7/7/04

Civil Appeal No. 28 of 2003
Grand Court Cause No. 458 of 1998

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

IN THE MATTER OF THE TRUSTS OF A SETTLEMENT DATED 5 JANUARY 1984 MADE BETWEEN PANDELIS CHRISTOS LEMOS, AS SETTLOR, AND ROYWEST TRUST CORPORATION (CAYMAN) LIMITED AND OTHERS, AS TRUSTEES

BETWEEN:

COUTTS (CAYMAN) LIMITED AND OTHERS

APPELLANTS (DEFENDANTS)

AND:

PANDELIS CHRISTOS LEMOS AND OTHERS

RESPONDENTS (PLAINTIFFS)

BEFORE: Rt. Hon. Mr. Justice E. Zacca, President
Hon. Mr. Justice G. Collett, Justice of Appeal
Hon. Mr. Justice M. Taylor, Justice of Appeal

Appearances: Michael Briggs, Q.C. and Colin McKie, instructed by Maples & Calder, for the Appellants, Roger Kaye, Q.C. and John Stephens, instructed by Walkers, for the Respondents.

Heard: April 19-21, 2004 Released: 7th July, 2004

REASONS FOR JUDGMENT

TAYLOR, J.A.

By a deed of trust executed in 1984, Captain Pandelis Christos Lemos settled his Greek-based shipping business on professional trustees in the Cayman Islands, for the benefit at their discretion of family members and charities, on terms that enabled him to direct its affairs during his lifetime and contemplated its continued operation thereafter by the trustees, notwithstanding the considerable risks that he acknowledged would be involved in running such a business.

Following the death of Captain Lemos, in 1989, disagreement developed over the management of his trust -- known as the Trofos Foundation -- and litigation ensued between family members and the trustees, both in Greece and in the Cayman Islands. This was resolved in 1994 by a settlement involving important amendments to the trust deed, consented to by the Grand Court on behalf of minor, unascertained and unborn beneficiaries. The peace did not prove an enduring one. Four years later the present action was started by certain of the beneficiaries against the successor trustees, alleging loss of many millions of dollars through alleged mismanagement of the shipping business. The issues raised include two questions of construction that were dealt with in a pre-trial ruling by the Chief Justice of the Grand Court, the subject of this appeal.

The questions of construction posed to the Court relate to the imposition on the trustees by the 1994 amendments of the obligation to adhere to a "Statement of Investment Policy and Guidelines" (hereafter referred to as "the investment policy statement") prepared by the trustees to record how they intended to carry out their duties. The questions are concerned with the extent to which the trustees enjoy the protection of exculpatory provisions of the trust deed in light of the restrictions imposed on their discretion by the policy statement with respect to the continued operation of the shipping fleet and the choice by the trustees of a shipping expert to advise on its management. The Chief Justice decided both questions in favour of the plaintiff beneficiaries. The trustees appealed on the ground that while the Chief Justice was correct in his understanding of the law, he erred in applying the accepted canons of construction in this case.

At the conclusion of the sitting we dismissed the appeal except as to a qualification sought by the trustees in respect of the answer to the second question, and awarded costs of the appeal to the respondents.

The following are our reasons for that decision.

(a) The Trust Deed

The trust deed recites that Captain Lemos is contemplating partial or complete retirement from day-to-day management of his companies engaged in the ownership and operation of cargo vessels, that he is anxious that following his death or complete retirement the business continue to be operated as a single unit under his existing partners, senior managers and employees, and that he wishes to settle on the trustees the assets to be so employed – in fact the shares of his holding company -- for the benefit of the defined beneficiaries.

Clause 7(i) provides that, in addition to all powers enjoyed by them under the general law, the trustees shall have authority to retain any property forming part of the trust assets in the state received "without being answerable for any loss occasioned thereby", but this provision is expressly stated to be subject to Clause 16, whose terms are central to the present dispute.

