**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**


**CAUSE NO. FSD 12 OF 2012 (ASCJ)**
**(ORIGINALLY CAUSE NO. G 484 OF 2008)**

**BETWEEN:**


**(1) MARIKA CHRISTOS LEMOS**
**(2) PANDELIS CHRISTOS LEMOS**
**(3) VIRTUS TRUST LIMITED**

**Plaintiffs**

**AND**

**CIBC BANK AND TRUST COMPANY (CAYMAN) LIMITED**

**Defendant**

## AMENDED WRIT OF SUMMONS

TO: CIBC Bank and Trust Company (Cayman) Limited of Box 694, 11 Dr Roy's Drive, Grand Cayman KY1-1107.

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

Within 14 days after the service of this Amended Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P. O. Box 495G, George Town, Grand Cayman, the accompanying Acknowledgment 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 14th day of October 2008.
Issued this 11th day of July 2013.

NOTE – This Amended 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 Acknowledgment of Service are given with the accompanying form.

## GENERAL INDORSEMENT

The Plaintiffs claims against the Defendant as sole Trustee of the settlement known as "the Panmar Trust" established by the Defendant by a Declaration of Trust dated 17th January 2000 ("the Trust") in respect of ~~(A)~~ the Defendant's sale on or about 18th October 2002 in breach of trust constituting inter alia (and without prejudice to the generality of the foregoing allegation) wilful default of its duties as trustee and/or wilful misconduct as trustee, negligently, and/or generally in breach of duty of the Panamax bulk carrier known as the *Oinoussian Seaman*~~;~~ ~~and~~

~~(B) the Defendant's acquisition by way of investment on behalf of the Trust on a date unknown to the Plaintiffs of shares in Enron and their subsequent retention in each case in breach of trust, constituting inter alia (and without prejudice to the generality of the foregoing) wilful default of its duties as trustee and/or wilful misconduct as trustee, negligently, and/or generally in breach of duty,~~

the following relief:

1. all proper accounts and inquiries necessary to determine the loss suffered by the Trust as a result of the Defendant's aforesaid breaches of duty;
2. payment to the Trust of all sums found due pursuant to paragraph 1 above;
3. damages for negligence and/or breach of trust and/or wilful default as trustee and/or wilful misconduct as trustee and/or breach of duty generally;
4. interest on the foregoing sums for such period and at such rate as the Court may think just;
5. further or other relief;
6. interest;
7. costs.

Conyers Dill & Pearman (Cayman) Ltd.

**CONYERS DILL & PEARMAN (CAYMAN) LIMITED**

~~**MAITLAND**~~

**THIS** AMENDED **WRIT** OF SUMMONS was issued by ~~M~~ by ~~Maitland~~ Conyers Dill & Pearman (Cayman) Limited, attorneys at law for the Plaintiffs, whose address for service is care of their attorneys, P. O. Box 2681, Boundary Hall, 2nd Floor, Cricket Square, George Town, Grand Cayman, KY1-111 ~~PO Box 1034, 4th Floor, Harbour Place, Grand Ceyman KY1-1102~~ .

Legal – 3540244.1

IN THE GRAND COURT OF THE CAYMAN ISLANDS
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**(1) MARIKA CHRISTOS LEMOS**
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**(3) VIRTUS TRUST LIMITED**

**Plaintiffs**

**- and -**

**CIBC BANK AND TRUST COMPANY (CAYMAN) LIMITED**

**Defendant**

## AMENDED STATEMENT OF CLAIM

### Introduction

1. The Defendant is a subsidiary of a major international bank, has at all material times carried on business in the Cayman Islands of acting as a professional Trustee, and was at all material times the sole Trustee of a Cayman Islands discretionary trust, established on 17th January 2000 by a Declaration of Trust ("the Declaration") made on that date. The trust is known as "Panmar" and will be referred to in this Statement of Claim as "Panmar".

2. At all material times the Defendant held itself out as an experienced professional Trustee and as possessing a degree of financial expertise commensurate with its status as a subsidiary of a major international bank; the Defendant acted as Trustee of Panmar for substantial reward, including a special and additional fee of 0.25% of the value of any ships held by Panmar.

3. Clause 10 of the Declaration provided expressly as follows:

"... the Trustees ... may exercise from time to time the following powers.

10.1 To retain any property belonging to or forming part of the Trust Fund ... including, for the avoidance of doubt, any ship or the shares of any company which owns a ship, or an interest in a ship, transferred to the Trustee by the trustees for the time being of the [Trofos] Foundation, so long as the Trustees shall think proper without being answerable for any loss occasioned thereby.

10.2 To sell ... all or any property at any time forming part of the Trust Fund ...

4. The Third Plaintiffs is the Trustee of Panmar and is suing in that capacity. Marika Christos Lemos and Pandelis Christos Lemos ("the Beneficiaries") are among the objects of the Defendant's discretion as Trustee of Panmar and are and have at all material times been the only living objects of that discretion and They sue as beneficiaries of Panmar.

**Relevant history**

5. On 2nd November 1999 this Honourable Court directed that the Trofos Foundation (under which the Plaintiffs Beneficiaries had previously been objects of the discretion of the Trustees of that Foundation) be divided on a just and equitable basis and its assets transferred into four sub-trusts, being one such sub-trust for the family of each of the children of the late Captain Pandelis Christos Lemos (the settler of the Trofos Foundation and the Plaintiffs' Beneficiaries' grandfather), pursuant to which Panmar was established with effect from 1st May 2000 and to a further Order made dated 18th April 2000 directing the scheme of division.

6. Pursuant to the aforesaid Orders assets were transferred in tranches to the Defendant by the Trustees of the Trofos Foundation comprising the following:

(1) cash and securities, and

(2) two Panamax dry bulk carriers known as the *Oinoussian Seaman* and the *Oinoussian Leader*.

7. The *Oinoussian Seaman* was of approximately 64,000 d.w.t and was delivered in 1987; and the *Oinoussian Leader* was of approximately 71,500 d.w.t and was delivered in 1997.

8. The *Oinoussian Leader* had been acquired by the Trustees of the Trofos Foundation for a price of US$ 29,413,049 financed in part by a loan from National Westminster Bank PLC of US$ 20,000,000 at LIBOR – 0.8% repayable over 10 years (that loan being jointly and severally secured on *Oinoussian Seaman*), further terms of that loan being that annual repayments of principal in the sum of US$ 500,000 would be paid semi-annually until and including 24th June 1999, and thereafter annual repayments of principal in the sum of US$ 1,670,000 would be made (again paid semi-annually), with the first payment of US$ 835,000 being due on 24th December 1999 and a final payment of US$ 6,475,000 being paid on 24th June 2007. Prior to the acquisition of the *Oinoussian Leader* the *Oinoussian Seaman* had been unencumbered.

9. The Defendant later sold the *Oinoussian Leader* and discharged the balance of the loan then outstanding from the proceeds of the sale. No complaint is made with regard to this transaction, and from that time the *Oinoussian Seaman* was once again unencumbered.

