken down between different asset classes and telling the reader that unshaded segments of the chart denoted debit balances or short positions.

[8] Mr Robert Sayers was the expert called by Citco

[9] consistent with Citco's pleaded defence

[10] there are some gaps in the documents in the Court bundles, but I assume that these are due to documents having become lost rather than omissions on the part of Global to send statements in particular months

[19] The Global statement for June 2005 shows the Company's portfolio as having a NAV of US$7.3 million as at 30 June 2005. A fee agreement dated 27 December 2000 and made between Citco and Mr Marmorek shows, or at any rate suggests, that when the settlement was entered into at the end of 2000, the funds held by the Company had been in the region of US$7 million, because Citco's annual fee for acting as Trustee (US$12,000) had been based upon a fund of that value. It is not possible to say whether a value of US$7.3 million as at the handover in June 2005 represented successful investing on the part of Consultatio or not, because while it is known that distributions were made from time to time out of the fund there was no evidence whether or not any such distributions had been made before 30 June 2005 and the Trust had also had to bear Citco's fees and those of the Investment Manager.

[20] The pie chart for 30 June 2005, in the first monthly portfolio statement received from Global, showed, if accurate, that some 65% of the fund was cash (shown in a cash balance summary on the same page as represented by cash held by brokers by way of margin); and that 33% was represented by equities and 2% by short equities. So that even an inexpert reader could gather what the fund was valued at as at the month end and how the fund had been made up at that date. The reader of the 30 June 2005 statement could see at a glance that if what was being represented was true, the restrictions set out in the LTA and the investment guidelines set out in the Annex had been seriously flouted during the period in question.

[21] A monthly statement sent for the end of January 2006 shows that a statement (not in the bundles) had been sent for 30 December 2005, giving the fund a value of US$6.7 million. Twelve months later the monthly statement for the period ended 29 December 2006 valued the funds under investment at US$5.6 million. During the year to date distributions totaling US$314,500 had been made from the Trust Fund, but the figures still disclose a loss in value over twelve months of some US$600,000. At 31 December 2007 the fund's value had dropped to US$5.2 million, of which just under US$4 million was cash at Bear, Stearns, to whom the account had been transferred. Some US$210,200 of this difference is said by Mr Marmorek to have been accounted for by distributions made out of the fund during the year. It appears that further distributions were made in January of the following years, although I was taken to no evidence showing the amount of each one. At the end of 2008 the portfolio was shown as having a value of US$3.7 million. A year later the figure was US$241,625. At the end of December 2010 the fund was given a value of US$141,166. The 31 December 2010 statement showed that at the end of November 2010 the fund had been shown as worth US$3,274. When Citco retired on 12 July 2011 the fund was worth about US$142,000.

[22] It is pleaded by Appleby that during the period which I have dealt with above there were distributions to the beneficiaries of the Trust (some of which I have mentioned above)

and payments of fees from the funds under management, both to Citco as Trustee and to Global, totaling some US$1.5 million. The pleaded loss to the fund takes those distributions and payments into account by deducting them from the total difference between the stated value of the fund as at 30 June 2005 and its stated value upon Citco's retirement as trustee and on that basis arrives at a figure of US$5,624 million. The Joint Experts' Report, however, treats the amount of the deduction requiring to be made for withdrawals by way of fees and distributions over the same period as US$2.6 million. No mention was made at trial of this discrepancy.

[23] It is accepted by Citco that each of the monthly statements was considered around the time it was received by Citco Cayman personnel. Indeed, and although versions so initialed were not before the Court, it was said that the front page of each statement had been initialed by the person reading it. Mr Thomas told me, and I accept, that the reason why Citco considered the statements was in order to check whether there had been any additions to or subtractions from the fund – possibly (although Mr Thomas did not say so) because it had been agreed that Citco's fee arrangements would be subject to further negotiation should further assets be added to the fund. Apart from that, and although staff did raise pertinent queries from time to time, there is no evidence that any systematic analysis was undertaken by any Citco manager, whether in Cayman or in the BVI, of the monthly portfolio statements.

