

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION



FSD NO: 81 OF 2010 AHJ

(ORIGINALLY CAUSE NO: 555 OF 2008)

B E T W E E N:

- (1) HELMSMAN LIMITED
- (2) THE HOTHAM TRUSTEE COMPANY LIMITED



- and -

THE BANK OF NEW YORK TRUST COMPANY
(CAYMAN) LIMITED

Defendant

-and-

MALCOLM STANLEY HEALEY

Third Party

AMENDED WRIT OF SUMMONS

TO: The Bank of New York Trust Company (Cayman) Limited
Butterfield House
#68 Fort Street

PO Box 705
George Town
Grand Cayman, KY1-1107 GT
Cayman Islands

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiffs in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495, George Town, Grand Cayman KY1-1106, the accompanying Acknowledgement of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiffs may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 26th day of November 2008.

NOTE - This Writ may not be served later than 4 calendar months (*or, if leave is required to effect service out of the jurisdiction, 6 months*) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgement of Service are given with the accompanying form.

STATEMENT OF CLAIM

PARTIES

1. The First Plaintiff (“**Helmsman**”) is a company established under the laws of Bermuda which ~~has been~~ was the sole trustee of the Beverley and Howden Settlements mentioned below ~~since~~ between 17 February 2005 and 7 April 2011. It ~~remains the sole trustee of the Beverley Settlement~~ and sues in that capacity.

2. The Second Plaintiff (“**Hotham**”) is a company established under the laws of England which has been the sole trustee of the London Settlement since 13 October 2004 and sues in that capacity. Since 7 April 2011 it has also been the sole trustee of the Howden Settlement and also sues in that capacity.

3. The Defendant (“**BNY Cayman**”) is a company established under the laws of the Cayman Islands. At the time of the matters complained of it carried on the business of a professional trust corporation.

4. BNY Cayman was the sole trustee of the Beverley and Howden Settlements from their creation on 15 June 1999 until 17 February 2005.

5. BNY Cayman was the sole trustee of the London Settlement from its creation on 29 March 2000 until 29 November 2002.

6. BNY Cayman is a subsidiary or affiliate of The Bank of New York (“**BNY**”), which is a corporation established under the laws of the State of New York. At the time of the matters complained of BNY carried on the business of (*inter alia*) investment management.

GENERAL

7. Unless otherwise stated:

- (1) the paragraphs referred to below are paragraphs of this pleading;
- (2) all amounts of money referred to below are stated in United States dollars.

THE TRUST AND OTHER INSTRUMENTS

8. The Plaintiffs will refer to the following instruments (copies of which are served with this Statement of Claim) for their full terms and effect:

- (1) two Investment Management Agreements (together with the Investment Management Agreement mentioned at (4) below the “IMAs”) dated 10 and 11 June 1999 respectively made by BNY Cayman in anticipation of and purportedly in its capacity as trustees of the Beverley Settlement and the Beverley II Settlement (meaning thereby the Howden Settlement which had not then been named) appointing BNY investment manager and custodian;
- (2) a Declaration of Trust (the “**Beverley Settlement**”) dated 15 June 1999 made between (1) BNY Cayman and (2) Eric Grocott (“**Mr Grocott**”) which provided (in Clause 29) that it might be referred to as the Beverley Settlement;
- (3) a Declaration of Trust (the “**Howden Settlement**”) dated 15 June 1999 and made between (1) BNY Cayman and (2) Mr Grocott which provided (in Clause 29) that it might be referred to as the Howden Settlement;
- (4) two Payment and Indemnification Agreements (the “**Beverley and Howden Indemnities**”) dated 22 June 1999 made between (1) BNY and (2) BNY Cayman both for itself and as trustee of the Beverley and Howden Settlements respectively;
- (5) an Investment Management Agreement dated 22 June 1999 made by BNY Cayman in its capacity as trustees of the Howden Settlement appointing BNY investment manager and custodian;
- (6) two Deeds of Appointment (the “**July 1999 Deeds**”) dated 1 July 1999 made by Mr Grocott BNY Cayman Malcolm Stanley Healey (“**Mr Healey**”) and John Dick (“**Mr Dick**”) supplemental to the Beverley Settlement and the Howden Settlement respectively;
- (7) two Deeds of Appointment dated 27 June 1999 but in fact executed on 27 September 1999 (the “**September 1999 Deeds**”) made between (1) Mr Grocott, (2) Howard A Parker Jr (“**Mr Parker**”) and (3) BNY Cayman;

- (8) an Investment Management Agreement (the “**London IMA**”) dated 20 March 2000 made by BNY Cayman in anticipation of and purportedly as trustee of the London Settlement appointing BNY investment manager and custodian;
- (9) a Declaration of Trust (the “**London Settlement**”) dated 29 March 2000 made between (1) BNY Cayman and (2) Timothy John Wheldon (“**Mr Wheldon**”) and (3) Paul Jonathan Howell (“**Mr Howell**”); and
- (10) a Payment and Indemnification Agreement (the “**London Indemnity**”) dated 29 March 2000 and made between (1) BNY, (2) BNY Cayman for itself and as Trustee of the London Settlement and (3) Mr Healey as primary beneficiary under the London Settlement.

9. The Plaintiffs will also refer to the other documents mentioned below (copies of which are served with this Statement of Claim) for their full terms and effect.

THE FACTS

General background

10. Mr Healey, who had been married previously, is and was at all material times married to Angela Muriel Healey (“**Mrs Healey**”) by whom he has four children, all of whom were at the material time minors. Mr Healey was born in the United Kingdom and lived there until about 1987, when he and Mrs Healey and their children went to live in the United States after a short stay in France.

11. While living in the United States Mr Healey set up Mills Pride LP (“**Mills Pride**”), a limited partnership established under the laws of Ohio which manufactured and sold flat-packed, self-assembly kitchens. The predecessor to the Beverley Settlement was an original partner in this enterprise.

12. Mr Healey’s longstanding and trusted advisers at the time of the events pleaded below included Mr Grocott, who was a chartered accountant and former senior partner of the Hull office of Ernst & Young in the UK, and Barry McCutcheon (“**Mr McCutcheon**”) who was a member of the English bar specialising in tax and trusts, practising from chambers in Gray’s Inn. Mr Dick was a long-standing acquaintance of Mr Healey and Alan Turner (“**Mr Turner**”) was Mr Healey’s brother-in-law.

13. In or about 1994 Mr Healey met Mr Parker who at all material times carried on business from his home in Manalapan, Florida as a financial adviser and/or asset manager under the name Parker Asset Management. At all material times Mr Parker was registered with Broker-Dealer Financial Services, Inc. of Johnston, Iowa and held a US series 7 broker and other supervisory licences. Those licences permitted Mr Parker to effect orders for stocks and bonds on behalf of his clients on a non-discretionary basis only. It was contrary to the *United States Federal Investment Advisers Act 1940* for Mr Parker to act a discretionary basis without being or being associated with a registered investment adviser.