Subject to a proviso of no relevance in this case, Clause 16(i) provides that every discretion or power conferred on the trustees by the deed or by the general law shall be "absolute and uncontrolled", and "no Trustee shall be liable for any loss or damage accruing as a result of concurring or refusing or failing to concur in the exercise of any such discretion or power". Clause 16(ii) states that no trustee

"shall be liable for any error of judgment or mistake of law or other mistake or for anything save wilful misconduct or wilful breach of the Trusts hereof". Clause 16(iii)(a) authorizes the trustees to employ investment advisors and 16(iii)(b) deals with the remuneration of such advisors.

It is with the balance of Clause 16 comprising 16(iii)(c), (iv) and (v), all of which were amended in 1994, and with the investment policy statement to which the amendments refer, that the present dispute is concerned.

Clause 16(iii)(c) provides that no trustee shall be liable for any loss resulting from acceptance of the advice of an investment advisor. From this there was deleted in 1994 the further final phrase "and so that in particular but without prejudice to the generality of the foregoing no Trustee shall be liable for any failure to diversify the investment of the Trust Fund or any part thereof".

Clause 16(iv), which then follows, was completely replaced by the 1994 amendments. In its original form it read:

> (iv) The Trustee shall not be bound or required to interfere in the management or conduct of the business of any company in which the Trustee hereof shall be interested either directly or indirectly although holding the whole or a majority of the shares carrying the control of the company but so long as there shall be no notice of any act of dishonesty or misappropriation of moneys or negligent

> management on the part of the directors having the management of such company the Trustee shall be at liberty to leave the conduct of its business (including the payment or non-payment of dividends) wholly to such directors and no Beneficiary hereunder shall be entitled to require the distribution of any dividend by any company in which this Settlement may be interested or require the Trustee to exercise any powers it may have of compelling any such distribution.

In place of the above, there was substituted in 1994 the following, which is to apply notwithstanding *any other* provision of the deed, and is expressly stated to qualify the protection afforded by other parts of Clause 16:

> Notwithstanding any other provision of this Deed *the Trustee shall exercise the powers of investment and related powers conferred upon the Trustee by this Deed in accordance with the investment policy* from time to time approved by the Court pursuant to an application under Sections 45 or 60 of the Trusts Law (Revised) of which reasonable notice has been given to all the Beneficiaries for the time being living and *the Trustee shall not be entitled to the protection afforded by subclauses (i), (ii), (iii) and (v) of Clause 16 of this Deed unless the Trustee shall have complied with the said investment policy* or any modification thereof approved as aforesaid. [Emphasis added]

The next following sub-clause of Clause 16 was amended in 1994 so as to add the opening proviso italicized below. As amended, it reads:

> (v) *PROVIDED that the Trustee shall have complied with its stated investment policy and guidelines in relation to the Shipping Capital Fund* the Trustee shall not be liable or accountable in any manner or circumstances for any loss caused by failure to diversify the investments comprised in the Shipping Capital Fund and for greater clarity it is hereby declared that it is specifically intended (and

> indeed the Trustee is so directed by the Settlor) that the Scheduled Company will indirectly through its subsidiary companies acquire own and manage ships and other cargo vessels and generally engage in the business of shipping with all the risks that the shipping business entails this Settlement having been constituted inter alia for this express purpose. The Trustee may continue to hold the shares in the Scheduled Company for as long as the Trustee may in its sole discretion think fit despite any capital losses arising from time to time and the Trustee is specifically hereby indemnified and held harmless out of the Trust Fund in respect of any losses of any kind whatsoever arising in respect of the said Scheduled Company or in respect of the management profitability investment policies or nature of the assets of the said Scheduled Company. This Clause shall be read and construed as affording full and complete protection to the Trustee in accordance with the wishes of the Settlor. [Emphasis added]

From these amendments it is apparent that compliance with the policy statement was made mandatory in 1994 and became a condition precedent to future enjoyment by the trustees of the exculpatory provisions, thus effectively imposing an important limitation on their previously broad discretion.

The significance of the amendments is emphasized by the fact that the authority given by Clause 7(i) to retain the holding company assets (referred to as discretion "not to diversify") is by its terms subject to Clause 16, to which the above amendments were made. That discretion is clearly qualified by the obligation added in 1994 to conform with the investment policy.