[24] Mr Marmorek himself was not sent copies of the monthly portfolio statements, either by Global or by Citco, although he was supplied by Mr Lanusse with annual combined statements for the Harmony and Clef trusts down to around 2010. He said that he had not retained copies of these combined statements, although he described them as being some two pages in length and, although that was not Mr Marmorek's term, in summary form.

[25] In late 2010 Mr Marmorek was considering rearranging his affairs, with the assistance of an Argentine law firm called Allende & Brea. In January 2011 he asked Mr Solomon, of Citco Cayman, for the value of the Company's assets as at y/e 2009 and y/e 2010. Mr Marmorek received these figures,[11] after some delay, on 3 February 2011. On 7 March 2011 Citco provided Allende & Brea with the monthly portfolio statements for 2006-2010. They revealed the positions which I have summarized in paragraph [21] above.

[26] On 12 July 2011 Citco retired as trustee of the Trust. These proceedings were commenced by Appleby as successor Trustee on 9 December 2011.

The pleaded basis of Citco's liability

[11] US$241,625 and US$141,166 respectively

[27] Appleby pleads, first, that in the exercise of its powers and discretions, including its power to delegate the management of the Trust Fund and of the investments which it comprised, Citco was bound to act in good faith, in the interests of the beneficiaries as a class and in accordance with the duties imposed upon it by law, always having regard to the circumstances and the Settlor's wishes. Critically, for present purposes, Appleby pleads that notwithstanding its power to delegate performance of its functions, Citco had a duty to supervise and monitor the performance of those to whom it had delegated them and to ensure that policies and guidelines for which it had stipulated were being adhered to.

[28] In breach of these duties, Appleby says, Citco failed to monitor the performance of Core/Global at all; failed to check whether the investment guidelines set out in the Annex were being adhered to; failed to review the performance of the portfolio; failed to consult Core/Global (described as Citco's chosen investment advisor) about what was going on; concealed the losses from the beneficiaries of the Trust; failed to read the monthly statements and to spot the use of high leverage, churning and high risk investments; and failed to see to it that Core/Global had effective and sufficient professional indemnity insurance in place.

[29] In consequence of the losses which are said to have resulted from these breaches, Appleby claims the loss of the fund's capital value; loss of corresponding net income; and unnecessary fees incurred as a result of churning.

What were Citco's duties?

[30] The Trust Deed is silent upon the question and the Trustee Act ('the Act') throws no direct light upon the nature and extent of the duties undertaken by Citco when it accepted the appointment as Trustee of the Trust. Mr Thomas referred to what happened in this case as a pre-pack arrangement, by which I took him to be describing an arrangement under which a provider of trustee services, such as Citco, exchanges places with the shareholder(s) of a corporate structure already under management by the professionals by whom the intended settlor has been introduced to the service provider, on the understanding that the trust property will continue to be managed by the same persons as before, with the service provider holding the transferred shares on trust for persons selected by the transferor. I do not think that the route by means of which a trust comes to be established of itself affects the underlying duties of its trustee. Those duties may be more or less extensive depending upon the circumstances and upon the terms of the trust itself, but I cannot see why the question is affected by the identity of the introducer or by the fact that it is intended that the introducer should continue to manage the investments to be put into trust.

[31] In my judgment, any person, such as a trustee, holding property on behalf of others who delegates dispositive powers and functions such as the management of investments representing the property held, is under a duty to have in place appropriate risk management procedures in order to be able to satisfy himself that such delegated powers and functions are adhered to and not abused by the agents to whom they have been delegated. This is not something which, in my judgment, needs to be spelt out, as it is in the English Trustee Act 2000. It follows from the well established principle that a trustee should not (subject always to the provisions of the trust in question) take more risks with the trust property than would a prudent man of business with his own.[12] Further, Citco, as sole owner of the Company, being the only asset of the Trust, had a duty not only to respond to information giving cause for concern about the management of the Company's assets, but also to inform itself at appropriate intervals on the state of the Company's portfolio and the manner in which it was being managed.[13]