14. In or about 1994 Mr Parker introduced Mr Healey to BNY. BNY took on the role of investment managers for:

- (1) Buckingham LP (“**Buckingham**”) a limited partnership established under the laws of Ohio and owned by Mr Healey which held Mr Healey’s personal portfolio of equity investments;
- (2) Mr Grocott, Mr Dick and another as nominees for two of Mr Healey’s daughters from his first marriage; and
- (3) as from 1997 the trustees of four settlements (the “**Daughters’ Settlements**”) for the benefit of two of Mr Healey’s daughters from his first marriage and their descendants.

The contact at BNY was Herbert W. Rauser (“**Mr Rauser**”) a Vice-President in the Personal Asset Management division of BNY.

15. On 20 April 1998 Mr Rauser wrote to Mr Grocott in relation to the Daughters’ Settlements in the following terms:

“Let us first outline some of the investment guidelines that we have been asked to observe. Generally, we have been requested to maintain a 40% bond – 60% stock ratio. For the equity portion, about 90% of the assets are considered long term holdings where the intention would be to retain the position for at least one year. The other 10% could be considered more opportunistic and profits are realized more readily. In the past, the opportunistic approach was the norm for all the accounts but our emphasis now is more long term.”

The Beverley and Howden Settlements

16. Immediately before the events pleaded below:

- (1) Rothschild Trust Guernsey Limited and two of its officers or employees (together referred to as “Rothschilds”) were the trustees of two Declarations of Trust dated 23 December 1987 for the benefit of certain descendants of Mr Healey known as Regent H109 and Regent H110 respectively;
- (2) As trustees of Regent H109 Rothschilds held about a 29.3% interest in Mills Pride;
- (3) A sale of Mills Pride to Masco Corporation Inc. (“Masco”), a corporation listed on the New York Stock Exchange, was under consideration. For this purpose Masco required the owners of Mills Pride to be in a position to permit their interests in Mills Pride to be “pooled” with Masco for United States accounting purposes; and
- (4) Neither Regent H109 nor Regent H110 was in a suitable form for this purpose.

17. As a result of discussions in the period March–June 1999 between Mr Healey and his advisers, Rothschilds and BNY and BNY Cayman it was agreed and understood between them that two new settlements would be created with BNY Cayman as trustee and in a form that would allow “pooling” under United States accounting rules. Mr McCutcheon would settle the new settlements, which would like Regent H109 and H110 be for the benefit of certain descendants of Mr Healey. In order to implement such agreement and understanding the steps pleaded below were taken.

18. Mr McCutcheon duly settled the drafts of the proposed new settlements, which became the Beverley and Howden Settlements. In connection with those drafts he prepared an explanatory note stating (*inter alia*) as follows:

“The deed is structured to benefit three generations.” (Paragraph 1)

“If the Protector appoints an Investment Adviser the trustee’s powers of investment vest in that Investment Adviser, along with any other powers commensurate with the exercise by him of those powers (see First Schedule, para 9). In particular, the trustee’s power to hold assets through nominees vests in him. The Investment Adviser can appoint Investment

Managers, as can the trustees if there is no Investment Adviser.”
(Paragraph 28)

Norman Wylie, who was a director of BNY Cayman and Vice President, International Trust Services at BNY, received that note on behalf of BNY Cayman and BNY respectively on 23 May 1999. A subsequent version of the said note prepared by Mr McCutcheon and sent to Mr Wylie by letter dated 10th April 2000 stated (inter alia) as follows:-

“The Settlement envisages 3 generations of beneficiaries – MII’s [meaning Mr Healey’s] existing second generation children [meaning his children by Mrs Healey], their children and their grandchildren” (Appendix 3 paragraph 9)

“Although on the appointment of an Investment Adviser he may exercise the First Schedule investment powers as a matter of general trust law the Trustees would be regarded as having a residual fiduciary responsibility to ensure that the Investment Adviser did not exercise his powers in an irresponsible or fraudulent manner. Accordingly, the Trustees should review periodically the Investment Adviser’s performance and pursuant thereto should exercise their Clause 20(2)(c)(i) power to require reports from the Investment Adviser”. (Appendix 3 paragraph 65)

19. In anticipation of the creation of the Beverley and Howden Settlements BNY Cayman signed the first two IMAs on 10 and 11 June 1999 respectively.

20. On 15 June 1999 BNY Cayman and Mr Grocott executed the Beverley and Howden Settlements, in the form drafted by Mr McCutcheon. Each of those Settlement was in substantially the same form and provided (inter alia) as follows:

- (1) Under Clause 3(1) the proper law was the law of England and Wales;
- (2) Clause 5 gave the Trustees power to appoint accumulation and maintenance trusts for the Secondary Beneficiaries, that is to say the children of Mr Healey’s two daughters by his first marriage (Clause 5);
- (3) Subject to any exercise of that power Clause 6 declared accumulation and maintenance trusts for the Primary Beneficiaries, that is to say the children of Mr

and Mrs Healey, onto which Clauses 7–9 engrafted continuing trusts thereby providing for three generations of beneficiaries;

- (4) Clause 10 gave the Trustees an overriding power of appointment over settled property with an interest in possession;
- (5) Clause 16(2) exonerated any corporate trustee for any loss to the Trust Fund arising by reason of the exercise in good faith of any discretion or power hereunder or mistake or omission save in the case of fraud or negligence of that corporate trustee;
- (6) Clause 17 gave Mr Healey (and, after his death or incapacity, Mrs Healey and others) power to appoint a Protector;
- (7) Clause 19 provided that so long as no Investment Adviser had been appointed the Trustees might appoint and dismiss one or more Investment Managers;
- (8) Clause 20:
 - (1) gave the Protector power to appoint and dismiss an Investment Adviser;
 - (2) provided that:
 - (a) the powers of investment conferred by the Settlement were to vest in the Investor Adviser; and
 - (b) the Investment Adviser might exercise those powers or establish an investment policy and delegate those powers to one or more Investment Managers with directions to implement that policy; and
 - (3) directed the Investment Adviser to submit reports to the Trustees and the Protector as the Trustees or the Protector should direct.

21. On 16 June 1999 BNY Cayman and Mr Doyle A. Dally (“Mr Dally”), a director of that company, were appointed trustees of Regent H109 in place of Rothschilds and on 18 June 1999 they transferred the assets of Regent H109, being quoted securities valued at ~~\$19,018,386.00~~ 15,947,672.50 plus cash equivalents of \$2,376,622.28 or thereabouts plus

the 29.3% interest in Mills Pride referred to above, to BNY Cayman to hold on the trusts of the Beverley Settlement.

22. On the same day BNY Cayman and Mr Dally were appointed Trustees of the Regent H110 Settlement in the place of Rothschilds and on 18 June 1999 they transferred the assets of the Regent H110 Settlement, being quoted securities valued at ~~\$64,994,731.95~~ \$63,218,213.00 plus cash equivalents of \$1,571,089.95 or thereabouts, to BNY Cayman to hold on the trusts of the Howden Settlement.

23. On 22 June 1999 BNY entered into the Beverley and Howden Indemnities by which they agreed to meet any final judgment (as therein defined) against BNY Cayman in respect of the Beverley and Howden Settlements.

24. On the same day BNY Cayman entered into the third of the IMAs as pleaded at Paragraph 8(5) above.

25. By the July 1999 Deeds Mr Healey appointed Mr Grocott as Protector, and Mr Dick as Deputy Protector, of the Beverley and Howden Settlements respectively.