(b) The Investment Policy

The investment policy statement adopted by the trustees is said in affidavit evidence placed before the Court in 1994 to record policies in many respects already in effect; there is no evidence as to the extent, if any, to which it may have been designed or adapted to meet concerns of the beneficiaries, but it is clear that it was to meet those concerns, and bring about the 1994 settlement, that the stated investment policy was made binding on the trustees.

Section 2.2 of the policy statement says that the division of the assets of the trust between General Capital Fund and Shipping Capital Fund shall continue. Section 2.3 says that the companies comprising the Shipping Capital Fund "will carry on a shipping business in accordance with the guidelines contained in Section 3". Section 3 opens with the following provision:

> 3.1 *The Trustees shall operate a fleet of bulk carriers so long as they duly consider that such operations are capable of generating an adequate long term return on capital employed.* The Trustees are not to engage in the trade of buying and selling vessels for profit. [Emphasis added]

The first question before the Chief Justice is concerned with the meaning of the first sentence of Section 3.1. Does it mean and, as the trustees say, *mean only* that

the trustees are *obliged* to operate the fleet for so long as they hold the required belief? Or does it, as the beneficiaries say, mean that the trustees may operate the fleet *only* for so long as they hold that belief?

The second question arises from Section 2.11 of the policy statement, which says that "when appointing Investment Advisors for the purposes of Clause 16(iii)(c)" of the deed, the trustees "shall apply the following criteria":

(a) the advisor must have demonstrated experience and success in its field of expertise;

(b) the appointment will not be made on terms that the advisor is relieved from liability for negligent or wrongful acts;

(c) the advisor must be an individual or company of substance;

(d) the advisor will not normally be appointed for a term of more than two years at a time; and

(e) the advisor must not be precluded from acting by any conflict of interest.

The beneficiaries rely on sub-sections (a) and (c) above in asserting that the trustees acted in breach of the investment policy statement in appointing the shipping advisor chosen by them.

The beneficiaries seek by the answer to the second question to establish that on a proper construction of Clause 16(iv) the trustees thereby disentitled themselves to all exculpatory protection provided by the deed.

(c) The First Question

The first question, as it was re-stated and argued during the hearing before the Chief Justice, reads as follows:

> Whether on the true construction of the Revised Deed of Settlement of the Tofos Foundation and paragraph 3.1 of the Statement of Investment Policy and Guidelines, the Trustees were under an obligation to diversify the assets of the Shipping Capital Fund such as would deny them the protection of the exculpatory provisions of the Revised Deed of Settlement if they failed to do so, once they no longer held the belief or were in doubt whether those assets could generate an adequate long term return on the capital employed.

The Chief Justice answered this question affirmatively, but subject to insertion in the third line above of the phrase "after a reasonable time for decision" immediately following the words "the Trustees were", so as to make it plain that the "obligation to diversify" did not arise immediately that the trustees no longer held the qualifying belief, or fell into doubt about it.

The first sentence of Section 3.1 reads: *"The Trustees shall operate a fleet of bulk carriers so long as they duly consider that such operations are capable of generating an adequate long term return on capital employed"*. The beneficiaries say this means that the trustees may only operate the fleet when duly holding the required opinion; they say that this is so whether or not the words also impose an *obligation* to operate the fleet for so long as the trustees hold that opinion. The trustees say that the words impose an obligation to operate the fleet for so long as they duly hold the required opinion but leave them free, once they cease to hold that opinion, to operate the fleet under the discretionary investment powers provided by Clause 7 of the trust deed and the general law of trusts. The trustees maintain that operation of the fleet when they no longer hold the required opinion would not constitute a failure to comply with the investment policy, and thus that exculpatory provisions of the deed, including Clause 7(i) and Clause 16, would continue thereafter to protect them from liability for losses, so long as such losses were not caused by wilful breach or misconduct.