**Marsoft**

10. To the best of the Plaintiffs' knowledge and belief neither the Defendant nor any of its officers had any experience in or knowledge of the shipping market prior to their execution of the Declaration and acceptance of the *Oinoussian Seaman* and the *Oinoussian Leader*, but the Defendant nonetheless accepted the trusteeship and agreed to accept the *Oinoussian Seaman* and the *Oinoussian Leader* as Trustee of Panmar in the knowledge –

(1) that the operation of ships in the dry bulk shipping market could be a volatile and high risk investment, but was also an investment capable of generating very high returns;

(2) that separate proceedings had been commenced by the ~~Plaintiffs~~ Beneficiaries against the Trustees of the Trofos Foundation-

(a) seeking the directions of this Honourable Court as to whether the Trustees of the Trofos Foundation should sell or retain the *Oinoussian Seaman* and two similar ships, and the *Oinoussian Leader* and two similar ships ("the Originating Summons Proceedings"), and

(b) alleging breach of trust in the retention by those Trustees of the *Oinoussian Seaman* and her sister ships, and the acquisition of the *Oinoussian Leader* and her sister ships, which had allegedly (and in fact) resulted in very substantial losses to the Trofos Foundation;

(3) that the ~~Plaintiffs'~~ Beneficiaries' father (Christos Pandelis Lemos) was active in the shipping business and operated a company called Maritime Projects Limited in London; and

(4) that the ~~Plaintiffs~~ Beneficiaries were keen to continue their association with the shipping as the source of their family's wealth.

11. Accordingly, at and prior to the Defendant's appointment as Trustee of Panmar the ~~Plaintiffs~~ Beneficiaries made clear to the Defendant –

(1) that they were comfortable with a part of the funds of Panmar being invested in shipping and wished that course to be followed;

(2) that they regarded as an essential condition of the Defendant's appointment as Trustee of Panmar that they and their father should be consulted on all strategic decisions regarding the *Oinoussian Seaman* and the *Oinoussian Leader*, and especially in relation to any potential sale of one or both;

(3) that they accepted the Defendant's non-negotiable requirement that all the actual decisions would be made by the Defendant and the Defendant alone; and

(4) that in order to ensure that the ships were reasonably and properly managed at the trust level the Defendant should retain specialist advisers to assist the Defendant with its decision-making.

The Defendant accepted all of the foregoing.

12. Accordingly, at all material times the Defendant retained, with the ~~Plaintiffs'~~ Beneficiaries' knowledge, encouragement and approval, a company of specialist shipping analysts and advisers called Marsoft Inc. ("Marsoft"), whose principal place of business was and remains in Oslo, in the Kingdom of Norway.

13. As part of its standard advisory service Marsoft provided to the Defendant quarterly Investment and Risk Management Reports, which consisted in part of a general summary of the dry bulk market (especially in the context of their views on the world economy), and in larger part of an investment appraisal and forecasts of potential returns tailored specifically to the ships owned by the Defendant as Trustee of Panmar.

14. The forecasts of future returns provided by Marsoft were critically dependent on future charter rates and the residual values of ships at the end of the period under consideration, and those rates and values in turn depended critically on supply and

demand both for cargo and for the ships themselves which in turn depended on "the market's" perceptions of future supply and demand.

15. As acknowledged by Marsoft in their October 2002 Report ("the Marsoft October Report") and as had in conceptual terms always been the case from the beginning of Marsoft's retainer –

> " ... by end Q3 this year the [actual] IRR [of Seaman] was -1.4% p.a. for the period 2000 Q4 – 2002 Q3 vs. the expected [IRR] from 2000 of 7% ... This is no attempt to excuse the difference between forecast and actual, rather an attempt to show why some factors do not remain constant." (emphasis added)

In particular, therefore, and as must have been obvious at all times to the Defendant, Marsoft's forecasts of future returns –

(1) were no more than Marsoft's best estimates or approximations regarding the succeeding period of time;

(2) were inherently very sensitive to variations in their forecasts of future earnings and residual values;

(3) could not reasonably be, and were not intended to be, read or used as tools having the degree of precision which an analysis of a past return would have; and

(4) could not in any sense therefore be regarded as precise or guaranteed.

16. In addition to providing the quarterly reports mentioned above, Messrs Paal Monsen and Jørn Fredriksen of Marsoft were also available to the Defendant at all times for *ad hoc* consultation and/or for particular advice on any aspect of Panmar's shipping investment.

**The Benchmark IRR**

17. A Panamax bulk carrier is a wasting asset in the sense that it has a finite life span and an owner would expect to scrap it between 20 and 30 years or so after its launch, the precise time of scrapping depending in part at least –

(1) on when the ship was actually built, more recently built ships having generally a longer expected useful life, and

(2) on market conditions, for example whether the hire rates on offer at any time for a ship of the appropriate age would be sufficient to meet the ship's operating expenses.

The Trustees of the Trofos Foundation had previously adopted a conservative depreciation policy in respect of the *Oinoussian Seaman* of 15 years (by which is meant that in the accounts of the Trofos Foundation the *Oinoussian Seaman* had been depreciated on a straight line basis to its scrap value over a 15 year period), but as at October 2002 a 20 year expected life for the *Oinoussian Seaman* was regarded as more appropriate, as was recognised by Marsoft valuing the ship at that time at $7m which was significantly in excess of its scrap value.

18. In this Statement of Claim –

(1) the expression "IRR" is used to mean the internal rate of return of an investment project as follows:

"The percentage earned on the amount of capital invested in each year of the life of the project after allowing for the repayment of the sum originally invested."

(2) the expression "residual value" is used to mean the market value of a ship at the end of any charter or at any future time.

19. The IRR on a Panamax bulk carrier (whether it be its actual derived from actual past performance or its putative IRR derived from some forecasts) is a function over the period in question of the ship's –

(1) net market value (that is its value net of commissions on a notional sale) at the commencement of the period in question,

(2) earnings (that is its daily rate of hire),

(3) operating expenses (that is those costs of operating the ship which were or were to be for the account of the owner rather than the charterer), and

(4) net residual market value at the end of the period in question (that is allowing for rises or falls in the market).

20. Under the Trofos Foundation its Trustees had been subject to compliance with a Statement of Investment Policy and Principles ("SIPP") approved several years earlier by the Grand Court which provided *inter alia* as follows:

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.

21. In September 1998, and for the purposes of the Originating Summons Proceedings between the ~~Plaintiffs~~ Beneficiaries and the Trustees of the Trofos Foundation, Marsoft had determined a target IRR (referred to herein as the "Benchmark IRR") for a fleet of 6

bulk carriers including the *Oinoussian Seaman* of not less than 14.11%, using an analytical tool known as the Capital Asset Pricing Model ("CAPM"). At paragraph 82 of a report prepared by Marsoft in 1998 for that litigation (and which was available to the Defendant) Marsoft had advised as follows:

"For a project to be regarded as viable its IRR must exceed the return available on permissible alternative investments and its NPV [Net Present Value] must be positive at the discount rate appropriate for the risk inherent in the project. Whilst the IRR is an objective figure inherent in the cashflow the NPV is a product of the choice of discount rate. It is therefore necessary that the investor determines and uses a discount rate appropriate to the nature and risk of the particular project under consideration. An investor may choose a discount rate according to his personal perception of his project's risk; alternatively, there exist a number of scientific mechanisms whereby a "risk factor" may be determined on a mathematical basis. For the purpose of our risk analysis we have used CAPM..."

22. Accordingly, the original purpose of Marsoft determining the Benchmark IRR in 1998 at 14.11% was to provide a target return allowing objectively for risk in order to assist the Court in the Originating Summons Proceedings in deciding, in the context of paragraph 3.1 of the SIPP and the then prevailing economic and financial conditions, whether or not to order the Trustees of the Trofos Foundation to sell or retain the three ships they already owned (including the *Oinoussian Seaman*) and the three further ships that had been built and delivered in 1997.

