

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHC (COM) 156 of 2011

BETWEEN:

**APPLEBY CORPORATE SERVICES (BVI) LIMITED
(as Trustee of the Clef Trust)**

Claimant

and

CITCO TRUSTEES (BVI) LIMITED

Defendant

Appearances: Mr Stephen Moverley Smith QC and Mr Phillip Kite for the Applicant/Defendant
Mr Michael Heywood and Mr Andrew Willins for the Respondent/Claimant

JUDGMENT

[2012: 9, 17 May]

(Summary judgment/strike out - claim for breach of trust - whether trustee defendant entitled to indemnity and, if so, whether claim bad for circuity of action – whether claim for indemnity unavailable to trustee if trustee guilty of willful default – claimant pleading willful default – whether pleading of willful default adequate – whether pleading of willful default should be struck out – whether, in absence of claim for willful default defendant trustee entitled to summary judgment/strike out)

- [1] This is an application by the defendant, Citco Trustees (BVI) Limited (Citco'), for summary judgment under CPR 15.2(a) dismissing the claim of the claimant, Appleby Corporate Services (BVI) Limited ('Appleby'), on the ground that Appleby has no real prospect of succeeding on the claim; or alternatively for an order under CPR 26.3(1)(b) or (c) striking out the statement of claim on the grounds that it does not disclose any reasonable ground for bringing the claim or is an abuse of the process.
- [2] Citco was, between December 2000 and 12 July 2011 the sole trustee of a family settlement established by a Mr Franklin Marmorek ('the Settlor'). The trust document consists of a deed entered into between those parties on 27 December 2000. On 12 July 2011 Citco, on the Settlor's request, retired as trustee and was replaced by Appleby. The reasons why Citco was asked to retire are summarised in a letter written to Citco on behalf of the Settlor on 18 April 2011 and

elaborated in a statement of claim attached to a claim form issued by Appleby on 9 December 2011. No defence has been put in by Citco, although it has served a request for further information which was answered on, I think, 29 February 2012.

- [3] Appleby, as the new trustee, alleges in its statement of claim that as at 30 June 2005 the trust assets had a value of some US\$ 7.3 million whereas, when Citco retired in July 2011, the trust fund (after distribution of some US\$1.5 million had been made in the interim) had an attributed value of some US\$ 143,000, a net reduction of some US\$5.6 million. The greater part of that loss is said, in an affidavit put in on behalf of Appleby, to have occurred between 2008 and 2010. Appleby goes on to allege that between June 2005 and March 2011 the trust's then investment managers provided Citco with monthly portfolio statements chronicling this decline but that in breach of trust Citco failed to monitor the performance of the portfolio and deliberately or recklessly and negligently failed to apprise the beneficiaries of what was happening and that further it has failed to take any steps to prevent it happening or to prevent it from continuing to happen. The allegations of breach are in fact much more elaborate than that but I think that for the purposes of the present applications that précis adequately states their thrust.
- [4] It is alleged that these breaches, together with the others set out in paragraph 23 of the statement of claim resulted in a loss to the trust of (a) the US\$5.6 million depreciation in capital value; (b) the income that would have been received had the capital value been maintained; and (c) certain other sundry losses.
- [5] Mr Moverley Smith QC, who appeared together with Mr Phillip Kite for Citco, says that this claim cannot succeed. The reason he advances is that Citco is entitled (unless it can be shown that the breach involved Citco's own willful fraud or wrongdoing) to an indemnity against the trust assets in respect of any breach of trust which it may have committed in the course of its trusteeship. He goes on to submit that if judgment is given against Citco, the amount which Citco will be required to pay under that judgment will become an asset of the trust and so available to satisfy the indemnity; so that any obligation to pay damages for breach of trust will be self cancelling. Citing **Ingram v IRC**¹ he submits that the law will not permit such a claim to proceed because it suffers from the vice of circuity of action – or, perhaps more simply, that the law will not countenance the prosecution of claims which cannot lead to any benefit to the person claiming. He therefore asks for summary judgment striking out the claim. Alternatively, he says that it is an abuse of the Court's processes to pursue proceedings in which recovery is, or will ultimately be, impossible and that for that reason also (or in the alternative), the claim should be struck out.
- [6] The indemnity upon which Mr Moverley Smith relies is to be found in clause 14(b) of the trust document:

'The Trustee may resign as trustee hereof on providing 60 days notice to the Protector (or, if there is no Protector, 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.'