The position of the beneficiaries is that the purpose of Section 3.1 is to protect the trust assets from unreasonable risk. They say that this appears both from its first sentence dealing with operation of the fleet and also from its second sentence, cited earlier, which forbids the trustees from engaging in the particularly risky

business of trading in ships. The position of the trustees, on the other hand, is that the first sentence is not intended to provide the beneficiaries with protection, but only to provide an assurance that the fleet *will* in fact be operated, in accordance with the wishes of Captain Lemos, for so long *at least* as the trustees hold the stated belief as to its long-term return capability. They say that it gives the beneficiaries no assurance against continued operation of the fleet after the trustees have ceased duly to hold the required belief.

In resolving any ambiguity created by these words, consideration must be given to the reasonableness of the obligation which would be imposed on the trustees by the construction for which the beneficiaries contend.

According to that construction, an obligation to cease operating the fleet arises when the trustees cease to "duly consider" that its operation is "capable of generating an adequate long term return on capital employed". What would constitute "adequate return", and what would constitute the "long term", are matters regarding which the trustees may well be entitled to considerable discretion in forming their opinion. Were there any disagreement between the trustees that could not be resolved under Clause 20(i) of the deed, they would have the option, under the general law and Clause 16(iv) of the deed, of seeking the assistance of the Court. They would not be required to form an opinion whether the business

was *likely* to make an adequate long-term return, but only whether it was *capable* of so doing – the question would be whether in their opinion the business *could*, under *some* reasonable hypothesis as to future conditions, produce a long-term return that appeared "adequate".

The trustees contend that such a construction is unreasonable. They say it would oblige them to sell the business precipitately, and probably at the "bottom of the market", this being the time at which prospects as to long-term return on the then value of the investment are likely to be at their lowest.

That argument does not seem to us persuasive.

It seems reasonable that the owner of any business employing substantial assets would make periodic re-assessment of its value in the market and its future earning potential with a view to deciding whether to continue its operation or to sell. The adequacy of currently anticipated long-term earnings, expressed as a return on current capital value, depends on a current assessment of both. A decision to sell on the basis of such an assessment seems as likely to occur at the top of the market, when the value of the investment is at its highest, as at the bottom, when the investment value is lowest, and thus the required long-term return that much less. If Section 3.1 of the investment policy is given the meaning

ascribed to it by the beneficiaries, and accepted by the Chief Justice, the task assigned to the trustees would not seem to differ greatly from that which other prudent business people would be likely to undertake in deciding whether to carry on or sell, except that the latter would perhaps be looking for more than *capability* of the business to produce an adequate long-term return, and more probably for the *likelihood* that it would produce such a return.

It is difficult to imagine that trustees having a discretion would continue to engage in a known high-risk business without the belief stated in Section 3.1. It seems quite reasonable, therefore, that they would accept an obligation not to leave trust funds invested in a risky business when they no longer believed it *capable* of producing an adequate return, even in the long term. A further factor properly considered by the Chief Justice in assessing the reasonableness of the interpretation advanced for the beneficiaries was that the trustees are in the business of managing trust assets and compensated for so doing. They are entitled also in carrying out their duties to retain specialized advice at the expense of the estate, and provided they apply the selection criteria set out in the policy statement to rely on such advice without risk of incurring liability.

The function of the further words inserted by the Chief Justice in answering the first question does not appear to be that of a true implied term. These words

indicate that the trustees are not expected to sell precipitately so soon as they lose the necessary degree of confidence in long-term return capability, but free like other prudent business people to work out an "exit strategy", take proper time to test the market and decide whether the best offer they can attract is adequate, in light of their then-prevailing view of long-term return capability, to justify a sale. This is to be implied from the words actually used, considered in their context and in that of the general law of trusts. By using this phrase in his answer, the Chief Justice was not extending Section 3.1, but was saying what it means.

Only the clearest instructions could justify the trustees in dealing with the shipping business in an imprudent or unbusinesslike manner. There is no such instruction in the trust deed as would compel them to sell instantly they lost the required confidence in its earning capacity. They would be entitled, while pursuing an "exit strategy", to operate, lease or tie-up the fleet, as seemed to them prudent in the prevailing circumstances.

We agree with the Chief Justice that the obligation imposed on the trustees by the construction that he adopted is not an unreasonable one.

The next and related question is whether the interpretation advanced for the trustees -- that Section 3.1 constitutes no more than an assurance that they will

carry out the settlor's wishes that the business be continued – is to be regarded as a more reasonable interpretation, having regard to the provisions of the trust deed and policy statement considered as a whole.