26. On 31 August 1999 Masco acquired the entire issued share capital of Mills Pride Inc. (the interests of the partners in Mills Pride having been replaced by shares in that corporation following a corporate reorganisation) and BNY Cayman as trustee of the Beverley Settlement received 15,456,337 shares of common stock in Masco in exchange for its shares in that corporation. Such stock was initially subject to restrictions on disposal but was sold between 13 November 2001 and 11 February 2002 after the expiry of those restrictions.

27. By the September 1999 Deeds Mr Grocott as Protector of the Beverley and Howden Settlements appointed Mr Parker as Investment Adviser for the purposes of those Settlements respectively.

28. Mr Parker did not:

- (1) exercise the investment powers under the Beverley and Howden Settlements himself,
- (2) appoint BNY as Investment Manager in respect of the Beverley and Howden Settlements; or

- (3) establish an investment policy in respect thereof and direct BNY to implement it, as required by Clause 20(2)(b) of those Settlements, if his investment powers were to be delegated to BNY.

29. Notwithstanding this, BNY managed the portfolios of investments of both the Beverley and the Howden Settlements (including accumulated income arising thereunder) on a discretionary basis until 18 May 2004.

30. On 13 January 2000, in the course of a review of the tax implications of Mr Healey's proposed return to the UK mentioned below, Mr McCutcheon wrote to BNY Cayman concerning UK capital gains tax ("CGT") planning and record keeping, saying (*inter alia*):-

"Given that the Trusts' [meaning the Beverley and Howden Settlements] basic investment posture is to invest in blue chip stocks and retain them for long term growth, the natural course in the light of the UK CGT considerations mentioned above will be for the Trusts to retain their assets during MH's period of UK residence, so that no further gains are generated. This is subject to the qualification that if it becomes imperative to realise some gains it may be possible to offset those gains by realising losses, either in the form of existing losses (assuming they remain intact) or in the form of new losses brought into being because of the uplifted base costs arising from the envisioned acquisitions and subsequent falls in value in the newly acquired assets."

Neither BNY Cayman nor BNY (which responded by letter dated 18 January 2000 from Mr Rauser) queried or challenged the "basic investment posture" of the Beverley and Howden Settlements stated by Mr McCutcheon.

31. On 1 August 2000 Mr Grocott died and Mr Dick thereupon became Protector of the Beverley and Howden Settlements respectively pursuant to Clause 17(5) of those Settlements. By deeds respectively dated 2 March 2001 Mr Dick was dismissed as Protector of the Beverley and Howden Settlements and replaced by Mr Turner. BNY Cayman had no contact with Mr Dick or Mr Turner in connection with the affairs of the Beverley and Howden Settlements during the periods when they were respectively Protectors thereof. By deeds respectively dated 6 September 2001, Mr Turner was dismissed as Protector of the Beverley and Howden Settlements and replaced by Mr Wheldon.

32. On 18 May 2004 at a meeting of its trust investment committee held in New York BNY Cayman resolved to sell in an orderly manner the portfolios of investments held in the Beverley and Howden Settlements (all of which BNY held as custodian or nominee) and to invest the proceeds of sale in reasonably yielding cash equivalents.

33. In the event those investments (save for certain Treasury bonds in the Beverley Settlement) were all sold at one time and on 15 June 2004 the net proceeds of those sales were re-invested in Irish-registered Goldman Sachs unit trusts in accordance with that resolution. The proceeds of sale of the said Treasury bonds namely \$300,621.08 were remitted to Goldman Sachs on 7 July 2004.

34. By that date there had been capital losses to the Beverley and Howden Settlements (including the accumulated income funds arising thereunder) of \$54,145,189.56 \$53,245,649.85 made up as follows:

Beverley	<u>\$30,474,971.73</u> <u>\$29,780,861.02</u>
Howden	<u>\$23,670,217.83</u> <u>\$23,464,788.83</u>
Total losses	<u>\$54,145,189.56</u> <u>\$53,245,649.85</u>

as a result of their investment by BNY. Full particulars are set out in Schedules 1 and 2.

The London Settlement

35. After the sale of Mills Pride Mr Healey decided to go back to the UK to live with his family, and did so in June 2000.

36. In anticipation of his return to the UK, Mr Healey's advisers reviewed the tax planning implications and on 13 January 2000, as a result of that review, Mr McCutcheon wrote to BNY Cayman on the subject of UK capital gains tax ("CGT") planning and record keeping, saying (*inter alia*):

"Given that the Trusts' [meaning the Beverley and Howden Settlements'] basic investment posture is to invest in blue chip stocks and retain them for

long term growth, the natural course in the light of the UK CGT considerations mentioned above will be for the Trusts to retain their assets during MH's period of UK residence, so that no further gains are generated. This is subject to the qualification that if it becomes imperative to realise some gains it may be possible to offset those gains by realising losses, either in the form of existing losses (assuming they remain intact) or in the form of new losses brought into being because of the uplifted base costs arising from the envisioned acquisitions and subsequent falls in value in the newly acquired assets."

Neither BNY Cayman nor BNY (which responded by letter dated 18 January 2000 from Mr Rauser) queried or challenged the "basic investment posture" of the Beverley and Howden Settlements stated by Mr McCutcheon.

37. Mr Healey decided to settle the equities held in Buckingham before his proposed return to the UK so as (*inter alia*) to increase their base value for CGT purposes to their market value on the date of their transfer to the settlement.

38. On 20 March 2000 in anticipation of the creation of the settlement referred to in the last paragraph, BNY Cayman entered into the London IMA.

39. On 29 March 2000 BNY Cayman, Mr Wheldon and Mr Howell executed the London Settlement which had been drafted by Mr McCutcheon and provided as follows:

- (1) Under Clause 5(1) the proper law was the law of the Cayman Islands;
- (2) Clause 8(2) gave Mr Healey a life interest;
- (3) Subject thereto Clause 8(3)–(9) declared trusts for certain descendants of Mr Healey;
- (4) Clause 9(1) gave Mrs Healey and in certain events certain other persons the power to revoke the Settlement whereupon the Trust Fund is to be distributed to Mr Healey;
- (5) Subject thereto Clause 10 conferred on Mr Healey overriding powers of appointment in favour of the other Beneficiaries;

- (6) Subject thereto Clause 11 conferred on the Trustees overriding powers in favour of the Beneficiaries;
- (7) Clauses 15–17 contained provisions for the appointment of Special Protectors, Protectors and Deputy Protectors;
- (8) Clause 17 gave Mr Healey (and, after his death or incapacity, Mrs Healey and others) power to appoint a Protector;
- (9) Clause 18 provided that so long as no Investment Adviser had been appointed the Trustees might engage on an annual (or shorter) basis one or more Investment Managers;
- (10) Clause 19:
 - (1) gave the Protector and subject thereto Mr Healey during his life power to appoint an Investment Adviser;
 - (2) provided that:
 - (a) the power of appointing Investment Managers powers of investment conferred by the Settlement were to vest in the Investor Adviser; and
 - (b) the Investment Adviser might exercise those powers or establish an investment policy and delegate those powers to one or more Investment Managers with directions to implement that policy; and
 - (3) directed the Investment Adviser to submit reports to the Trustees and the Protector as the Trustees or the Protector should direct.
- (11) Clause 23(2) exonerated any corporate trustee from liability for any loss to the Trust Fund arising by reason of the exercise in good faith of any discretion or power hereunder or mistake or omission save in the case of fraud or negligence of that corporate trustee, and Clause 23(4) exonerated any trustee from liability for any loss to the Trust Fund arising by reason of the acts or omissions of any delegate agent advise (including any Investment Adviser) supervised with reasonable care by that trustee.