23. The Declaration establishing Panmar contained no comparable provision to paragraph 3.1 of the SIPP, but nonetheless and following the Defendant's appointment as Trustee thereof, the Defendant decided to adopt and apply the concept of using a benchmark IRR, and in the event the Benchmark IRR as derived by Marsoft in 1998 of 14.11% to provide a target return in respect originally of the *Oinoussian Leader* and the *Oinoussian Seaman*, and latterly in respect of the *Oinoussian Seaman* alone.

24. The decision to adopt and utilize the concept of a benchmark IRR, and the level actually used of 14.11%, was a decision made by the Defendant alone.

25. The Benchmark IRR was neither intended nor suitable for use as a prescriptive tool, that is a tool replacing the exercise by the Defendant of the judgment to be expected of an ordinary reasonable and prudent man of business operating a ship, so that the Defendant would be required to sell a particular ship if it was not expected to achieve the Benchmark IRR, or to buy one if it was. The Purpose of determining and using the Benchmark IRR (of which, it is to be inferred, the Defendant was fully aware) was in the premises no more than to assist the decision-maker (i.e. the Defendant) in deciding whether to buy, retain or sell a particular ship having regard to the risk inherent in operating ships: the decision by the Defendant whether to buy, hold or sell a ship remained an exercise of the Defendant's judgment and was not to be made by a rigid application of the Benchmark IRR to the returns forecast by Marsoft (whether in the Marsoft October Report or otherwise).

26. In particular, and without prejudice to the generality of the foregoing, whether or not the return forecast from a particular ship met or exceeded the Benchmark IRR did not replace the Defendant's duty to consider whether to retain or sell that ship in the context of the returns then and prospectively available on other investment media.

27. Further, it is to be inferred from the Defendant's position as a paid professional Trustee and a subsidiary of a major international bank that at all material times the Defendant was fully aware of the following:

(1) how the Benchmark IRR had been determined;

(2) that the Benchmark IRR being used in 2002 was based on an assessment carried out by Marsoft as at September 1998;

(3) that the Benchmark IRR had not been revised since September 1998; and

(4) that the use of the Benchmark IRR as a prescriptive tool was inappropriate in the context of Marsoft's forecast returns.

28. The CAPM formula which Marsoft had used for calculating the Benchmark IRR in September 1998 was as follows:

$r_f + \beta(r_m - r_f) = E(r)$ where –

| | | |
|---|---|---|
| $E(r)$ | = | expected rate of return |
| $r_f$ | = | risk free rate of return |
| $r_m$ | = | market return |

The expression "$\beta$" in the foregoing formula is (and was used as ) a measure of volatility and had been calculated by Marsoft in September 1998 at 1.061, based on a sample of the share price volatility of 10 shipping companies quoted on the Oslo Stock Exchange.

29. The key constituents of the CAPM (as used by Marsoft in September 1998 and which produced the figure of 14.11%) were accordingly the following:

(1) the risk-free return which was then available (using as a proxy therefore the return available on US Government bonds) and which was 5.2% p.a. in September 1998,

(2) the historic average return which had been available on alternative investments (using as a proxy therefore the average past return on the S&P 500) which was 13.6% p.a. in September 1998, and

(3) the "β" to be applied to the foregoing, at 1.061.

30. Each of the three constituents of the CAPM (namely the "β" to be applied, the risk-free return and the historic average return on the S&P 500) was variable so that, and as was apparent from the Marsoft October Report (pages 14 and 15, as set out at paragraph 37(12) below), the Benchmark IRR required regular review and re-determination, in the premises at not less than annual intervals.

31. The Marsoft October Report advised (on page 14) and the First Plaintiff expressed the view (in the meeting held on 11th October 2002 to which reference will be made below) that the financial factors relevant to the determination of the Benchmark IRR had changed significantly since September 1998, from which it follows that by October 2002 at the latest the Defendant was aware –

(1) that the Benchmark IRR of 14.11% previously determined was out of date,

(2) that that Benchmark IRR should not accordingly be used as part of the Defendant's decision-making process, and

(3) that if a Benchmark IRR was to be used as part of the Defendant's decision-making process it should be recalculated.

32. Applying the CAPM formula set out at paragraph 28 above, and the relevant financial data set out on page 16 of the Marsoft October Report (namely a risk-free return of 1.75% and the average S&P return set out by Marsoft of 7.4%) correct Benchmark IRR as at October 2002 was 7.74%: 1.75 + 1.061 (7.4 – 1.75) = 7.74%.

**The Defendant's duties as Trustee**

33. The Defendant was at all material times under concurrent general duties to the ~~Plaintiffs~~ Beneficiaries both as the Trustee of Panmar and in tort –

(1) to exercise the reasonable skill and care to be expected of a paid professional Trustee that was a subsidiary of a major international bank, having regard in particular in the context of this claim to the potential risks and rewards inherent in participation in the shipping industry (by which is meant the direct buying, selling and operation of ships as distinct from investment in the shares of quoted shipping companies), and

(2) to monitor and review regularly the investments of Panmar and to manage them-

(a) in good faith,

(b) in the financial interests exclusively of the beneficiaries, and

(c) so as to generate the best financial return reasonably attainable having regard –

(A) to the risk inherent in any particular investment and

(B) to the alternative investments then available (the only other such investments which the Defendant has ever made having been investments in US bonds and international equities).

34. Further, by virtue of –

(1) the Defendant's acceptance of the trusteeship of Panmar knowing that it owned and operated ships and that those ships had been and were still at that time the subject of major litigation,

(2) the cyclical nature of shipping, its risk of significant loss and potential for substantial gain, and its volatility (each of which was well known to the Defendant),

(3) the special nature of shipping as an investment medium when compared with more mainstream trust investments such as equities and bonds (namely the close but varying correlation between supply and demand),

(4) the Defendant's position as part of a major international bank and as a professional Trustee responsible for a substantial investment and charging substantial fees,

(5) the fact that it would not be able to delegate any of the necessary investment decisions to professional investment managers as was to be (and was) done with respect to Panmar's other investments but would, on the contrary, have to make those decisions itself,

(6) the extra and special charge of 0.25% of the value of the ship(s), and

(7) the Defendant's (correct) insistence at all times that whatever consultations it might undertake with the ~~Plaintiffs~~ Beneficiaries and/or their father, it would be the Defendant and the Defendant alone that would make all the decisions,

the Defendant assumed and accepted a particular and special duty to ensure, and impliedly represented and warranted, that each of its officers who was, or might be or

become, involved in matters concerning Panmar's shipping assets and in particular in any decision to buy, retain or sell any one or more ship(s) –

(a) had sufficient training, ability, expertise and experience to understand fully what Marsoft was advising and the rationale and reasoning behind such advice;

(b) understood the limitations inherent in Marsoft's advice, and in particular that Marsoft's forecast returns were no more than forecasts based on their best assessment of the future and subject to a number of sensitivity factors, and could not in any sense be regarded as guaranteed nor as providing anything more than a broad estimate of how Marsoft saw the future;

(c) had familiarised himself with all the factors relevant to shipping as an investment (including, without limiting the generality of this pleading, the factors relevant to the Benchmark IRR including how Marsoft had determined it and its inherent limitations, particularly when applied to forecast returns);

(d) was fully up to date with and understood the general financial and economic factors being used by Marsoft in the context of the financial and economic conditions pertaining from time to time, especially in connection with the use of the Benchmark IRR;

(e) was aware and understood that the Defendant's duty was to maximize returns from the investments of Panmar, including the shipping component thereof, consistent with the risk being run and that pursuant to that duty –

(A) each and every decision with regard to the sale or retention of either of the ships or the acquisition of one or more further ships had to be judged exclusively on the foregoing criteria – namely the maximization of returns consistent with the risk being run,

(B) the Defendant was not entitled to have regard to extraneous factors which did not relate directly to the foregoing criteria, and

(C) in particular, that the Defendant was not entitled to adopt or follow any sort of policy of ceasing the operation of ships;

(f) in fact understood fully what Marsoft was advising and the rationale and reasoning behind such advice; and

(g) was sufficiently knowledgeable and experienced to question and test Marsoft's advice, and in particular to ensure that that advice was itself –

(A) based on current financial and economic conditions, especially in connection with the Benchmark IRR,

(B) internally consistent, and

(C) met fully the needs of the Defendant as a trustee of trust assets to consider how the funds then represented by the *Oinoussian Seaman* could better be invested.