In this connection particular emphasis is to be given to Clause 16(v) of the deed. It says that the specific intention and direction of the settlor is that the transferred holding company will through its subsidiaries "own and manage ships and other cargo vessels and generally engage in the business of shipping with all the risks that the shipping business entails this Settlement having been constituted *inter alia* for this express purpose". While the whole of Clause 16, expressly including these words of sub-clause (v), is subject to compliance with the investment policy statement, the interpretation of the policy statement is properly to be conducted in light of such a statement of the settlor's intention.

Captain Lemos says that he knows the shipping business to be risky, and he foresees the possibility of losses being suffered in its operation, for which he does not intend that the trustees be held liable.

It does not, however, seem that anything but the clearest language could permit the trustees to assume, and the Court to conclude, that Captain Lemos intended such risks to be undertaken at a time when the trustees no longer regarded the

business as *capable* even of producing adequate long-term return on investment. The incurring of large risks in operating a business in circumstances in which it does not appear capable -- that is to say, under the most favourable of reasonable hypotheses as to future conditions -- of producing an adequate long-term return, cannot be regarded as falling within the expressed or implied wishes of Captain Lemos. The most that can fairly be said to have been contemplated by the settlor is that the trustees would expose the trust assets to those risks in the belief that they *might*, at least in the long-term, produce an adequate return. To incur such risks without such belief --- however mistaken -- would be foolhardy. It cannot from the originally broad discretionary powers and exculpatory provisions be inferred that the settlor intended that his paid professional trustees would conduct themselves in that manner. It cannot therefore be said that the interpretation adopted by the Chief Justice contradicts the wishes of the settlor.

But whatever may have been the original intention of Captain Lemos, the deed of settlement must now be read in light also of the intention to be derived from the 1994 amendments. The purpose of these amendments was plainly to provide some protection from the risks of the shipping business. This is apparent from the nature of the amending provisions, from the affidavit material filed by the trustees in support of the 1994 approval application and cited at length by the Chief Justice in

the decision under appeal, and from what was said by counsel during the 1994 proceedings. Notes made by attorneys for the trustees at the 1994 hearing, and referred to in these proceedings, show that counsel for the trustees then stated that the trustees would not adopt a "super-conservative approach" to the shipping business, and were committed to operating it, but that they would not operate it "for sentimental reasons", and, in particular, that: "The shipping business must give a good return and indeed it is recognized that shipping is a long-term business". There is nothing in the original deed, in the 1994 amendments or in the proceedings that resulted in approval of the 1994 amendments by the Court that can be said either to conflict with the meaning adopted by the Chief Justice or that would render the meaning proposed by the trustees a more reasonable one.

We turn, then, to the important question of the "ordinary and natural meaning" of the words, as read in their immediate context.

The investment policy statement is not, like the trust deed, a directive addressed to the trustees, but a declaration by the trustees of their own intentions. The words "will" and "shall" are used in the document interchangeably to express these intentions. By Section 2.3 the trustees state that the companies comprising the Shipping Capital Fund and their subsidiaries "will carry on a shipping business

in accordance with the guidelines contained in Section 3 of this Statement". It is thus as an outline of the terms, conditions and limitations under which the shipping business is to be operated that Section 3 should be read. By Section 3.1 the trustees state the type of fleet to be operated, that they will operate it so long as they hold the stipulated belief as to its long-term return capability, and that they will not trade in ships. If Section 3.1 does indeed *oblige* the trustees to operate the fleet for so long as they hold the specified opinion, as the trustees contend, that would not be inconsistent with it establishing a restriction also on the circumstances under which they will do so.