[32] For these reasons, it seems to me that among the duties owed by Citco to the beneficiaries of the Trust was a duty to take reasonable steps to satisfy itself at appropriate intervals that the investment guidelines were being observed and that the overall value of the fund had not been affected by any abuse on the part of Consultatio/Global of its delegated authority. Any such review would require more than a mere glance at NAV. There would need to be inquiry into the nature of the investments held over the period under review, in order to see whether those investments observed the restrictions set out in the LTA and fell within the guidelines set out in the Annex and whether the performance of the fund gave rise to any concerns that irregularities might have occurred. In other words, Citco had a duty, owed to the beneficiaries, to make regular prudential checks on the management of the underlying assets of the Company which went to support the value from time to time of the Trust Fund.

[33] Citco relies upon paragraph 8 of the Second Schedule to the Act, which relieves trustees from any obligation to interfere in the management of any company whose shares are held in the trust (unless they have notice of misconduct on the part of the company's executive directors). I do not think that this provision is engaged. The fact that Citco had no obligation to involve itself in the *management* of the Company did not relieve it of the duty to satisfy itself from time to time that nothing untoward was affecting the value of the shares. They are two different things.

[34] In fact, and to be fair to Citco, the surviving documentary evidence (largely in the form of email exchanges) shows that Citco seems to have been conscious of at any rate some such obligation and to have paid intermittent attention to the state of the portfolio. For example, when asked by Salomon Smith Barney in September 2001 to execute a

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[12] **Bartlett v Barclays Bank Trust Co Ltd** [1980] 1 Ch 515 at 531A-H

[13] **Bartlett v Barclays Bank Trust Co Ltd** (supra) at 532E-H

mandate permitting trading in put and call options and uncovered options, Citco immediately challenged the request as being contrary to the investment guidelines set out in the Annex. Mr Wiegers, from whom the request presumably originated, backed down when confronted by Citco about the matter. In January 2002 Citco BVI discovered that Consultatio was trading on margin, because Salomon Smith Barney had asked Citco BVI to sign a mandate that would permit such trading. The matter was passed to Citco Cayman, which initially refused to sign any mandate permitting such trade. Citco Cayman took the matter up with Mr Wiegers, telling him that the guidelines in the Annex did not include permission for trading on margin. Mr Wiegers replied that occasionally it was necessary to trade on margin to a limited extent and asked Citco Cayman to sign the mandate in order that that could continue. Whether Citco ever executed such a mandate on that occasion or subsequently does not appear from the evidence.

[35] In February/March 2004 Bear, Stearns, made a margin call. Citco asked Mr Wiegers what action it should take. He told Citco that the margin had been covered.

[36] In November 2007 Citco asked Mr Wiegers to explain the large movements on the account during the preceding month. Mr Lanusse supplied an answer to Mr Wiegers, which he passed on to Citco. Mr Lanusse's answer, so far as his jargon can be penetrated, was to the effect that a bet early in the month had resulted in losses, but that subsequent positioning had been (or was going to be) beneficial. Citco's subsequent question seeking quantification of the losses and asking how much had been recouped may have been answered, but, if so, the answer has not survived.

[37] An email sent by Citco to Mr Lanusse in July of 2008 evidences that discussions had been taking place around this time about the monthly statements. It is not possible to detect the nature of those discussions, but they appear to have prompted Citco to ask Mr Lanusse why the December 2005 monthly statement showed a negative cash balance of US$4 million. Mr Lanusse replied that he would respond on the following day, but there is no document recording that he did, or that the inquiry was pursued by Citco.

[38] On 30 January 2009 Citco asked Mr Lanusse for the NAV as at that date. Mr Lanusse replied that it was US$5.3 million. The monthly statement for 30 January 2009 gives a figure of US$4.8 million. Given the paucity of available evidence, it is not possible to make anything of this discrepancy.