40. On 29 March 2000 BNY entered into the London Indemnity with BNY Cayman for itself and as Trustee of the London Settlement and with Mr Healey as primary beneficiary (“the London Indemnity”) by which BNY agreed to meet any final judgment (as therein defined) against BNY Cayman in respect of the London Settlement.

41. On 3 April 2000 the relevant equity investments held on behalf of Mr Healey by Buckingham LP (then valued at \$25,239,200.00 ~~25,043,925~~ excluding an unquoted investment namely shares in Fuzion Technologies, Inc to which no value is attributed) were transferred to BNY Cayman to hold on the trusts of the London Settlement. Those investments continued to be held by BNY as custodian or nominee for BNY Cayman.

42. No Investment Adviser was ever appointed under the London Settlement. Furthermore, apart from the London IMA made in anticipation of the London Settlement BNY Cayman did not exercise the power in Clause 18 of the London Settlement to engage on an annual (or shorter) basis one or more Investment Managers.

43. Notwithstanding this, BNY managed the investment portfolio of the London Settlement on a discretionary basis throughout the trusteeship of BNY Cayman.

44. On 29 November 2002 BNY Cayman ceased to be trustee of the London Settlement, by which time there had been a capital loss to the Trust Fund of \$11,327,232.20 ~~\$11,327,232.20~~ \$11,160,632.20. Full particulars are set out in Schedule 3.

BREACHES OF TRUST

The Beverley Settlement

45. Wrongfully and in breach of its duties as trustee, BNY Cayman failed to appreciate that the status of trustee of the Beverley Settlement involved a role fundamentally different to that of custodian and/or investment manager hitherto fulfilled by BNY in relation to the predecessor trust (Regent H109), the portfolio held by Buckingham and/or the daughters’ settlements.

Particulars

- (1) BNY Cayman wrongly adopted a passive or inert stance at all times until 2004.

- (2) BNY Cayman failed to satisfy themselves that they had got in all of the trust assets from Rothschilds in respect of the Beverley Settlement in that when its attention was drawn to the fact that the closing balance provided by Rothschilds differed from the opening balances produced by BNY Cayman by \$8,348.47, BNY Cayman failed and/or refused to investigate the reason for the discrepancy.
- (3) BNY Cayman failed to have any, or any sufficient, regard to the terms of Mr McCutcheon's explanatory notes pleaded in paragraph 18 above.
- (4) BNY Cayman failed to take any, or any sufficient, steps to understand the objective of the Beverley Settlement, namely the preservation of wealth on a dynastic basis for Mr Healey's descendants over three generations within the regime of English law accumulation and maintenance trusts.
- (5) BNY Cayman failed to take any, or any sufficient steps to establish an attitude to investment risk that was commensurate with that objective, and/or to communicate such attitude to risk to Mr Parker and/or BNY.
- (6) BNY Cayman failed to take any, or any sufficient, steps to enquire as to the suitability, regulatory authorisation status and/or qualifications of Mr Parker to carry out the role of Investment Adviser to the Beverley Settlement and/or to act on a discretionary basis, either by reference to the requirements of the *United States Federal Investment Advisers Act 1940* or at all.

Unauthorised investment by BNY

46. As trustee of the Beverley Settlement it was the duty of BNY Cayman to safeguard the Trust Fund and to secure that it was dealt with in compliance with the terms of the Beverley Settlement.

47. Wrongfully and in breach of that duty BNY Cayman permitted the Trust Fund to be dealt with in an unauthorised way by permitting BNY to invest the same.

Particulars

- (1) Following the appointment of Mr Parker as Investment Adviser the powers of investment conferred by the First Schedule to the Beverley Settlement (the

“investment powers”) vested in him in accordance with Clause 20(2)(a) of that Settlement.

- (2) By virtue of Clause 20(2)(b) of the Beverley Settlement Mr Parker was authorised and obliged (i) to exercise the investment powers or (ii) to establish an investment policy and delegate any or all of those powers to one or more Investment Managers with directions to implement that policy.
- (3) Mr Parker did neither of those things. In particular:
 - (a) Mr Parker did not himself exercise the investment powers conferred; and
 - (b) Mr Parker did not:
 - (i) establish an investment policy for the Beverley Settlement;
 - (ii) delegate any or all of the investment powers to BNY as Investment Manager; or
 - (iii) direct BNY to implement an investment policy established by him.
- (4) All investments made by BNY were therefore unauthorised.
- (5) If necessary Helmsman will contend that:
 - (a) if (which is not admitted) the IMA with BNY relating to the Beverley Settlement is to be treated as an anticipatory exercise of the power to appoint an Investment Manager under Clause 19 of the Settlement, it ceased to have effect on the appointment of Mr Parker as Investment Adviser since that power applies only so long as no Investment Adviser has been appointed under Clause 20 thereof; and
 - (b) further, or alternatively, that IMA was in a form personal to the person or persons entering into it and was not capable of applying to successors in title.

48. If Mr Parker had established an investment policy in order to enable him to delegate investments powers to BNY it should and/or would have specified an asset

allocation policy requiring a 60% equities 40% bond asset allocation ratio and requiring BNY to have regard for the need for diversification within the equity portfolio, and the long term investment horizon of the Settlement.

Particulars

Helmsman will rely on the following facts and matters:

- (1) Helmsman avers that the approach summarised by Mr Rauser on behalf of BNY as pleaded at paragraph 15 was appropriate for the Beverley and Howden Settlements, and that BNY Cayman should have ensured that such an approach was adopted on behalf of the Beverley Settlement.
- (2) Further or alternatively, BNY Cayman should have made enquiries of Mr Parker and/or BNY to ascertain the approach to allocation which Mr Parker and/or BNY proposed to adopt, and their reasons for such approach.
- (3) Helmsman further avers that, in the light of the letter pleaded at paragraph 15 above, Mr Grocott as Protector and subsequent Protectors were reasonably entitled to assume that BNY and/or BNY Cayman were adopting or maintaining a correct approach to the Beverley and Howden Settlements having regard to the fact that the settlements referred to in paragraph 15 above maintained investment portfolios that paralleled the investments held by the Beverley and Howden Settlements,
- (4) The appropriateness and relevance of a 40% bond – 60% stock ratio is further evidenced by the fax from Mr Parker to Mr Healey sent on 23 April 2002 pleaded at paragraph 54(2) below.
- (5) The BNY Compliance Manual envisages the completion of a standard form Trust Investment Profile document which defines different levels of risk including:

“Moderate – Balanced: 50 – 70% Equities, Remainder in Fixed Income/Cash

For clients seeking long term capital appreciation with an average tolerance for market risk and volatility. Income is a moderate consideration. Investments have a higher level of large cap equities than fixed income securities, but maintain a significant commitment to both. Cash will be

held for future security purchases and to provide liquidity as needed. Other asset classes such as small cap, international, real estate and private equities along with high yield bonds and hedge funds, may be employed for diversification purposes.”