**The *Oinoussian Seaman*, the "Marsoft February Report" and the "Marsoft October Report"**

35. In their Investment and Risk Management Report for February 2002 ("the Marsoft February Report"), Marsoft advised specifically with regard to the *Oinoussian Seaman* as follows:

(1) The ship had just completed a dry docking that had been "more than usually successful" according to Golden Union Shipping Co, SA ("Golden Union"), the ship's manager (who was in October 2002 to be the *Oinoussian Seaman's* eventual buyer).

(2) The estimated value of the ship had dropped from $8.21m at the beginning of 2001 to $6.48m at the end of that year, in each case net of 2% commission on a notional sale.

(3) "Strong gains" were "likely in 2003-2004" with a 20 year old Panamax (the *Oinoussian Seaman* was 15 years old at this time) increasing in value to $10.5m by the end of 2002 and $12m by early 2005.

(4) When carrying out a "buy/hold" analysis "2004/2005 stands out as the natural point of exit ... [and] at this point the risk is also greatest".

(5) The ship's IRR was expected to peak in Q3 2005 at 20.5%, and as illustrated by Figure 13 it was very unlikely that the expected IRR would be less than 14% through to Q3 2005.

(6) Marsoft's general conclusion was that –

" ... the Seaman should be kept until 2004/2005 rather than trying to sell the vessel now."

36. In July 2002 Marsoft presented to the Defendant a due diligence report ("the Blossom Report") on a proposal to change the technical management of the *Oinoussian Seaman* from Golden Union to Blossom Maritime Corporation ("Blossom"), a company owned by Christos Lemos (the ~~Plaintiffs'~~ Beneficiaries' father) and his brother George Lemos.

37. At page 1 of the Blossom Report Marsoft expressed their opinion that they –

" ... would have no difficulty in recommending a switch to Blossom if the company agree to the conditions listed at the end of this report".

The conditions referred to by Marsoft related to Blossom's financial strength, were acceptable to Blossom, and would in any event be met within the time period set out by Marsoft.

38. By recommending the change in technical management subject only to conditions relating to Blossom's own financial strength Marsoft were to be taken by the Defendant as having accepted the comparison table of operating expenses set out at page 3 of the Blossom Report as follows:

| | |
|---|---|
| Golden Union (Greek flag): | $4,081 per day. |
| Blossom (Greek flag): | $3,653 per day. |
| Blossom (Cyprus flag): | $3,272 per day. |

Accordingly, at all material times after July 2002 the Defendant was aware that savings of up to $809 per day in operating expenses ($295,285 p.a.) were available at a one-off cost incurred on changing flag of approximately $100,000 as advised by Marsoft.

39. In their Investment and Risk Management Report dated October 2002 ("the Marsoft October Report"), and despite the very substantial change in the investment factors relevant thereto (as noted at page 14 thereof), Marsoft referred repeatedly to the

Benchmark IRR as being 14%, from which it is to be inferred that Marsoft had been instructed to maintain and use as the Benchmark IRR the figure derived in and prior to September 1998.

40. In the Marsoft October Report Marsoft advised expressly and specifically with regard to the *Oinoussian Seaman* as follows:

(1) At page 2:

" ... the prices for these ships have returned to their early 2001 levels, despite the fact that rates are still 15-20% below where they were at that time."

(2) At page 6:

"Similarly ... both spot and TC rates were still nearly 20% below their early 2001 levels.

However, this did not prevent Panamax secondhand value from rising back to their early 2001 levels. Most Panamax values rose by $1-1.5 million over the past three months, with a 10 year old vessel moving from $10.2 million to $11.5 million."

(3) At page 7:

"We have had a request from Transfield to extend the charger @ USD 7.250 per day for 5/7 months. The offer was declined and we countered at around USD 8.000 for such period, or USD 7.750 for 3/5 months. No response has been received from the charterer. We are currently in the market to fix a new charter ..."

(4) At page 7:

"As the market has rebounded strongly over the past couple of months we have heard from brokers that a price of USD 8 mill. may be obtainable for the vessel.

These are vague indications and USD 8 mill. is substantially above the current value Marsoft assign (sic) to Seaman and deserves to be followed up."

(5) At page 8:

"We have in the report included an analysis where USD 8 mill. is used as the expected value of Seaman today, and will show what the lowest acceptable price is in order not to breach the requirement of generating an expected IRR of at least 14% p.a."

(6) At page 8:

"As the year moves towards an end we have a chance to revisit the OPEX issue. Golden Union did in 2001 operate the vessel at USD 4.260 per day ... This year they are down to about USD 4.180 per day. The estimate for this year was USD 4.100 per day and we will seek to reduce the OPEX further. ... The reduction in ongoing maintenance should be acceptable, especially as we may be looking to sell the vessel between now and 2004 Q1. This issue is obviously something to be confirmed by the Trustees and Beneficiaries, ..."

(7) At page 8:

"Marsoft expect the rates [i.e. the daily time charter rates] obtainable for Seaman to peak in 2004 Q1".

(8) At page 9:

"As can be seen Marsoft estimate the current value of Seaman to be USD 7 mill. The value will drop about USD 0.5 mill. over the next 3-4 quarters, before leveling out when the market picks up. As can be seen in figure 8, 2004 Q1 is the last quarter before the value of Seaman turn downwards. Even though we have used this quarter as the point of liquidation of the vessel in the investment analysis, we will certainly start the process of selling at least 6 months before, i.e. in the middle of 2003.".

(9) At page 10: Under the hearing of "Buy-Hold Analysis 2002 Q3" said this:

"Based upon the factors described above, Marsoft have performed the Buy-Hold analysis from now onwards. The criteria are, as usual, simple; holding the vessel at its current value is equivalent of buying the vessel at the same value. To do such an investment the expected IRR p.a. over the period have to exceed 14%, and no new equity is to be added to the existing equity base."

(10) At page 11: At Figure 9, Marsoft illustrated their expected IRR and commented as follows:

"As can be seen the IRR peaks in 2004 Q1. However, liquidating in 2004 Q1 may mean more exposure is carried than acceptable for Panmar, therefore Seaman may be sold at any point from 2003 Q2 to 2004 Q1. All through the period Marsoft expect the investment to produce an IRR in excess of 14%.

Also, if a decision is made to hold the vessel till scrap Marsoft expect the IRR to hover around the required return of 14%."

At Figure 10 Marsoft illustrated the probability of attaining an IRR at various levels, and said this:

"As Figure 10 shows the expected IRR is 18%, but if the market develops according to the Low Case, the downside is significant. ... However, 2004 Q1 is at the very peak of the market. If the market slides downwards a couple of months before anticipated we may not be able to sell the vessel."