[39] On 17 March 2009 Simone Leijeon, of Citco Cayman, emailed Mr Wiegers to ask for an explanation of a debit of US$18,398 to the fund. The reply, from Global, said that it was the interest on a negative balance in the month to 20 February. In July of the same year Ms Leijeon queried a similar debit which had showed up in the May statement and received a similar answer. Ms Leijeon asked whether the debit was balanced by a

transfer to another Trust account, but was told, consistently with the earlier response, that the money had gone to the bank funding the overdrawn account.

[40] These exchanges are the sum of what is now known, from contemporary documents, about Citco's review of the funds under management. They show that there was some scrutiny of the statements. Missing documents might have shown more. There is, however, no evidence that Citco undertook any regular periodic review of Global's conduct including, in particular, its adherence to the investment guidelines and the restrictions imposed by the LTA, or that it ever addressed itself to the question whether continued delegation to Core/Global was – or was not - in the best interests of the beneficiaries. Indeed, it is clear that it did none of those things. In my judgment, that failure amounted to a negligent breach of duty on the part of Citco.

[41] Had Citco reviewed the conduct of the account on a systematic basis, it would have seen, quite early on after the changeover to Global had taken place and without needing to deploy more than ordinary business acumen, that the investment guidelines were not being adhered to. Instead of sitting on a portfolio of marketable securities, the Company was repeatedly incurring large exposures in the course of speculation. It would also have been apparent that turnover and volatility was abnormally high for what was designed to be a moderately conservative portfolio. Moreover, it was not difficult to see over a relatively short period that this speculative activity was steadily eroding the value of the Company's assets and thus of the shares which formed the Trust Fund.

[42] In identifying these failings the Court has had the benefit of the Joint Expert Report of Ms Valtanen and Mr Richard Sayers (the latter of whom, as I have mentioned, was called by Citco), but in my judgment this course of dealing would have been evident to any reasonably astute businessman and certainly to a service provider holding itself out as having, or at the very least having access to, the expertise necessary to act as trustee of the entire issued share capital of an investment fund. The experts are agreed that the warning signs were evident from the start of the Core/Global relationship in June 2005. It is no answer to say (if it is being said) that the personnel who actually considered the monthly statements did not have the requisite expertise to analyse them, because Citco cannot be heard to say that it had no obligation periodically to put the monthly statements in front of someone who had or that it had no one available to call upon who had that degree of skill. On the contrary, the pie charts by themselves were a simple graphic statement that things were seriously amiss. Unless, therefore, it can rely upon some exonerating provision in the Act or on a similar provision in the documents pursuant to which it was appointed and/or retired, Citco must be liable to the Trust for whatever damage is proved to have been caused by its negligence in failing to keep the management of the account under appropriate regular review.

[43] Citco says that it is relieved of any liability for losses caused to the Trust Fund because it delegated to Consultatio (and subsequently, by novation, to Core/Global;) discretion to manage the underlying investments.

[44] In this regard, Citco relies upon two separate provisions. The first is paragraph 4(q), which I set out here:

> (q) power-
>
> (i) to engage the services of such investment counsel adviser or manager ("the Investment Adviser') as the Trustees may from time to time think fit (including the settlor or any trustee of this instrument or any corporate trustee or any parent subsidiary or affiliate of such corporate trustee) in order to obtain advice on the investment and reinvestment of the Trust Fund and to delegate to the Investment Adviser without being liable for any consequential loss discretion to manage the portfolio or any part thereof within the limits and for the period stipulated by the Trustees and the Trustees-
>
> (aa) shall settle the terms and conditions for the remuneration of the Investment Adviser and the reimbursement of the Investment Adviser's expenses as in their uncontrolled discretion they deem proper and such remuneration and expenses may be paid by the Trustees from and out of the Trust Fund, and
>
> (bb) shall not be liable for any action taken in good faith pursuant to or otherwise in accordance with the advice of the Investment Adviser.

The second is section 31(1) of the Act ('section 31(1)'):

> A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for any other loss, unless the same happens through his own willful default.