In a unilateral statement by the trustees of their policy, or plan of action, the expression "the trustees shall" does not bear either the mandatory or imperative meaning that it would have if contained in a directive addressed to them, nor the promissory meaning that it would bear if used in a bilateral contract to which the trustees were a party. In a statement by the trustees of their own policy the function of the expression "the trustees shall" is declaratory; it means: "the trustees are going to". By the amended terms of the trust deed the policy is rendered unalterable except with consent of the Court, and compliance with it becomes mandatory and a prerequisite to future enjoyment by the trustees of exculpatory protection under the deed, but these amendments to the deed cannot

change the natural and ordinary meaning of the words of the policy statement. To operate the fleet without "duly" holding the required opinion regarding its capacity to generate an adequate return, and without embarking on an appropriate "exit strategy", necessarily results in the trustees no longer being in compliance with the policy as declared in Section 3.1 of the statement.

A reasonable person in the position of the beneficiaries, to whom the policy statement was presented, would in our view properly conclude, as the ordinary natural meaning of the words of Section 3.1, that they impose a limitation on the circumstances under which the trustees will continue to operate the fleet, and are intended to afford the beneficiaries a measure of protection.

If the trustees, while they no longer "duly consider" the fleet capable of achieving the stipulated return, take no steps to adopt an "exit strategy" but simply continue to operate the fleet in the ordinary course, they can no longer be said to be complying with the investment policy statement, as required by Clause 16(iv) and (v) of the trust deed in order for them to enjoy the benefit of the exculpatory provisions, and they thereby lose that protection. This is all that needed to be decided for the purposes of answering the first question.

We were for the above reasons of the view that the Chief Justice was correct in the answer he gave to the first question.

(d) The Second Question

The second question is said by the Chief Justice, in his reasons for the ruling, to have been stated and argued as follows:

> Whether on the true construction of the Revised Settlement and Statement of Investment Policy and Guidelines, a failure by the Trustees to comply with paragraph 2.11 of the Statement of Investment Policy and Guidelines disentitles the Trustees from relying on subclauses (i), (ii) and (v) of Clause 16 of the Revised Settlement, rather than Clause 16(iii)(c) thereof only.

In his reasons the Chief Justice answers this question affirmatively; in the formal order it is so answered but with the addition, in the fourth line above, of the phrase "in relation to any liability for a loss caused by that failure", immediately after the words "disentitles the Trustees".

In our direction dismissing the appeal we upheld the decision of the Chief Justice in answer to the question, but in response to the request of the trustees did so with the addition, at the end, of the words: "but only in relation to damages flowing from the breach of investment policy alleged".

Clause 16(iii) of the trust deed deals with employment by the trustees of investment advisors, sub-clause (iii)(a) says that the trustees may appoint such advisors in respect of the whole or any part of the trust fund and (iii)(b) deals with their remuneration. Sub-clause (iii)(c), as amended, then says:

> No Trustee shall incur any liability or be in any way responsible for any loss which may be incurred as a result of anything done or not done as a result of advice or recommendation given or purported to have been given by such Investment Advisor . . . or for any omission to take any action in the absence or non-receipt of such advice or recommendation from such Investment Advisor.

As already noted, Clause 16(iv), which next follows, denies the trustees that protection unless they have complied with the investment policy:

> (iv) Notwithstanding any other provision of this Deed the Trustee shall exercise the powers of investment and related powers conferred upon the Trustee by this Deed in accordance with the investment policy from time to time approved by the Court pursuant to an application under Sections 45 or 60 of the Trusts Law (Revised) of which reasonable notice has been given to all the Beneficiaries for the time being living and the Trustee shall not be entitled to the protection afforded by subclauses (i), (ii), (iii) and (v) of Clause 16 of this Deed unless the Trustee shall have complied with the said investment policy or any modification thereof approved as aforesaid.

The issue raised by the second question is to what extent a failure to meet one or more of the earlier reproduced five criteria stipulated in Section 2.11 of the policy

statement for the appointment of investment advisors results in the trustees being denied the protection of the exculpatory provisions.

In their amended Statement of Claim the beneficiaries allege that neither the corporate defendant retained by the trustees as their shipping advisor nor its principal provided the trustees with evidence of "demonstrated experience and success in its field of expertise", as required by Section 2.11(a) of the investment policy, nor was either "of substance" as required by 2.11(c).