- (6) The BNY Policy Directory for International Private Client Services III.I.320 (for business accepted after 30 November 1999) states at Section III.5:

“In irrevocable trusts where no management committee or protector is clearly responsible for investment oversight, an asset allocation arrangement with BNY PAM must be established to the satisfaction at least (sic) two Directors of BNY Cayman.”

Helmsman avers that this provision represents “best practice” prior to 30 November 1999 alternatively that BNY Cayman should, immediately upon the introduction of this policy, have reviewed the absence of any asset allocation arrangement in the Beverley and Howden Settlements.

- (7) The clear expectations of the Settlements’ UK adviser as set out by Mr McCutcheon in his letter of 13 January 2000.
- (8) The fact that, after May 2003, BNY introduced into its standard form Private Client Services Account Statement for both Settlements a section marked “Investment Objective”, which stated “Consult – Long Term Capital Growth”. Helmsman avers that this statement correctly summarises the investment objectives of the Beverley and Howden Settlements and that, accordingly, BNY Cayman should from the outset have adopted an attitude to risk consistent with that set out at sub-paragraphs (3) to (5) above

Failure to monitor and/or supervise Mr Parker and/or BNY

49. As trustee of the Beverley Settlement it was the duty of BNY Cayman to take reasonable care to monitor and/or supervise the conduct of Mr Parker as Investment Adviser and/or BNY as Investment Manager if (contrary to Helmsman’s case) it was an Investment Manager after the appointment of Mr Parker as Investment Adviser. In support of that contention Helmsman will, if necessary, rely on the fact that BNY Cayman accepted the trusteeship of the Beverley Settlement on the basis of Mr

McCutcheon's advice pleaded in paragraph 18 and thereby assumed responsibility to monitor and/or supervise such conduct.

50. Wrongfully and in breach of that duty BNY Cayman did not take reasonable care to monitor and/or supervise Mr Parker's conduct as Investment Adviser and/or BNY's conduct as Investment Manager.

Particulars

- (1) As a trustee BNY Cayman was under a duty to exercise such care and skill as was reasonable in the circumstances in the conduct of the trust business, having regard in particular to the special knowledge and/or experience that it held itself out as having and/or that it was reasonable to expect of a subsidiary of a major international bank carrying on business as a trust company.
- (2) As a trustee, BNY Cayman was under a duty to ascertain the objective of the Beverley Settlement, to establish an attitude to risk in relation to trust investments which was appropriate for that objective, and to communicate this attitude to risk to the Investment Adviser and/or Investment Manager. BNY Cayman did none of these things.
- (3) In carrying out his responsibilities as Investment Adviser Mr Parker was, or alternatively was subject to the same duties as, a trustee. Accordingly:
 - (a) Mr Parker was under a duty to exercise such care and skill as reasonable in the circumstances;
 - (b) he was under a duty to have regard to:
 - (i) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and
 - (ii) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust(the "standard investment criteria");

- (c) he was under a duty from time to time to review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied;
- (d) he was under a duty to obtain and consider advice from a person whom he reasonably believed to be qualified to give it by his ability in and practical experience of financial and other matters in relation to investment matters; and
- (e) he was under a duty not to delegate the investment powers without having prepared a policy statement evidenced in writing providing guidance to the delegate.

In support of this plea Helmsman will rely on the United Kingdom *Trustee Act 2000* (a copy of which is served with this Statement of Claim) and will contend that in relevant respects it codifies the common law.

- (4) If (contrary to Helmsman's case) BNY was an Investment Manager after the appointment of Mr Parker as Investment Adviser, it was, alternatively, subject to the same duties as a trustee in carrying out its responsibilities as such. Accordingly it was subject to the same duties *mutatis mutandis* as Mr Parker as pleaded above.
- (5) Mr Parker and/or BNY did not fulfil those duties in the following respects:
 - (a) There was no investment policy or policy statement;
 - (b) Mr Parker and/or BNY did not ascertain the objectives of the trust or the attitude to risk appropriate to those objectives;
 - (c) They did not adopt an investment strategy appropriate to those objectives and commensurate to that attitude to risk or an asset allocation appropriate for such investment strategy; and
 - (d) They did not ensure an appropriate level of diversity of investments, so as to produce a blend of risk to the portfolio in order to manage risk, implement strategy and achieve objectives. On the contrary the portfolio constructed by BNY was inappropriately concentrated both as regards

sector and individual stocks. In particular, that portfolio was inappropriately concentrated in:

- (i) US equities;
- (ii) the US technology and communications sector; and
- (iii) Metromedia Fibre and JDS Uniphase.

Full particulars are set out in Schedule 4;

- (6) BNY Cayman did not require Mr Parker to submit any, or any adequate, reports to it under Clause 20(3)(c)(i) of the Beverley Settlement;
- (7) BNY Cayman took no, or no sufficient, steps to ascertain how Mr Parker intended to exercise his powers under Clause 20 of the Beverley Settlement, or to ensure that Mr Parker and/or BNY fulfilled the duties, and/or took the steps pleaded at subparagraphs (3) to (5) above. In particular, BNY Cayman failed to conduct regular periodic reviews, or any reviews, of the performance of trust investments with Mr Parker and/or BNY;
- (8) BNY failed to identify and/or raise as an issue with Mr Parker and/or BNY and/or the Protector the existence of excessive trading or “churning” of the investments held by the Beverley Settlement (excluding investments held in relation to accumulated income). Those trades generated net capital losses of \$5,699,507.24 including the payment of commissions or dealing costs of \$1,954,980. Full particulars of the trades relied upon as excessive trading or churning, together with the net capital losses and commissions or dealing costs paid, are given in Schedule 5; and
- (9) BNY Cayman did not suggest to Mr Grocott or any subsequent Protector that he should dismiss or consider dismissing Mr Parker as Investment Adviser.

The Howden Settlement

51. Wrongfully and in breach of its duties as trustee BNY Cayman failed to appreciate that the status of trustee of the Howden Settlement involved a role fundamentally different to that of custodian and/or investment manager hitherto fulfilled by BNY in relation to

the predecessor trust (Regent H110), the portfolio held by Buckingham and/or the daughters' settlements.

Particulars

- (1) BNY Cayman wrongly adopted a passive or inert stance at all times until 2004.
- (2) BNY Cayman failed to satisfy themselves that they had got in all of the trust assets from Rothschilds in respect of the Howden Settlement in that when its attention was drawn to the fact that the closing balance provided by Rothschilds differed from the opening balances produced by BNY Cayman by \$19,023.67, BNY Cayman failed and/or refused to investigate the reason for the discrepancy.
- (3) BNY Cayman failed to have any, or any sufficient, regard to the terms of Mr McCutcheon's explanatory notes pleaded in paragraph 18 above.
- (4) BNY Cayman failed to take any, or any sufficient, steps to understand the objective of the Howden Settlement, namely the preservation of wealth on a dynastic basis for Mr Healey's descendants over three generations within the regime of English law accumulation and maintenance trusts.
- (5) BNY Cayman failed to take any, or any sufficient steps to establish an attitude to investment risk that was commensurate with that objective, and/or to communicate such attitude to risk to Mr Parker and/or BNY.
- (6) BNY Cayman failed to take any, or any sufficient, steps to enquire as to the suitability, regulatory authorisation status and/or qualifications of Mr Parker to carry out the role of Investment Adviser to the Howden Settlement and/or to act on a discretionary basis, either by reference to the requirements of the *United States Federal Investment Advisers Act 1940* or at all.