[45] To take section 31(1) first, that provision is modeled upon the (now repealed) section 30(1) of the English Trustee Act 1925. Since section 31(1) was enacted before the repeal of the English section 30(1), it is to be assumed, in my judgment, that the legislature intended that it would be interpreted in accordance with the then current English jurisprudence upon the parallel English provision. That jurisprudence is summed

up in the decision of Maugham J in **In re Vickery.**[14] In that case the judge held that the section did not mean that no trustee was to be liable for *any* breach of trust unless acting (or failing to act) in wilful default. The section protected only against liability for losses caused through the acts of persons within the ambit of the second limb of the section (brokers, bankers, etc), and then only if the losses occurred independently of any wilful default on the part of the trustee sought to be made liable. Maugham J defined wilful default as conduct on the part of a trustee who is

> *conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not.*

That definition was approved, *obiter*, by the English Court of Appeal in **Armitage v Nurse.**[15] The 'reckless carelessness' referred to does not, in my judgment, connote negligence, gross or otherwise. It connotes *refusal* (as opposed to mere failure) to address the question whether what the trustee is proposing to do, or failing to do, amounts to a breach of duty. Negligence, in other words, however egregious, is insufficient[16] unless accompanied by the mental element identified in **In re Vickery.**[17] Nothing in Citco's conduct gets near to establishing that it was in wilful default in this sense in relation to the matters giving rise to this claim. Citco's fault was negligence, pure and simple.[18]

[47] Assuming that, in assenting to the delegation by the Company to Consultatio of the Company's power to manage its investments, Citco is to be treated as having delegated powers which belonged to it *qua* Trustee, so that section 31(1) is engaged, that will not, in my view, assist Citco on the facts of this case. Section 31(1) is a provision dealing with vicarious, or secondary, liability. The second limb of the subsection protects an innocent trustee from vicarious liability for the defaults of others – whether those others are co-trustees or agents to whom powers have been delegated or property entrusted. The first limb explicitly leaves trustees liable for the consequences of their own defaults. **In re Vickery**[19] was concerned exclusively with vicarious liability - see the reference at the foot of page 532 of the report to the question in what circumstances a trustee can be made 'liable for the default of another.' If, in contrast, a trustee is in breach of a duty directly owed by him personally to the beneficiaries, he cannot, in my judgment, escape liability for the breach by saying that the proximate cause of the resulting loss is the

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[14] [1931] 1 Ch 572
[15] [1998] Ch 241
[16] see **Armitage v Nurse** (supra) at 253E to 265D
[17] (supra)
[18] cf **Armitage v Nurse** (supra) at 257F
[19] (supra)

default of an agent to whom powers have been lawfully delegated. In the present case Appleby does not seek to make Citco liable for Global's defaults. It seeks to make Citco liable for its own default in failing to exercise reasonable prudential oversight over the handling of the Trust's assets.

[48] Citco was plainly negligent in failing to discharge duties owed by Citco directly to the beneficiaries. That negligence blindsided Citco to the otherwise obvious fact that the only way in which further damage to the assets of the Trust could be stemmed was by terminating Global's retainer. The fact that Citco might as a matter of law not have vicarious liability for the defaults of Global does not relieve it from primary liability for the loss caused by its breach of its own separate duty, any more than the fact that the management of the subject company's business in **Bartlett** had been lawfully delegated to its board of directors meant that the defendant trust company in that case could escape in the absence of a finding of wilful default.

[49] Paragraph 4(q) does not assist Citco, for much the same reasons. The exception for 'consequential loss' did not relieve Citco from the duty, in the circumstances of this case, to keep a watch on the portfolio and to respond to the obvious red flags which showed that Global's retainer had to be terminated. The exception would require to be far more explicitly drawn before it could relieve Citco from the consequences of its own negligent breach of duty.

[50] In my judgment, therefore, Citco is not protected by paragraph 4(q) or section 31(1) from liability to compensate the Trust for the losses caused by its failure to take timely steps to protect the Trust from the dissipation of virtually the entirety of its property at the hands of Core/Global.