¹ [1999] 1 All ER 297 at 305

- [7] Before considering Mr Moverley Smith's argument, I must deal with the circumstances of Citco's retirement.
- [8] Following the Settlor's request, made on 18 April 2011, that Citco retire, Citco wrote on 10 May 2011 confirming that it was willing to retire and seeking an indemnity from Appleby, to be contained in the deed of retirement and appointment of the new trustee. In that letter Citco sought an indemnity unlimited in amount against (inter alia) all liabilities whatever for or in respect of which it might be or become liable as trustee or former trustee, but not extending to any liabilities arising only by virtue of its willful fraud or wrongdoing. That was rejected as too wide. Instead, Citco was offered an indemnity covering only liabilities in respect of which it would have been entitled to reimbursement had it remained a trustee, limited to the value of the trust fund from time to time.
- [9] The form of indemnity ultimately agreed between the parties and provided to Citco by Appleby as the incoming trustee was contained within a deed of retirement and appointment, expressed to be supplemental to the trust settlement and providing, in its material parts:
- '[Appleby] hereby covenant[s] with [Citco] [. . .] to indemnify [Citco] . . . against any and all liabilities, actions, proceedings, claims, demands, taxes and duties
- [. . .] and all other costs and expenses whatsoever for and in respect of which [Citco] may be or become liable as trustees or former trustees of the trust ('the Liabilities') PROVIDED THAT the liability of [Appleby] under the above indemnity shall
- 3.1 extend only to the Liabilities in respect of which [Citco] 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 funds [as at 12 July 2011]²
- [10] Mr Heywood, who appeared together with Mr Andrew Willins for Appleby, submitted that clause 14(b) of the trust deed was never engaged, because, he said, that clause only applied where a trustee *resigns* after having given 60 days notice, which is not what happened here. I cannot accept that submission. There is no material distinction between retirement and resignation and the fact that Citco was asked to retire rather than retiring (or resigning) of its own motion seems to me to be factually immaterial. In any case, more than 60 days elapsed between the date of Citco's letter confirmed its willingness to retire and the date when it did so.
- [11] More formidable is Mr Heywood's submission that clause 3 of the deed of retirement and appointment superseded the indemnity granted by clause 14(b). It seems to me that there is a persuasive argument for saying that it did. Clause 14(b) granted Citco an indemnity according to its tenor. Instead of electing to rely upon that indemnity, Citco specifically asked, first, to be given a different indemnity and finally agreed to accept the indemnity which is set out in paragraph [9] above. It seems to be well arguable that clause 14(b) cannot have been intended to co-exist alongside clause 14(b) and that clause 14(b) must yield to clause 3 of the clause of retirement and appointment. If that is right, then it must follow that Citco is limited to its rights under clause 3 of

² the document in the papers before the Court does not bear a date, but there was no dispute that it was executed as of 12 July 2011

the deed of retirement and appointment, which does not provide any indemnity for breaches of trust, willful or otherwise, but is restricted to a right to reimbursement of expenses incurred in its character as trustee.³ If this argument succeeds at trial, Citco will have no defence based upon the circuitry principle to any claims for breach of trust which may Appleby establish.

- [12] There was some discussion at the hearing as to the precise ambit of clause 14(b) of the Trust document.⁴ The wording of this indemnity may be contrasted with the wording of the indemnity given to the Protector by clause 16 of the trust document:

'The Protector (if any) shall not be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investment or investments or any mistake or omission or any other matter or thing except willful fraud or wrongdoing on the part of the Protector and this clause shall apply whether or not the Protector had or should have had notice of the matter causing loss.'