Unauthorised investment by BNY

52. As trustee of the Howden Settlement it was the duty of BNY Cayman to safeguard the Trust Fund and to secure that it was dealt with in compliance with the terms of the Howden Settlement.

53. Wrongfully and in breach of that duty BNY Cayman permitted the Trust Fund to be dealt with in an unauthorised way by permitting BNY to invest the same.

Particulars

- (1) Following the appointment of Mr Parker as Investment Adviser the powers of investment conferred by the First Schedule to the Howden Settlement (the “investment powers”) vested in him in accordance with Clause 20(2)(a) of that Settlement.
- (2) By virtue of Clause 20(2)(b) of the Howden Settlement Mr Parker was authorised and obliged (i) to exercise the investment powers or (ii) to establish an investment policy and delegate any or all of those powers to one or more Investment Managers with directions to implement that policy.
- (3) Mr Parker did neither of those things. In particular:
 - (a) Mr Parker did not himself exercise the investment powers conferred; and
 - (b) Mr Parker did not:
 - (i) establish an investment policy for the Howden Settlement;
 - (ii) delegate any or all of the investment powers to BNY as Investment Manager; or
 - (iii) direct BNY to implement an investment policy established by him.
- (4) All investments made by BNY were therefore unauthorised.
- (5) If necessary Helmsman will contend that:
 - (a) if (which is not admitted) the IMA with BNY relating to the Howden Settlement is to be treated as an anticipatory exercise of the power to appoint an Investment Manager under Clause 19 of the Settlement, it ceased to have effect on the appointment of Mr Parker as Investment Manager since that power applies only so long as no Investment Manager has been appointed under Clause 20 thereof; and

- (b) further or alternatively, that IMA was in a form personal to the person or persons entering into it and was not capable of applying to successors in title.

54. Helmsman repeats Paragraph 48 above.

Failure to monitor and/or supervise Mr Parker and/or BNY

55. As trustee of the Howden Settlement it was the duty of BNY Cayman to take reasonable care to monitor and/or supervise the conduct of Mr Parker as Investment Adviser and/or BNY as Investment Manager if (contrary to Helmsman's case) it was an Investment Manager after the appointment of Mr Parker as Investment Adviser. In support of that contention Helmsman will, if necessary, rely on the fact that BNY Cayman accepted the trusteeship of the Howden Settlement on the basis of Mr McCutcheon's advice pleaded in paragraph 18 and thereby assumed responsibility to monitor and/or supervise such conduct.

56. Wrongfully and in breach of that duty, BNY Cayman did not take reasonable care to monitor and/or supervise Mr Parker's conduct as Investment Adviser, and/or BNY's conduct as Investment Manager.

Particulars

- (1) As a trustee BNY Cayman was under a duty to exercise such care and skill as was reasonable in the circumstances in the conduct of the trust business, having regard in particular to the special knowledge and/or experience that it held itself out as having and/or that it was reasonable to expect of a subsidiary of a major international bank carrying on business as a trust company.
- (2) As a trustee BNY Cayman was under a duty to ascertain the objective of the Howden Settlement, to establish an attitude to risk in relation to trust investments which was appropriate for those objectives, and to communicate this to the Investment Adviser and/or Investment Manager. BNY Cayman did none of these things.
- (3) In carrying out his responsibilities as Investment Adviser Mr Parker was, or alternatively was subject to the same duties as, a trustee. Accordingly:

- (a) Mr Parker was under a duty to exercise such care and skill as reasonable in the circumstances;
- (b) he was under a duty to have regard to the standard investment criteria;
- (c) he was under a duty from time to time to review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied;
- (d) he was under a duty to obtain and consider advice from a person whom he reasonably believed to be qualified to give it by his ability in and practical experience of financial and other matters in relation to investment matters; and
- (e) he was under a duty not to delegate the investment powers without having prepared a policy statement evidenced in writing providing guidance to the delegate.

In support of this plea Helmsman will rely on the United Kingdom *Trustee Act 2000* (a copy of which is served with this Statement of Claim) and will contend that in relevant respects it codifies the common law.

- (4) If (contrary to Helmsman's case) BNY was an Investment Manager after the appointment of Mr Parker as Investment Adviser, it was, or alternatively was subject to the same duties as, a trustee in carrying out its responsibilities as such. Accordingly it was subject to the same duties *mutatis mutandis* as Mr Parker as pleaded above.
- (5) Mr Parker and/or BNY did not fulfil those duties in the following respects.
 - (a) There was no investment policy or policy statement.
 - (b) Mr Parker and/or BNY did not ascertain the objectives of the trust or establish the attitude to risk appropriate to those objectives.
 - (c) They did not adopt an investment strategy appropriate to those objectives and commensurate to that attitude to risk or an asset allocation appropriate for such investment strategy.

(d) They did not ensure an appropriate level of diversity of investments, so as to produce a blend of risk to the portfolio in order to manage risk, implement strategy and achieve objectives. On the contrary the portfolio constructed by BNY was inappropriately concentrated both as regards sector and individual stocks. In particular, that portfolio was inappropriately concentrated in:

(i) US equities;

(ii) the US technology and communications sector; and

(iii) Metromedia Fibre and JDS Uniphase.

Full particulars are set out in Schedule 6.

- (6) BNY Cayman did not require Mr Parker to submit any, or any adequate, reports to it under Clause 20(3)(c)(i) of the Howden Settlement.
- (7) BNY Cayman took no, or no sufficient, steps to ascertain how Mr Parker intended to exercise his powers under Clause 20 of the Howden Settlement, or to ensure that Mr Parker and/or BNY fulfilled the duties, and/or took the steps pleaded at subparagraphs (3) to (5) above. In particular, BNY Cayman failed to conduct regular periodic reviews, or any reviews, of the performance of the trust investments with Mr Parker and/or BNY.
- (8) BNY Cayman failed to identify and/or raise as an issue with Mr Parker and/or BNY and/or the Protector the existence of excessive trading or “churning” of the investments held by the Howden Settlement (excluding investments held in relation to accumulated income). Those trades generated a net capital gain of \$1,120,624.80 but involved the payment of commissions or dealing costs of \$1,012,956.00. Full particulars of the trades relied upon as excessive trading or churning, together with the net capital gain and commissions or dealing costs paid, are given in Schedule 7.
- (9) BNY Cayman did not suggest to Mr Grocott or any subsequent Protector that he should dismiss or consider dismissing Mr Parker as Investment Adviser.

The London Settlement

57. Wrongfully and in breach of its duties as trustee BNY Cayman failed to appreciate that the status of trustee of the London Settlement involved a role fundamentally different to that of custodian and/or investment manager hitherto fulfilled by BNY in relation to the predecessor trusts of the Beverley and Howden Settlements (Regent H109 and H110), the portfolio held by Buckingham and/or the daughters' settlements.