[51] Citco also relied at trial upon clause 14(b) of the Trust Deed itself ('clause 14(b)') and upon clause 3 of the Deed of Retirement and Appointment of Trustees dated 12 July 2011 under which Citco retired as Trustee and appointed Appleby in its stead ('clause 3'). Clause 14(b) reads as follows:

> The trustee may resign as trustee hereof on providing 60 days written notice to the Protector (or, if there is no Protector, then to the Settlor) and at the end of such period the Protector (or the Settlor) shall exercise its power of appointment to appoint a new trustee and the outgoing Trustee shall be discharged from its trust and shall be indemnified in respect of any fiscal imposition or other liability of any nature payable in respect of the Trust Fund or otherwise in connection with this Trust except its own willful fraud or wrongdoing.

Clause 3, by contrast, is in these terms:

> The new Trustees hereby covenant with the Retiring Trustees and with their successors in title and assigns and with the directors, officers and employees of the Retiring Trustees and of such successors in title and assigns at all times fully and effectually (but subject as provided below) to indemnify the Retiring Trustees and their successors in title and assigns and the directors, officers and employees of any of the foregoing against any and all liabilities, actions, proceedings, claims, demands, taxes and duties (and all associated interests, penalties and costs) and all other costs and expenses whatsoever for and in respect of which the Retiring Trustees may be or become liable as trustees or former trustees of the Trust (the "Liabilities") PROVIDED THAT the liability of the New Trustees under the above indemnity shall:
>
> 3.1 extend only to the Liabilities in respect of which the Retiring Trustees would have been entitled to reimbursement out of the Trust Fund had they remained as trustees of the Trust on its present terms; and
>
> 3.2 be limited to the value of [the] Trust Fund at the date hereof.

[52] Mr Heywood, who appeared together with Mr Andrew Willins for Appleby, submitted that Citco could not be entitled to rely simultaneously upon two different indemnities and that clause 3 must be taken to have superseded clause 14(b). I do not accept this submission. In my judgment, the provisions are complementary. Clause 14(b) deals with debts or other liabilities towards third parties for which Citco has incurred personal liability in the course of acting as trustee. If called upon after retirement to discharge any such liability, Citco is entitled to an indemnity unless the liability was incurred as a result of its own fraud or wrongdoing. Clause 3 is Appleby's promise to indemnify Citco against liabilities in respect of which Citco would have been entitled to reimbursement out of the fund – in other words, liabilities covered by clause 14(b). Neither provision would protect Citco against claims for damages for its own negligence.

[53] Citco had a further argument, that if Appleby had been liable to indemnify Citco under clause 3 for any liability of Citco's to the Trust in negligence, Appleby's liability to indemnify Citco would have been co-extensive with Citco's liability, on the grounds that the claim against Citco was part of the value of the Trust Fund within the meaning of clause 3.2. The result, so it was submitted, would have been an automatic self-cancelling set off leaving Citco with no liability to make any payment to the Trust. Irrespective of the true effect of clause 3, the argument seems to me to be misconceived. The Deed of Retirement and Appointment is expressed to be supplemental to the 27 December 2000 Trust Deed (Recital A). That means that words and expressions used in the Deed of Retirement and Appointment must (unless the context otherwise requires) be given the same meaning as they have in the Trust Deed. The Trust Deed defines the

Trust Fund as the entire issued capital of the Company (together, which is not relevant for present purposes, with additions and accumulations) and the expression must be given the same meaning in Clause 3.2. The present claim is an asset of the Trust, but it is not part of the Trust Fund. The value of the Trust Fund (as defined) on 12 April 2011 was, as I understand it, around US$140,000. That figure would therefore have been the limit of any obligation (had any such obligation existed) on the part of Appleby to indemnify Citco against the consequences of its own negligence. There would have been no self-cancelling set off.

Compensation

(1) Causation

[54] Dealing first with the question of causation, Citco's failure to spot what was happening must have been causative of the depreciation in the value of the Trust Fund as from the time when Citco (a) ought to have become aware of the problem and (b) been in a position to stem further losses by terminating Core/Global's agency. Under the IMA, Core/Global had the right to three months notice of termination, but Citco could terminate forthwith if Core/Global should commit any material breach of its obligations under the IMA and fail to remedy the breach within seven days of the receipt of a written notice from Citco requiring it to do so.