Unlike clause 14(b), whose construction is more obscure, clause 16 plainly and unambiguously excludes liability for non-wilful breaches of trust. If it had been the intention to provide similar protection to Citco, the question must be answered why similar wording was not used in clause 14(b) in order to achieve that result. So that even if Citco continued to have the benefit of clause 14(b) after execution of the deed of retirement and appointment, it seems to me far from obvious that clause 14(b) provides Citco with an indemnify against breaches of trust.

- [13] Citco is not entitled to summary judgment against Appleby unless it discharges the burden of showing that Appleby has no real prospect of succeeding on its claim. In my judgment Citco fails to do that. Citco makes no attack in this application other than that Appleby's claim cannot succeed because Citco has a complete indemnity against the claim which Appleby is unable to go behind unless it can plead and cannot prove bad faith. Citco's case on this application is that Appleby has failed to plead that and, for good measure, will never be in a position to do so. I cannot say that Appleby has no real prospect (if Citco gets round to pleading the indemnity defence) of demonstrating at trial (or on some earlier application) that Citco has no claim to be indemnified for the breaches of trust relied upon by Appleby because it does not have the benefit of any such indemnity, with the result that Citco would not have a circuitry defence available to it. On the contrary, it seems to me that Appleby makes a case of substance (which may or may not succeed at trial) for exactly that. It follows that Appleby has a real prospect of succeeding on its claim.

- [14] Once that point is reached, it seems to me that it does not help Citco on its summary judgment application to argue that if it should turn out at trial to have a good indemnity against breach of trust claims, Appleby is in no position to show that it could defeat such an indemnity on the grounds of bad faith. That is because the issue on this application under CPR 15.2(a) is whether or not the claimant has a real prospect of succeeding on its claim. If it once appears to the Court that a claimant has a real prospect of succeeding, the Court is not concerned with the possibility that the

³ compare section 31(2) of the Trustee Ordinance 1993, as amended

⁴ see paragraph [6] above

claim might fail. That remains true whether the risk of failure is on a point which the Court considers to have a real prospect of success or some other point.⁵

[15] That makes it unnecessary for me to go on to consider whether Citco is right in its contention that if it is entitled to an indemnity for any breaches of trust which Appleby might establish at trial, Appleby is not now and never will be in a position to rely upon the bad faith exception in clause 14(b) of the trust document. Since, however, the point was fully argued, I think that I should go on to consider it.

[16] I have already set out the terms of clause 14(b) of the trust deed. It is common ground, that the final words of clause 14(b) disentitle Citco from relying upon it if Appleby can establish that any claim by Citco under the indemnity would be vitiated by willful default or wrongdoing upon its part.

[17] Paragraph 25 of the statement of claim pleads as follows:

‘For the avoidance of doubt, it is the Claimant’s contention that the breaches of trust complained of as against the Defendant constituted or arose out of [Citco’s] willful default.’

[18] Citco asked Appleby whether this allegation was intended to mean that Citco had made a deliberate and conscious decision to commit a breach of trust or to act recklessly without regard to whether or not it was a breach of trust. The question was formulated in this way in order to correspond to the definition of willful default in the context of trustee exclusion clauses as meaning ‘nothing less than conscious and willful misconduct’,⁶ expanded to make clear that the trustee must be conscious that in doing the act which is complained of or in omitting to do the act which it is said ought to have been done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of duty or not.⁷

[19] Appleby’s answer was that it was indeed being alleged that the acts and omissions complained of were deliberate. It added that on the evidence then available to it, it was not in a position to say whether Citco actually knew that the acts and omissions constituted breaches of trust or had given no proper thought to the possibility that they might be. In answer to a further request, Appleby explained that by using the words ‘willful default’ in paragraph 25 of the statement of claim it intended to convey deliberate acts or omissions which Citco either knew amounted to a breach of duty or was recklessly careless whether or not they were in fact breaches of duty.

[20] Appleby was asked a further series of questions challenging it to identify the persons involved in the breaches, the precise nature of the breaches, when they were committed, which of them arose out of willful default and so forth. The answer to this line of questioning was, in short, that Appleby could not know the answers to any of these questions until after disclosure and exchange of witness statements.