Particulars

- (1) BNY Cayman wrongly adopted a passive or inert stance at all times.
- (2) BNY Cayman failed to take any, or any sufficient, steps to understand the objective of the London settlement, which Hotham avers was the maintenance of a portfolio of investments suitable for an investor whose attitude to risk can be defined as moderate-balanced (as defined in the BNY Compliance Manual as pleaded at paragraph 55(4) below) but having due regard to the preservation of capital for the residuary beneficiaries. Hotham relies (*inter alia*) upon the contents of a fax dated 23 April 2002 sent by Mr Parker to Mr Healey which states:

“Hello Malcolm,

I wanted to discuss with you the history of our investment relationship since we started in 1996. As you remember we initially picked a 60% stock 40% bond allocation, we were also not opposed to trading gains. As such we picked large cap growth stocks with the brightest outlooks, taking earnings (*sic*) potential and sector analysis into consideration. This approach thru 2000 served us well, as all of the accounts were up well over 100%. Consequently, if I remember correctly (*sic*), we received complaints about (*sic*) the capital gains we were taking on a regular basis in the early 1999 time frame. Thus it was decided we would be holding all of our positions long term to avoid paying capital gains taxes. In fact at one point shares were sold in Beverley (*sic*) & Howden in the Spring of 2000 and purchased back at significantly higher prices so as to step the cost basis. Unfortunately (*sic*) this has made a difficult market more difficult. The question going forward is does the current portfolio need to be adjusted and the answer is yes. At today's prices Herb [Mr Rauser] and I both feel the current portfolio will perform once some of the uncertainties are abated. As for tax

considerations there should be ample opportunities to make up the current (sic) losses over time. Remember Malcolm, we never have had a down trading year when he [Mr Rauser] decided to take advantage of volatility (sic) in the stock prices. May I suggest a monthly conference call with Herb and myself to discuss the markets including fixed income, the first Monday at 10 a.m. of each month.”

- (3) BNY Cayman was under a duty:
 - (a) from time to time to review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied;
 - (b) to obtain and consider advice from a person whom it reasonably believed to be qualified to give it by his ability in and practical experience of financial and other matters in relation to investment matters; and
 - (c) not to delegate the investment powers without having prepared a policy statement evidenced in writing providing guidance to the delegate.
- (4) BNY Cayman failed to take any of the steps referred to in sub-paragraph (3) above.
- (5) BNY Cayman failed to take any, or any sufficient, steps to establish, and/or communicate to BNY:
 - (a) An attitude to risk commensurate with the objective of the London Settlement; and
 - (b) An investment policy, written or otherwise, appropriate for that objective.

58. If BNY Cayman had established an investment policy in order to enable it to delegate investment powers to BNY it should and/or would have specified an asset allocation policy requiring a 60% equities 40% bond asset allocation ratio and requiring BNY to have regard for the need for diversification within the equity portfolio.

Particulars

Hotham will rely on the following facts and matters:

- (1) Hotham avers that the approach summarised by Mr Rauser on behalf of BNY as pleaded at Paragraph 12 was appropriate for the London Settlement, and that BNY Cayman should have ensured that such an approach was adopted on behalf of the London Settlement.
- (2) Further or alternatively, BNY Cayman should have made enquiries of BNY to ascertain the approach to allocation which BNY proposed to adopt, and their reasons for such approach.
- (3) The appropriateness and relevance of a 40% bond – 60% stock ratio is further evidenced by the fax from Mr Parker to Mr Healey sent on 23 April 2002 pleaded at paragraph 54(2) above.
- (4) The BNY Compliance Manual envisages the completion of a standard FORM Trust Investment Profile document which defines different levels of risk including:

“Moderate – Balanced: 50 – 70% Equities, Remainder in Fixed Income/Cash

For clients seeking long term capital appreciation with an average tolerance for market risk and volatility. Income is a moderate consideration. Investments have a higher level of large cap equities than fixed income securities, but maintain a significant commitment to both. Cash will be held for future security purchases and to provide liquidity as needed. Other asset classes such as small cap, international, real estate and private equities along with high yield bonds and hedge funds, may be employed for diversification purposes.”

- (5) BNY Cayman should from the outset have ensured the adoption of an asset allocation policy consistent with the above.

59. As trustee of the London Settlement, it was the duty of BNY Cayman to take reasonable care to monitor and/or supervise the conduct of BNY as Investment Manager.

60. Wrongfully and in breach of that duty BNY Cayman did not take reasonable care to monitor and/or supervise BNY's conduct as Investment Manager.

Particulars

- (1) As a trustee BNY Cayman was under a duty to exercise such care and skill as was reasonable in the circumstances in the conduct of the trust business, having regard in particular to the special knowledge and/or experience that it held itself out as having and/or that it was reasonable to expect of a subsidiary of a major international bank carrying on business as a trust company.
- (2) As a trustee BNY Cayman was under a duty to ascertain the objective of the London Settlement, to establish an attitude to risk in relation to trust investments which was appropriate for those objectives, and to communicate this to the Investment Manager in the form of a written investment policy. BNY Cayman did none of these things.
- (3) In carrying out its responsibilities as Investment Manager BNY was, or alternatively was subject to the same duties as, a trustee. Accordingly:
 - (a) BNY was under a duty to exercise such care and skill as reasonable in the circumstances;
 - (b) it was under a duty to have regard to the standard investment criteria;
 - (c) it was under a duty from time to time to review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.
- (4) BNY did not fulfil those duties in the following respects:
 - (a) BNY did not ascertain the objectives of the trust or establish the attitude to risk appropriate to those objectives.
 - (b) It did not adopt an investment strategy appropriate to those objectives and commensurate to that attitude to risk or an asset allocation appropriate for such investment strategy.

(c) It did not ensure an appropriate level of diversity of investments, so as to produce a blend of risk to the portfolio in order to manage risk, implement strategy and achieve objectives. On the contrary the portfolio constructed by BNY was inappropriately concentrated both as regards sector and individual stocks. In particular, that portfolio was inappropriately concentrated in:

(i) US equities;

(ii) the US technology and communications sector; and

(iii) Metromedia Fibre and JDS Uniphase.

Full particulars are set out in Schedule 8.

(5) BNY Cayman did not require BNY to submit any adequate reports to it under Clause 18(2)(b) of the London Settlement.

(6) BNY Cayman took no, or no sufficient, steps to ensure that BNY fulfilled the duties, and/or took the steps pleaded at subparagraphs (3) to (4) above. In particular, BNY Cayman failed to conduct regular periodic reviews, or any reviews, of the performance of trust investments with BNY.

THE CONSEQUENCES OF BNY CAYMAN'S BREACHES OF TRUST

61. Helmsman and Hotham aver that, but for BNY Cayman's breaches of trust particularised at paragraphs 42 to 57 inclusive above, the losses of capital and losses of return pleaded at paragraphs 603 and 644 below would and/or should have been avoided, alternatively reduced.