[55] The first question, therefore, is at what point in time ought Citco to have become aware that the directions given in the LTA and Annex were being ignored. Miss Valtanen's opinion was that the problem was apparent from the very first monthly portfolio statement, received, presumably, shortly after 30 June 2005. I do not consider, however, that Citco was required to review Core/Global's performance as regularly as once a month, despite the fact that it possessed the information which would have enabled it to have done that. It seems to me that a review of the fund's performance should have been undertaken at least quarterly, bearing in mind the significant value of the Trust's underlying assets and the fact that they were entirely in the hands and under the control of third parties. In my opinion, therefore, it would have been reasonable to have expected Citco some time in October 2005[20] to have reviewed the monthly statements for June, July, August and September. Those statements would have shown Citco that the asset allocations were being ignored and that Global was trading on margin. They would have shown a decline in value over the period from US$7.3 million to US$6.7 million. They also showed considerable churning. I would have expected a trustee faced with this information to have given firm instructions (as distinct from the raising of intermittent requests for explanations) that the asset allocations were to be restored as soon as possible and that trading on margin was to cease forthwith. Given the sort of

[20] the end of the first quarter after transition to Cove/Global

answers received from such questions as Citco did actually ask, I would have expected these instructions to have been met initially with obfuscation and excuses on the part of Global, coupled with assurances that matters would be brought back into line.

[56] I cannot say that Citco would have been acting unreasonably if it had accepted the sort of assurances which, in all probability, I think that it would have received had such instructions been given at, say, the end of October 2005. Again, as a matter of probability, given the fact that Global continued to mismanage the portfolio until it had been to all intents and purposes entirely dissipated, I would not have expected that Global would have altered its management behaviour over the following quarter in response to instructions given by Citco. When, therefore, in around January 2006 Citco came to review the results for the last quarter of 2005, I think that the probabilities are that, despite having received instructions to bring matters back into line with the LTA and the Annex, Core/Global would simply have continued as before. In other words, that what in fact happened in the last quarter of 2005 would have happened despite instructions to the contrary from Citco. At that point, it seems to me, the only step which Citco could properly have taken would have been to serve written notice requiring the funds to be brought back within the LTA/Annex guidelines within seven days and when, inevitably, that did not happen, to determine the IMA and cause the Company to determine the LTA, which would have prevented Core/Global from any further dealing with the portfolio.

[57] Citco would no doubt in practice have wished to have consulted Mr Marmorek about this, but he, of course, had no right to veto any step which Citco thought it right, in its discretion, to take to protect the funds. It is very easy, with hindsight, to assume that what would in any event have been important decisions and serious steps could have been taken in less time than, in practice, things tend to take. It seems to me, however, that it is reasonable to suppose that notice of determination of the LTA could have been given to Bear, Stearns by no later than 28 February 2006. That would have had the effect of freezing the account at that date, when it would have had a value, according to the relevant monthly portfolio statement, of US$6,267,188.

(2) Quantum

[58] In its pleading Appleby claims (1) the diminution in the fund's capital value; (2) the difference between the income actually earned by the fund as invested by Global and the income which the fund would have earned had it been invested by a reasonably competent investment manager; and (3) the difference between the fees and commissions as charged by Global on the basis of the actual trading volumes and the fees and commissions that would have been charged on the basis of a reasonable

trading volume. The experts do not address points (2)[21] or (3), and there is no other material upon which an award under either of those heads could properly be made, but in any event, as I will attempt to explain in a moment, I do not think that those heads of relief are claimable on the facts of this case.