(11) At page 12: Marsoft discussed the risk/reward ration and said this:

"Calculating a Sharpe ratio for each quarter starting 2003 Q2 show that 2003 Q4 is the best quarter to sell the vessel.

...

Leaving the academics for a second, it certainly makes sense trying to sell Seaman in Q3 and Q4 next year, when the assumption is that 2004 Q1 is the peak of the market. By selling in Q3/Q4 we maximize the return with acceptable distance from the peak ..."

(12) Pages 14 and 15:

"Much has happened since [Q4 2000], and one thing in particular is worth noting. When the required rate of return was determined to be 14%, this was based on certain assumptions. The main parameter was that the S&P 500 had yielded an average return of 14% over the 10 previous years (now this is down to 7.4%). Implicit in that assumption is the risk free interest rate, which averaged 6.5% (sic) over the same period.

The 14% return used as a benchmark was then built upon 6.5% risk free interest rate, and the equity markets premium on the same risk free rate (7.5% premium).

Since then both the S&P 500 and the risk free interest rate have been in free fall. The current risk free rate is 1.75% and the equity market premium is turned into an average discount of 19.5% over the period 2000 Q4 till now. Marsoft certainly did not expect the economy to turn around as abruptly as it did, but yet Seaman has performed relatively well. By end Q3 this year the [actual] IRR [of Seaman] was -1.4% p.a. for the period 2000 Q4 – 2002 Q3 vs. the expected [IRR] from 2000 of 7% ... This is no attempt to excuse the difference between forecast and actual, rather an attempt to show why some factors do not remain constant. At the end of the day we are looking at very real, practical opportunities available to us. Another way of showing that could be to say that the average risk free interest rate over the same period has been 4.3%, clearly better that the performance of Seaman. The average return on the S&P 500 has been negative 15.25% p.a., much worse than the performance of Seaman.

If Seaman is sold sometime between 2003 Q2 and 2004 Q1 we are looking at an expected IRR p.a. from 2000 Q4 till sale between 5 and 7%. This is certainly less than we started out with [i.e. were originally forecasting], but better than many of the current alternatives."

(13) Page 16: At Figure 17 Marsoft plotted the potential sale values against expected IRR and advised as follows:

"As can be seen from Figure 17, any sales value above USD 7.5 mill. will be acceptable based upon the target return."

(14) Also at page 16 and under the hearing "*Conclusion*" Marsoft said this:

Therefore, at current SH values Marsoft see no need to start the sales process in another 6-9 months, with the aim to sell in the latter half of next year. However,

to investigate the possibility of achieving USD 8 mill. for the vessel we will start the process early next year.

The exception will obviously be a decision to keep the vessel until scrap."

In each case the emphasis has been supplied.

41. Marsoft did not at any point in their October Report advise in express terms that it was necessary to revise the Benchmark IRR, although the need for such revision was obvious to the ~~Plaintiffs~~ Beneficiaries and was expressly and clearly raised by them in the meeting on 11th October 2002 to be referred to below, and should and would have been obvious to the Defendant had it considered properly (or at all) what Marsoft had said at page 14 of the Marsoft October Report (as pleaded at paragraph 37(9) above). Given that the Defendant is and was at all material times a subsidiary of a major international bank the Plaintiffs will say that it must in fact have been known generally to the Defendant from its knowledge to the investment climate generally, and in particular from Marsoft's comments at page 14 of the Marsoft October Report, that the Benchmark IRR of 14% (which had first been determined by Marsoft in September 1998) was by then out of date and that it should have revised that figure.

42. Nor did Marsoft at any point in their October Report advise –

(1) regarding the potential for chartering the *Oinoussian Seaman* on a long-term time charter for (say) 12 or 24 months as opposed to continuing to operate the ship effectively in the spot market, nor

(2) regarding the implications of such a time charter, namely that for the period covered thereby the prospective return would not depend on forecast rates but on the rate agreed, and that that return would be completely secure over the relevant period subject only to the solvency of the charterer against which

insurance was readily available at modest cost (known as Time Charter Default Insurance – "TCDI").

Nor at any time to the best of the Plaintiffs' knowledge and belief did the Defendant raise the potential for a long-term charter and its financial implications with Marsoft and ask them to advise in respect thereof.

43. Had the Defendant sought advice from Marsoft regarding long-term charters their advice could only have been as follows:

(1) Subject only to the solvency of the charterer (against which insurance was readily and cheaply available) the risk inherent in relying on forecast earnings and thus forecast returns ceased to exist, in that the vessel's future earnings for the duration of the charter would be known.

(2) Thus, the prospective return inherent in a long-term charter over a period of (say) 12 or 24 months could have been determined to a high degree of accuracy (the only real area of uncertainty being the residual value of the ship at the end of the period).

**Matters arising from the Marsoft October Report**

44. Prior to discovery herein the Plaintiffs have no knowledge as to what discussions (if any) the Defendant had with Marsoft prior to or after the 11th October meeting or questions the Defendant raised with Marsoft on the Marsoft October Report (no meaningful discussions have thus far been asserted in relation to that Report and its recommendation), but –

(1) the Marsoft October Report was not finalised until late in the evening of 10th October, so that

(2) the Defendant cannot have given any, still less any proper or meaningful, consideration to its contents prior to the meeting of 11th October even if, which is denied, the Defendant gave at any time any critical or proper consideration at all to the said Report.

45. For the avoidance of doubt, the notional appraisals or analyses which the Plaintiffs say the Defendant should have caused Marsoft to carry out (described as notional because they were not in fact carried out so far as the Plaintiffs are aware) could have been carried out by Marsoft very easily either prior to or during the course of the 11th October meeting (to be referred to below), had the Defendant asked for them which it should have done. They are based on Marsoft's own analyses and data and/or on data compiled by Clarksons (a well known firm of London ship brokers) which was readily available to Marsoft, and have been carried out on the Plaintiff's behalf for the purpose of this Statement of Claim using commercially available software known as "Shipinvest", which requires just five figures to be input in order to calculate the prospective IRR, namely –

(1) the initial net market value,

(2) the daily hire rate,

(3) the ship's daily operating expenses,

(4) the net residual market value, and

(5) the period of hire.

46. In addition to raising and discussing with Marsoft the matters pleaded at paragraphs 38 to 41 above, the Defendant ought to have raised a number of matters expressly with Marsoft prior to the 11th October meeting (or at the latest at that meeting), such as –

(1) the continuing appropriateness of using 14% as the Benchmark IRR, when the Defendant would have been informed by Marsoft that that figure was completely out of date and the correct figure was 7.74%;

(2) the suggestion apparent from the Marsoft October Report that the market was trending upwards, when the Defendant would have been informed that the 4 week moving average was indeed rising significantly;

(3) Marsoft's continuing use in determining the putative IRR of the *Oinoussian Seaman* of Golden Union's daily OPEX of $4,100 per day, when to the Defendant's knowledge Marsoft had supported a change of technical management to Blossom and a change to the Cypriot flag, for a future OPEX rate of $3,272 per day;

(4) Whether the counter-offer to Transfield of a charter for 5/7 months at $8,000 per day was realistic (when the Defendant would have been told it was) and what would be the implication in terms of a return for the *Oinoussian Seaman* of a charter at such a level and for such a period, when the Defendant would have been informed that the expected IRR would depend on what OPEX figure was used and on the ship's residual value 6 months hence (i.e. at the end of the charter), and that realistic scenarios would have shown the following:

(a) using the Blossom OPEX of $3,272 per day, the net price available from an offer of $8m ($7.632m), a residual value of $7.382m after 6 months and the $7,250 per day offered by Transfield the IRR would have been 8.95%,

(b) adjusting the daily hire to the $8,000 per day which Marsoft regarded as reasonable would have resulted in an IRR of 12.46%, and

(c) even assuming that the whole of Marsoft's forecast loss in value of $0.5m over the following year were to occur in the first 6 months following October 2002, the IRR at $8,000 per day would have been 5.95%;

(5) the implications of Figure 10 in the Marsoft October Report, when the Defendant would have been informed that there was a high probability of the *Oinoussian Seaman* generating an IRR of 12 ½% of the following year;

(6) the implications of the "rumour" that someone was prepared to pay $8m for the *Oinoussian Seaman* when the Defendant would have been informed –

(a) that if there was one buyer at that level there would probably be more than one (as there was),

(b) that a higher initial value would depress the prospective IRR unless one or both of the forecast earnings and/or residual value ought to be increased,

(c) that the putative buyer at that level must accordingly be prepared either to accept a lower return or believe that one or both of the forecast earnings and/or residual value would be higher, and

(d) that any general increase in ship values as at October 2002 would be likely to carry over to residual values after 6 months.

47. The Defendant ought also to have requested Marsoft to carry out a number of appraisals in order to inform the Defendant of the sensitivity of Marsoft's expected IRR.

48. Throughout these notional appraisals a figure for daily operating expenses of $4,100 has been used being the figure referred to by Marsoft in their October Report, although the comparable figure appearing in the ship's manager's interim accounts as at June 2002 was $3,719 per day (so that if the figures provided by Golden Union as manager were to be used the prospective IRR would in every case be higher).

49. On 11th October 2002 data down to 4th October (at least) was available from Clarksons which would have demonstrated, had the Defendant asked for it, that the market was rising steadily at that point:

(1) the 4 week moving average rate on a 6 month time charter for a 65,000 dwt Panamax bulk carrier had risen from $6,425 per day in August 2002 and was $8,125 per day as at 4th October 2002, as against $7,875 for the previous 4 week period; and

(2) the 3 and 2 week moving averages were respectively $8,250, and $8,500 per day.

Accordingly, any assessment of the prospective return from *Oinoussian Seaman* could reasonably, and should properly, have been based on earnings of not less than $8,125 or thereabouts.

50. In particular, during October 2002 Clarksons recorded 31 charters of Panamax bulk carriers. Of those 31 charters –

(1) all but one were for periods of 4-6 months and 5-7 months;

(2) two were at $7,000 and $7,500 per day respectively, one was at $8,000 per day and the remainder were at more than $8,500 per day;

(3) there was one 12 month charter, of a ship called the *Ark Fortune*, at $9,400 per day which adjusted for size was equivalent in the case of the *Oinoussian Seaman* to $8,720 per day;

(4) the nominal average rate was $9,302 per day which adjusted for the size of the *Oinoussian Seaman* equated to $8,405 per day.

51. On the *Oinoussian Seaman's* then value as estimated by Marsoft of $7m, and assuming a residual value of $6.75m (that is assuming that Marsoft's forecast fall in value of $0.5m over the following year did actually occur and in a straight line), a 6 month charter at the overall October average (as adjusted for size) would have yielded an IRR of 14.31%; and based on the *Ark Fortune's* charter mentioned above, the 12 month IRR which *Oinoussian Seaman* was capable of generating would have been 16.22%.

52. Further:

(1) A rate of at least $9,000 per day gross over a 24 month charter was available from the end of 2002 commencing in March 2003.

(2) Had Marsoft been asked in October 2002 to determine the return from operating the *Oinoussian Seaman* implied by such a rate and over such a period their answer would have been broadly as follows (based on residual values at the end of the 24 month charter as stated in each case and allowing for the $900,000 cost of dry docking in the period):

(a) October 2002 value = $7m; residual value = $6.5m as forecast by Marsoft base case in the Marsoft October Report.

Prospective IRR = 13.88%.

(b) October 2002 value = $7m; residual value = $7m as forecast by Marsoft best case in the Marsoft October Report.

Prospective IRR = 17.03%.

(c) October 2002 value = $8m (pursuant to Golden Union's offer); otherwise as under (a) above.

Prospective IRR = 5.95%.

(d) October 2002 value = $8m (pursuant to Golden Union's offer); otherwise as under (b) above.

Prospective IRR = 9.11%.

The Plaintiffs repeat in this context that Marsoft had advised the Defendant at page 14 of the Marsoft October Report that at this time the risk-free return on US Government bonds was just 1.75%, the S&P 500 had fallen substantially during 2002, and that the correct Benchmark IRR would in fact have been 7.74% had it been re-determined.

53. Accordingly, a careful, proper and fair reading of the Marsoft October Report, coupled with the only answers that Marsoft could have given to the various matters that ought expressly to have been raised with them by the Defendant, could only have led the Defendant to the following conclusions:

(1) "The market" was expecting hire rates to rise and the trend was upwards – see paragraph 37(1) above, and see the rising moving average referred to at paragraph 49 above.

(2) The Benchmark IRR of 14.11% was by then completely out of date and ought not to be used: the right Benchmark IRR was 7.74% - see paragraphs 31 and 37(9) above.

(3) A return of 14% could still have been achieved, however, by holding the *Oinoussian Seaman* until it was to be scrapped (thus eliminating virtually all uncertainty over residual values) – see paragraphs 37(7) and 37(11) above – and coupled with then available time charters and TCDI eliminating virtually all uncertainties.

(4) A good return could also be achieved throughout 2003 – see paragraphs 37(5) and 37(7) above.

(5) The returns available on US Government bonds were down to 1.75% and the S&P 500 had fallen significantly during 2002.

(6) Purely in terms of the prospective return on the *Oinoussian Seaman* the sensible time to consider a sale was towards the end of 2003 – see paragraph 37(11).

(7) It would also be prudent to explore the possibility of a long-term fixture.

**The 11th October 2002 meeting**

54. On 11th October 2002 a meeting took place in London between the ~~Plaintiffs~~ Beneficiaries and their father, Messrs Richard McMillan and Ben Gilooley of the Defendant, and Mr

Jørn Fredriksen and Paal Monsen of Marsoft at which the Marsoft October Report was seen by the ~~Plaintiffs~~ Beneficiaries and their father for the first time.

55. The said meeting was held pursuant to the ~~Plaintiffs'~~ Beneficiaries' consistently expressed view (to which the Defendant had agreed when it accepted the trusteeship) that they wished to be consulted with regard to all financial matters relating to Panmar and especially with regard to its shipping interests, and in order to discuss issues concerning primarily –

(1) the future operational management of the *Oinoussian Seaman* (i.e. whether Golden Union should be replaced by another and cheaper manager, which would in and of itself have resulted in an improved IRR),

(2) the possible sale of the *Oinoussian Seaman*, and

(3) the management of Panmar's general investment portfolio.

56. At that meeting the Beneficiaries, the First Plaintiff in particular, raised expressly the question of the Benchmark IRR and the fact that a Benchmark IRR of 14% was by then out of date and no longer appropriate having regard to the markets generally and the potential returns available on alternative investments. She was told by Mr Fredriksen that the Benchmark IRR was a matter for the Defendant as Trustee.

