

BRITISH VIRGIN ISLANDS HIGH COURT

Appleby Corporate Service (BVI) Limited (As Trustee of the Clef Trust) -v- Citco Trustees (BVI) Limited

PROCEDURE - BVI – STRIKE OUT - PROPER PLEADING OF “WILLFUL DEFAULT”

The issue in this case was whether CITCO Trustees BVI Limited (CITCO) was entitled to summary judgment under CPR 15.2(a) dismissing the claim of the Appleby Corporate Services (BVI) Limited (“Appleby”) on the ground that Appleby had no reasonable prospect of succeeding on its claim for breach of trust; or alternatively for an order under Civil Procedure Rules (“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 process. The allegation against CITCO was that it failed to monitor the performance of portfolio in respect of which the funds over which it acted as Trustees were administered and deliberately or recklessly and negligently failed to apprise the beneficiaries of underperformance of the investments which resulted in a net reduction in value of the assets of some US\$5.6 million.

CITCO sought to rely on an indemnity against the Trust assets in respect of any breach of trust which it may have committed in the course of its trusteeship. The result, it says, was that if judgment was given against CITCO the amount that CITCO would be required to pay would become an asset of the Trust and therefore satisfy any indemnity; so that any obligation would be self cancelling. The Court held that the indemnity relied on was superseded by a more narrow indemnity subsequently agreed between the parties in a deed of retirement and appointment. The Judge also found that because the issue on the application under CPR 15.2(a) is whether or not the Claimant has a real prospect of succeeding on its claim, once it appears to the Court that the Claimant has a real prospect of succeeding, the Court is not concerned with the possibility that the claim might fail. Further, citing LJ Millett in *Armitage -v- Nurse* [1998] Ch41 at 252 that that remained 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.

The Court also accepted that while a claim alleging willful default must be properly particularized on those facts the pleading was perfectly adequate since CITCO was told in clear terms what it is alleged to have done wrong and that that conduct amounted to willful default on its part.

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