[59] In my judgment, Citco's obligation is to reconstitute the trust fund to the value which it would have had if Citco had conscientiously performed its duty of supervision. I have already found that in that case a fund with a value, as at 28 February 2006, of US$6,267,188 would have been preserved safe for the benefit of the beneficiaries. This, in my judgment (subject to such deductions for proven subsequent events as are required to be made) is the fund which Citco is liable to reinstate. Citco is therefore liable for the difference between (a) the value of the fund as at 28 February 2006 (US$6,267,188) and (b) the value of the fund when Core/Global was finally got rid of, less the aggregate amount of intervening distributions. In order to compensate the Trust for having been kept out of that money, Citco must pay simple interest on the sum of US$6,267,188, as reduced from time to time by intervening distributions and withdrawals, from 1 March 2006 until judgment. Although this Court has no power to award pre-judgment interest on common law claims, it has an inherent power to award interest in equity, as, for example, where it orders a trustee to make good losses to a trust fund caused through its own negligent breach of duty.[22] Citco is clearly not entitled to deduct from the balance either its own or Global's fees referable to any period after 28 February 2006.

[60] There may be some difficulty in ascertaining the amount of the balance from time to time after allowing for distributions. Mr Marmorek gives dates and figures for some, but not all, of the distributions which were taken. Unless the figures can be agreed, I will direct an inquiry to establish the correct amounts and the dates upon which the withdrawals were made, so that interest may be calculated on the correct intervening balance from time to time.

[61] At the hearing Appleby relied upon certain calculations made by Miss Valtanen and embodied in the Joint Experts' Report[23] (although not accepted as to quantum by Mr Sayers). These calculations are said to show what a fund of US$7.3 million (the NAV at handover from Consultatio) would have been worth in November 2013 had it been invested with a reputable investment manager observing what she calls the 'implied investment guidelines' (but which are, in effect, the same as the guidelines set out in the Annex). Miss Valtanen actually performs two calculations: one is based upon indices for the three different grades of investment comprised in the Annex as relied upon in the

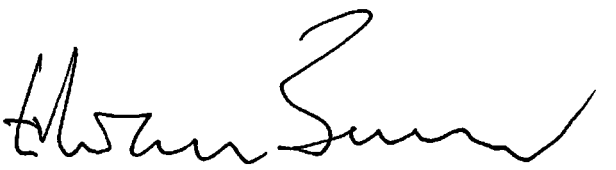
[21] other than in the most general way under the broad heading of 'Returns'
[22] see the current edition of the English Civil Procedure Rules at 7.0.9
[23] subsequently brought up to date

markets;[24] the other is a sample of her firm's clients' returns for portfolios of similar risk profile to that envisaged by the Annex. The former method produces a hypothetical value for the US$7.3 million fund as at November 2013 of US$12.3 million (ignoring intervening withdrawals); the latter, US$10.2 million.

[62] Leaving aside the question whether the claim was ever pleaded in this form,[25] this way of approaching the matter seems to me to be contrary to principle. Citco agreed, for reward, to act as Trustee and it was responsible, in the sense described above, for monitoring the conduct of the Investment Manager. The scope of the duty which I have found Citco to have broken was to take reasonable care to see that the Trust Fund was managed by Mr Lanusse and Mr Wiegers, or by whatever entity they represented in accordance with the authority conferred upon them. Citco was not responsible for the performance of the investments. It never engaged to deliver a fund with any, let alone any particular, rate of growth. Moreover, had the losses been stopped at the end of February 2006, it is impossible to say precisely how the fund would have performed in the hands of whoever had in fact been engaged as a replacement Investment Manager. Miss Valtanen's approach, like the pleaded claim for income which it is said would have been received had the fund been in the hands of a 'reputable' investment manager is effectively a claim for damages for breach of contract which gives the Trust the benefit of a bargain that it had no entitlement to and correspondingly throws upon Citco a burden which it was never liable to discharge.

Conclusion

[63] For these reasons, the order will be that Citco compensate the Trust by paying to Appleby as its present Trustee the sum of US$6,267,188 (less the value of the portfolio as at the date when Global's retainer was terminated and less the amounts of any intervening distributions), together with interest upon the sum of US$6,267,188 (as reduced from time to time by the withdrawal of distributions) from 1 March 2006 down to judgment. I will hear Counsel on the appropriate rate or rates of interest.



Commercial Court Judge
20 January 2014

[24] covered options are ignored for this purpose
[25] it was not