62. If and to the extent that BNY Cayman seek to rely upon the exculpation provisions contained in Clause 16 of the Beverley and Howden Settlements respectively and Clause 23 of the London Settlement, Helmsman and Hotham will aver that, by reason of the matters pleaded at paragraphs 42 to 57 inclusive above, BNY Cayman:

(1) failed to act in good faith; and

(2) was negligent.

Loss to Trust Funds

63. By reason of the breaches of trust pleaded above:

- (1) the Beverley Settlement suffered a diminution in capital value over the period from 18 June 1999 to 15 June 2004 of US ~~\$30,474,971.73~~ \$29,780,861.02; and
- (2) the Howden Settlement suffered a diminution of capital value over the same period of US ~~\$23,670,217.83~~ \$23,464,788.83; and
- (3) By reason of the breaches of trust pleaded above BNY Cayman caused the London Settlement suffered a diminution of capital value over the period from 3 April 2000 to 29 November 2002 of US ~~\$11,327,232.20~~ \$11,160,632.20.

Particulars of the capital lost by the Beverley, Howden and London Settlements respectively are set out in Schedules 1 to 3 hereto.

Loss of Return on Capital

64. Further, if BNY Cayman had procured that BNY and/or Mr Parker had applied an asset allocation policy of 60% equities and 40% bonds (which Helmsman avers to be the appropriate allocation given the respective objectives of the two Settlements) it is averred that, instead of a diminution in capital:

- (1) the Beverley Settlement should have benefited from an increase in capital value of US ~~\$6,432,146~~ \$6,344,437; and
- (2) the Howden Settlement should have benefited from an increase in capital value of US ~~\$8,086,197~~ \$8,049,899;

Particulars of the said increases in capital value are set out in Schedule 9 hereto.

65. If BNY Cayman had procured that BNY had applied an asset allocation policy of 60% equities and 40% bonds (which Hotham avers to be the appropriate allocation given the objective of the Settlement), it is averred that the London Settlement would have suffered a capital loss over the period 3 April 2000 to 29 November 2002 of ~~\$2,019,418~~ \$2,037,605. Particulars are set out in Schedule 10.

LOSSES IN THE BEVERLEY AND HOWDEN SETTLEMENTS AFTER 15 JUNE 2004

66. In the premises the assets of the Beverley Settlement as at 15 June 2004 should have included the following additional assets:

- (1) The capital lost of US ~~\$30,474,971.73~~ \$29,780,861.02 (which sum includes capital losses and commissions generated by excessive trading pleaded at paragraph 47(8) above) (Schedule 1); and
- (2) A loss of capital return of US ~~\$6,432,146~~ \$6,344,437 caused by the failure to adopt any, or any appropriate, asset allocation policy (Schedule 8)).

67. In the premises the assets of the Howden Settlement as at 15 June 2004 should have included the following additional assets:

- (1) The capital lost of US ~~\$23,670,217.83~~ \$23,464,788.83 (which sum includes capital losses and commissions generated by excessive trading pleaded at paragraph 53(8) above) (Schedule 2)); and
- (2) A loss of capital return of US ~~\$8,086,497~~ \$8,049,899 by reason of the failure to adopt any, or any adequate, asset allocation policy (Schedule 9)).

68. Helmsman is entitled to be compensated by BNY Cayman in respect of the assets referred to in Paragraphs 66 ~~and 67~~ hereof. Hotham is entitled to be compensated by BNY Cayman in respect of the assets pleaded at Paragraph 67 hereof.

69. Further, Helmsman and Hotham claims compound and/or simple interest against BNY Cayman and/or BNY on all sums found to be due to it pursuant to the equitable jurisdiction of the court at such rates and/or pursuant to Section 34 of the *Judicature Law (2007 Revision)* at the rate of 7.25% per annum or at such rate as the court thinks fit, and from 15 June 2004 to the date hereof or for such period, and with such rests as the court thinks fit.

LOSSES IN THE LONDON SETTLEMENT AFTER 29TH NOVEMBER 2002

70. In the premises, the assets of the London Settlement as at 29 November 2002 should have included the following additional assets, namely the net capital lost of \$8,861,699 made up as follows:

Capital loss	\$11,327,232.20	<u>\$11,160,632.20</u>
Income distributed	(\$446,115)	
Expected return	(\$2,019,418)	<u>(\$2,037,605)</u>
Net loss	\$8,861,699	<u>\$8,876,912</u>

71. In the premises, Hotham is entitled to be compensated by BNY Cayman in respect of the assets referred to at paragraph 70 hereof.

72. Further, Hotham claims compound and/or simple interest against BNY Cayman and/or BNY on all sums found to be due to it pursuant to the equitable jurisdiction of the court at such rates and/or pursuant to Section 34 of the *Judicature Law (2007 Revision)* at the rate of 7.25% per annum or at such rate as the court thinks fit, and from 29 November 2002 to the date hereof or for such period, and with such rests as the court thinks fit.

AND Helmsman claims:

1. An inquiry as to what would have been the value of the trust funds of the Beverley ~~and Howden~~ Settlements ~~respectively~~ on 15 June 2004 if BNY Cayman had performed its duties thereunder with proper care and skill;
2. An inquiry as to the actual value of the trust funds of the Beverley ~~and Howden~~ Settlements ~~respectively~~ as at 15 June 2004;
3. An order for the payment by BNY Cayman by way of compensation, or alternatively damages, for breach of trust of a sum equal to the excess of the amount certified under inquiry (1) above over the amount certified under inquiry (2) above;
4. Interest on equitable principles alternatively pursuant to statute on the sum referred to at prayer (3) above;

5. All necessary further accounts and inquiries;
6. Further or other relief; and
7. Costs

AND Hotham claims:

8. An inquiry as to what would have been the value of the trust funds of the London Settlement on 29 November 2002 if BNY Cayman had performed its duties thereunder with proper care and skill;
9. An inquiry as to the actual value of the trust funds of the London Beverley and Howden Settlements respectively as at 29 November 2002;
10. An order for the payment by BNY Cayman by way of compensation alternatively damages for breach of trust of a sum equal to the excess of the amount certified under inquiry (8) above over the amount certified under inquiry (9) above;
- ~~11. Interest on equitable principles alternatively pursuant to statute on the sum referred to at prayer (10) above;~~
12. An inquiry as to what would have been the value of the trust funds of the Howden Settlement on 15 June 2004 if BNY Cayman had performed its duties thereunder with reasonable care and skill;
13. An inquiry as to the actual value of the trust funds of the Howden Settlement as at 15 June 2004;
14. An order for the payment by BNY Cayman by way of compensation alternatively damages for breach of trust of a sum equal to the excess of the amount certified under inquiry (12) above over the amount certified under inquiry (13) above.
15. Interest on equitable principles alternatively pursuant to statute on the sum referred to at prayers (10) and (14) above;

16. All necessary further accounts and inquiries;

17. Further or other relief; and

18. Costs

Dated the 26th day of November 2008

Amended the 2nd day of June 2011



APPLEBY

This Writ of Summons was filed by Appleby, Attorneys-at-Law for the Plaintiffs, whose address for service is that of their Attorneys-at-law, Clifton House, 75 Fort Street, PO Box 190, George Town, Grand Cayman, Cayman Islands KY1-1104 (Ref:CDPML/~~RM~~/RC/311195.001).