57. The CAPM formula set out above and which had been used by Marsoft to calculate the Benchmark IRR in September 1998 was neither complex nor difficult to apply once the appropriate returns had been obtained, and those figures were in fact set out in the Marsoft October Report as pleaded above. Accordingly, a revised and updated Benchmark IRR could and should have been calculated during the meeting, which

would have yielded the following, as set out at paragraph 32 above: 1.75% + 1.061(7.4% - 1.75%) = 7.74%.

58. Despite the simplicity of its calculation, and the First Plaintiff having expressly requested that the Benchmark IRR be updated, no revised Benchmark IRR was produced to the meeting, from which it is to be inferred that the Defendant continued to regard 14% as the Benchmark IRR despite having information and advice from Marsoft that it was no longer appropriate and that opinion having been supported and reinforced by the First Plaintiff.

59. In the premises, all discussion at the meeting on 11th October regarding the future sale or retention of the *Oinoussian Seaman* and all consideration thereof by the Defendant must have proceeded on a Benchmark IRR of 14% when it should have been predicated on a Benchmark IRR of 7.74%.

60. Subsequent to the aforesaid meeting, the First Plaintiff sent an e-mail on 13th October 2002 to Mr McMillan, forwarding an e-mail from Maritime Projects and concluding with her personal views (on behalf of herself and the Second Plaintiff) as follows:

> "I would also like to see a similar thought process that is given to shipping, to be given to the investment portfolio, with projections and analyses on paper as well as orally – so that we do not become complacent about those assets. This is particularly significant if we are seriously to consider selling the ship."(emphasis supplied)

From the discussion at the meeting, which was reinforced by the two e-mails referred to above (to both of which the Plaintiffs will refer at the trial of this action for their full terms and true effect), it was clear and obvious to the Defendant that the ~~Plaintiffs~~ Beneficiaries at that time (that is after the 11th October meeting) –

(1) believed – rightly – that a Benchmark IRR of 14% was no longer appropriate and should not be used and that a revised and updated Benchmark IRR should be

obtained (the Beneficiaries ~~Plaintiffs~~ were not at that time aware of just how simple the calculation was),

(2) considered – again rightly – that there were a large number of strategic factors which needed to be considered before a decision to sell could be reached, as set out in the maritime Projects' e-mail referred to above, one of the principal factors being –

" … the return available on permissible alternative investments …"

as Marsoft had advised in September 1998 (and as was no more than basic common sense and one of the more important considerations inherent in the Defendant's duty as Trustee), and

(3) believed – wrongly in the event – that the possible sale of the *Oinoussian Seaman* was no more at that time than a mere possibility, and one that was not then being considered "seriously" by the Defendant, *inter alia* because Marsoft had advised clearly in their October Report, and not resiled from that advice during the meeting, that it was not appropriate to sell at that time.

61. In particular, nothing was said at the 11th October meeting either by the Defendant or by Marsoft to contradict the advice given in the Marsoft October Report that whilst the Defendant should be starting to look at a possible sale, the time generally for so doing had not yet arrived.

62. On 17th October 2002 the *Oinoussian Seaman* was sold to its manager, Golden Union, for $7.632m net of commission of which the Plaintiffs believes just $7.3m found its way into Panmar's account.

**The sale process**

63. The process by which the *Oinoussian Seaman* came to be sold was, according to the Defendant and/or Marsoft, as follows (the Plaintiffs have no personal knowledge of what actually happened):

(1) Following the 11th October meeting Marsoft (with, it is to be inferred, the agreement of the Defendant or on the Defendant's instructions) instructed R S Platou ("Platou") a firm of Oslo ship brokers to make discreet enquiries of potential buyers for the ship.

(2) The Plaintiffs do not know whether Platou did contact any other potential buyer apart from Golden Union, but Platou did contact Golden Union.

(3) On 17th October Marsoft contacted Mr Veniamis, the managing director of Golden Union, who orally offered $7.5m for the *Oinoussian Seaman*.

(4) That offer was rejected by Marsoft who informed Mr Veniamis that a price of in excess of $8m was required.

(5) On 18th October Golden Union formally offered $7.5m through Platou, who were instructed by Marsoft to make a counter-offer of $8.4m, without apparently any express instructions from the Defendant –

> " ... as the bid was far below the USD 8 mill. target."

(6) At 14.38 (presumably Oslo time) on 18th October 2002 Marsoft received a further bid from Golden Union at $7.6m which was rejected and a further counter-offer made to sell at $8.3m.

(7) At 16.08 on that day Golden Union made a further bid to Marsoft of $7.9m which was expressed to be open for acceptance for one hour only.

(8) Following this latest bid Marsoft contacted Mr McMillan at his home and informed him of the bid and that Golden Union were prepared to offer certain further concessions (such as free cancellation of its existing management contract) inferentially to "sweeten" the offer. According to Marsoft this took the gross value of the offer to more than $8m.

(9) After Mr McMillan had arrived at his office and contacted Marsoft he was apparently told that he had just 15 minutes to contact the Defendant's managing director and make his decision.

(10) At 15.49 (sic) the Defendant instructed Marsoft to proceed, the final price amounting to $7.95m less commissions.

64. At no time during the aforesaid negotiations were the ~~Plaintiffs~~ Beneficiaries informed that serious discussions for the sale of the *Oinoussian Seaman* were even taking place, still less were they consulted as to the principle of the sale or its price. Had the ~~Plaintiffs~~ Beneficiaries been consulted they would have informed the Defendant –

(1) that, far from the price offered by Golden Union being at such a level that it should immediately be accepted, the ~~Plaintiffs'~~ Beneficiaries' father was within a week due to sign (which in fact he did) a Memorandum of Agreement for the acquisition of a Panamax bulk carrier of comparable size and age to the *Oinoussian Seaman* for $8.5m, and

(2) that the ship to be acquired (and which was acquired and renamed *Sea Challenge*) was to be managed by Blossom, thereby meeting one of the main concerns expressed by Marsoft when they had considered changing the technical management of the *Oinoussian Seaman* in July 2002, and thus invalidating all Marsoft's forecast returns which had been predicated on operating expenses of $4,100 as charged by Golden Union and not the $3,272 which would have been charged by Blossom.

65. In October 2002 Marsoft provided an "Intermediate Report" (the Marsoft Intermediate Report") purporting to explain the thinking behind the Defendant's decision to sell the *Oinoussian Seaman*. At page 2 Marsoft explained the Defendant's approach as follows:

"As can be seen above, with a net value of USD 7.78 mill., but everything else kept the same as in the Q3 report [the Marsoft October Report], the expected IRR in 2004 is around 10% vs. expected 18% - 16% in the Q3 report. The new expected IRR is below the required return of 14% used as the benchmark in this project.

The expected IRR is at/below the 10%-11% briefly discussed as a potential new benchmark for the project.

All things considered, most of them discussed at our meeting and the Q3 report, in Marsoft's opinion this was a sales recommendation." (emphasis supplied)

66. In fact –

(1) from page 1, the net price was $7.632m and not $7.78 (and for reasons the Defendant has never explained only $7.3m was ever credited to Panmar's account);

(2) no figures for a revised Benchmark IRR at 10%-11% were discussed in the presence or hearing of the ~~Plaintiffs~~ Beneficiaries (and in any event such figures are wholly inconsistent with the application of the CAPM formula on which the

Benchmark IRR was based in the context of the relevant figures set out in the Marsoft October Report);

(3) in any event the true revised Benchmark IRR was 7.74% as Marsoft would have informed the Defendant had the Defendant asked;

(4) the expected IRR on a sale price even of $7.78m exceeded the revised and correct Benchmark IRR; and

(5) on any honest and objective analysis carried out exclusively in the financial interest of the beneficiaries there was no basis whatsoever for the Defendant considering that Marsoft's analysis mandated a sale of the *Oinoussian Seaman*.