The position of the beneficiaries is that if the investment advisor does not meet all criteria laid down in Section 2.11 of the policy statement, the trustees lose not only the exculpatory protection provided by Clause 16(iii)(c), but the protection of *all* exculpatory provisions. For this proposition they rely on the words of Clause 16(iv) requiring the trustees to "exercise the power of investment and related powers" conferred on them "in accordance with the investment policy", and providing that the trustees "shall not be entitled to the protection afforded by subclauses 16(i), (ii), (iii) and (v) of Clause 16" unless they have complied with the policy. It is contended for the beneficiaries that since the authority to appoint advisors is a "related power", any failure to conform with Section 2.11 in making an appointment must disentitle the trustees to all exculpatory protection.

In his reasons for answering the second question as he did, the Chief Justice makes the following observation:

> It is not open to the Trustees to say that liability which may arise from a breach of paragraph 2.11 of the SIPG *[the investment policy statement]* in respect of which exemption is otherwise provided by subclause 16(iii)(c) is lost, is nonetheless exempted by virtue of other provisions of Clause 16.

It thus appears that the Chief Justice understood the argument of the trustees to be that even though they might be deprived of the protection of Clause 16(iii)(c) by failure to comply with the appointment criteria contained in Section 2.11, they would still be entitled to claim exculpatory protection in respect of the results of that breach under other provisions of Clause 16.

The trustees say that the matter was only briefly explained to the Chief Justice and that the Chief Justice understood their point more broadly than intended. All that they intended by the second question, they say, was to establish that the loss in respect of which they would forfeit exculpatory protection is restricted to that flowing from the breach of Section 2.11 alleged.

Counsel for the trustees told us that the second question arises in respect only of loss *not* caused by the breach of Section 2.11. They seek an answer making it

clear that breach of Section 2.11 would not in itself deprive them of exculpatory protection in respect of losses other than those resulting from the breach of Section 2.11. They say in support that since the appointment of an advisor is optional, it would make no sense that the appointment of an advisor without full compliance with the Section 2.11 requirements should put them in a worse position, in matters having no connection with that breach, than would be the case had they chosen not to appoint an advisor at all.

The question appears to be one that has limited significance if the first question is properly answered in the affirmative, as we find that it is.

Mr. Briggs, for the trustees, emphasized that if a breach of Section 2.11 causes loss, the trustees cannot in respect of that loss rely on *any* exculpatory provision in the deed. His position is only that for the trustees to be deprived of protection by reason of breach of Section 2.11 there must be a causal connection between the breach and the loss concerned. Mr. Kaye, for the beneficiaries, took a 'hard-line' position – as he put it, "strike one and you're out". He characterized the investment policy statement as a strict, self-imposed mandatory code, and contended that in order to enjoy *any* exculpatory protection the trustees must have complied with *every one* of the requirements of the policy statement.

An issue to which the question is said to be relevant is that of reliance by the trustees on the advisor's advice in deciding to continue to operate the fleet, and indeed expanding it. The trustees say that if they did not in fact rely on the advisor's advice in so doing, they could not by reason alone of breach of Section 2.11 in the advisor's appointment be deprived of exculpatory protection in respect of the continued operation of the fleet. It is less than clear, on the present state of the pleadings, that this issue is raised, but it serves as a hypothesis to illustrate the significance of the point that the trustees make.

The requirement imposed on the trustees by Clause 16 to comply with the investment policy statement cannot, in our view, reasonably be applied with the severity contended for by the beneficiaries. We agree with the trustees that there must be some causal connection between a breach of Section 2.11 and the loss concerned before exculpatory protection will be forfeited.

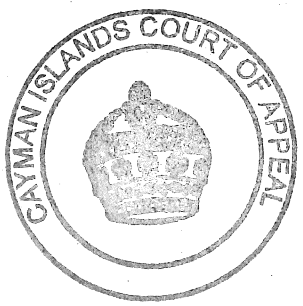
(e) Disposition

For the above reasons we dismissed the appeal with costs to the respondents, to be taxed if not agreed, adding to the ruling with respect to the second question,

as earlier mentioned, the words: "but only in relation to damages flowing from the breach of investment policy alleged".

E. Zacca, P.

G. Collett, J.A.



M. Taylor, J.A.