⁵ of course, the position might be different where the Court was considering a statement of claim asserting more than one cause of action, but that is not this case

⁶ Per Millett LJ in *Armitage v Nurse* [1998] Ch 241 at 252; cited with approval by the Privy Council in *Spread Trustee Company Limited v Hutcheson and others* [2011] UKPC 13 at paragraph [54]

⁷ *ibid*

- [21] Mr Moverley Smith says that this is not what he calls a 'proper' pleading of willful default. I accept, of course, that a claim alleging willful default must be properly particularised. It seems to me that this one has been. Sixteen acts, or elements, of alleged breach of trust are set out in paragraph 23 of the statement of claim.⁸ They include the matters which I have set out at paragraph [3] together with a considerable number of others which I do not think it is necessary for me to recite. This is not a case like **RGI International Ltd v Synergy Classic Ltd**⁹ where the defendant could not tell from the pleading what he was supposed to have done wrong (or to have omitted to do right). These specific breaches are said, in paragraph 25 of the statement of claim, to constitute or arise out of Citco's willful default. Leaving aside the circular 'arise out of', this is a plain allegation that what was done or omitted constituted willful default. It seems to me that an allegation (which, of course, remains to be proved) that trustees have sat back for two years and upwards watching some US\$5 million being wiped off the value of the fund of which they were supposed to be custodians, without taking any steps to arrest the decline or even inform the Settlor or any of the beneficiaries that it was taking place, is more than adequate as a pleading of willful default. Mr Moverley Smith complains that that there is no 'material' enabling Appleby to make the pleading. It was never quite clear during the hearing what Mr Moverley Smith meant by this, but if he meant that the precise course of events or that the identities of the individuals alleged to have been at fault cannot presently be mapped or specified, or that Appleby does not give chapter and verse as to the thought processes from day to day of the persons with responsibility for these events, as Mr Moverley Smith appeared at times to suggest, then in my judgment the complaint is not well founded. Citco is told in clear terms what it is alleged to have done wrong and that that conduct amounts to willful default on its part. That is a perfectly adequate pleading.
- [22] In my judgment, therefore, the allegation of willful default is properly pleaded and cannot be struck out, as Mr Moverley Smith invited me to do if I was not prepared to grant Citco summary judgment.
- [23] That leaves the strike out claim. Mr Moverley Smith properly accepted that the claim could not be struck out as disclosing no cause of action for breach of trust, but he said that if the claim suffered from an incurable vice of circularity it could be struck out under 26.3(1)(c) as an abuse of the process. For the reasons which I have attempted to explain above, this claim does not, in my judgment, amount to an abuse of the process. Appleby has a real prospect of succeeding in showing that Citco does not have the benefit of any indemnity against breaches of trust and, if that is wrong, Appleby has properly pleaded an allegation of willful breach which, if made good at trial, would defeat reliance upon it.
- [24] Finally, Mr Moverley Smith invited me to use the opportunity afforded by this application to determine the true construction of clause 14(b) of the trust document. Mr Heywood submitted that that should be done, if at all, on an application properly constituted for that particular purpose at which any relevant evidence of context and so forth could be assembled and deployed. Although CPR 15.6(1) gives the Court power to give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end, I agree with Mr Heywood that if such an exercise is to be attempted before trial it is best carried out on the hearing of a preliminary issue for which appropriate directions could be considered and made. The question of the true construction

⁸ although only fourteen of them are now relied upon

⁹ [2011] EWHC 3166 – cited in Citco's skeleton but not referred to in oral argument

of clause 14(b) was raised only during the hearing itself without the parties having an adequate opportunity to prepare considered submissions upon the point.

- [25] For the reasons given above, this application must be dismissed. In those circumstances I am required by CPR 15.6(2) to treat the hearing as a case management conference. I would accordingly ask that the parties be ready with agreed directions or, in default of agreement, with their positions on the question of directions so that the matter can be dealt with when judgment is handed down.

A handwritten signature in black ink, appearing to read 'A. B. Smith', written in a cursive style.

Commercial Court Judge
17 May 2012