**The Defendant's breaches of duty**

67. The Defendant's decision to sell the *Oinoussian Seaman* was a breach of trust and/or breach of the Defendant's duty to take reasonable care:

**PARTICULARS**

**The Benchmark IRR**

(1) The Defendant wrongly elevated the Benchmark IRR into a prescriptive requirement, to the effect that if the expected IRR as forecast by Marsoft did not meet precisely the Benchmark IRR the *Oinoussian Seaman* would be sold.

(2) In regarding meeting the Benchmark IRR as a requirement the Defendant failed to obtain and/or to heed advice from Marsoft on, and/or to recognise or accord

any or any proper weight to, the obvious limitations inherent in applying the Benchmark IRR in such a way to forecast earnings and residual values namely –

(a) that Marsoft's forecasts were not guaranteed projections,

(b) that those forecasts had historically varied from quarter to quarter and would continue to vary in each quarter in the light of changing perceptions of the shipping market as well as actual experience,

(c) that those forecasts were acutely sensitive to the input data and assumptions made therein,

(d) that it was inherently impossible (except by co-incidence) that the forecast IRR would ever be met precisely (or even approximately) by the ship's actual IRR over any given period,

(e) that even small variations in forecast earnings or residual values could have a significant effect on the forecast IRR,

(f) that the actual experience and performance of the shipping market over any given quarter was always going to be and always had been (save by co-incidence) at variance from its performance as previously forecast by Marsoft,

(g) that the Benchmark IRR was neither designed nor intended to be used for such a purpose and with such rigidity in the context of forecast earnings and residual values, each of which would be inherently inaccurate and impossible to forecast with the degree of precision required when the

Benchmark IRR was being used prescriptively as was done by the Defendant in October 2002.

**The Marsoft October Report**

(3) The Defendant failed to appreciate or consider properly or at all –

(a) that Marsoft was in any event advising that despite a Benchmark IRR of 14% being by that time far too high, a prospective IRR of 14% was available, as set out at paragraphs 37(7) and 37(11) above, if the *Oinoussian Seaman* were to be retained and operated until it was scrapped,

(b) that that advice implied an effective underpin to the future operation of the ship at a Benchmark IRR of 14% thus allowing the Defendant to retain the ship with such a forecast return and be in a position to take advantage of any upturn in the market before 2007 (the likely time at which the *Oinoussian Seaman* would be scrapped, unless the market was strong),

(c) that the risk warning given by Marsoft in the last sentence on page 11 of the Marsoft October Report was therefore redundant and irrelevant, and

(d) that operating the ship until it was scrapped at an IRR of 14% provided an expected return that was very high when compared with the returns potentially available from other investments.

(4) The Defendant must have accepted and followed Marsoft's advice regarding Table 17 in the knowledge, or without appreciating fully or at all, that Marsoft had already advised on matters that rendered its premise – namely that the Benchmark IRR was 14% - out of date and inappropriate.

(5) The Defendant failed to understand properly or at all Figure 10 which showed that there was a very high probability of achieving an IRR of at least 12½% by retaining the *Oinoussian Seaman* through 2003 and down to the First Quarter of 2004.

(6) Further, the Defendant failed to appreciate or consider properly or at all, or to evaluate, the potential IRR inherent in retaining the *Oinoussian Seaman* (namely 12½% down to the First Quarter of 2004 or 14% if the vessel were to be retained until being scrapped) and thus the potential sale thereof in the context of –

(a) the risk free return currently advised by Marsoft – 1.75% and/or

(b) the then historical average return on the S&P 500 – 7.4%,

(c) the fact that the S&P 500 had fallen very significantly during that year, and

(d) the forecast returns advised by Marsoft as set out above,

that potential IRR (12½%) being significantly in excess of the correct Benchmark IRR of 7.74% and very significantly in excess of the returns available at that time on alternative investments.

(7) The Defendant failed to appreciate, or to give any or any proper weight to Marsoft's advice as pleaded at paragraphs 37(1) to (4) above –

(a) that the potential sale of the *Oinoussian Seaman* could safely be deferred until the end of 2003 at the earliest, and

(b) that during that period the ship would be generating a return very significantly in excess of that available from any alternative investment.

(8) The Defendant failed to appreciate, or to give any or any proper weight to, the fact that the statements by Marsoft pleaded at paragraphs 37(1) and (2) above implied very clearly that the shipping market itself was expecting rates to rise.

(9) The Defendant failed to make any or any proper enquiries of Marsoft as to the relationship between an offer at a higher price than that at which Marsoft had valued the *Oinoussian Seaman* – namely $8m as against the Marsoft value of $7m – and any expectation of an increase in T/C rates.

(10) The Defendant failed to make any or any proper enquiries of Marsoft during the week after the 11th October meeting referred to above and in particular and particularly on 18th October –

(a) as to why they were then recommending an immediate sale when the Marsoft October Report was consistent in all its fundamentals with the Marsoft February Report pleaded at paragraph 20 above and both Reports had recommended holding the ship until the end of 2003, and

(b) as to what fundamentally had changed so as to require the change of strategy leading to Marsoft's recommendation of an immediate sale.

(11) The Defendant failed to question Marsoft on the Marsoft October Report and/or appreciate or to give any or any proper weight to the fact that the Marsoft October Report and the advice to sell at the price offered by Golden Union (which the Defendant has claimed Marsoft gave it) were each based on a number

of unresolved and fundamentally important inconsistencies and errors in the Marsoft October Report itself:

(a) Marsoft's apparent advice that a sale price of $7.5m was acceptable was based on a Benchmark IRR of 14%, when it had earlier advised in the Marsoft October Report that the basis on which the Benchmark IRR had been determined was no longer valid.

(b) The advice set out at paragraph 37(1) above indicated clearly that the shipping market itself was expecting rates to rise.

(c) Given the advice set out at paragraph 37(2) (especially in the context of the remainder of the Marsoft October Report) it was neither consistent nor objectively justifiable for Marsoft then to advise – without further explanation – that the *Oinoussian Seaman* (which had just had a good dry dock) was then worth just $7m when an experienced operator was offering $8m.

(d) The apparent urgency to sell to Golden Union in October 2002 and within just hours of an offer being made was quite inconsistent with the advice pleaded at paragraphs 37(4) and 37(5) above.

(e) Marsoft had advised as set out at paragraph 37(9) that the returns on "both the S&P 500 and the risk free interest rate have been in free fall", the S&P 500 return having fallen from 14% to 7.4% and the risk-free return having fallen from 6.5% to 1.75%, yet had also advised (as pleaded at paragraph 37(7) and repeated as pleaded at paragraph 37(11)) that the *Oinoussian Seaman* was expected to return 14% if held until it was scrapped.

(12) The Defendant failed properly or at all to consider and evaluate, or to ask Marsoft to consider and evaluate, the potential for a long-term charter of the *Oinoussian Seaman*.

(13) Had the Defendant caused Marsoft –

(a) to re-evaluate the Benchmark IRR and/or

(b) to examine the potential for long-term charter, and/or

(c) to consider its advice further in the light of the moving averages pleaded at paragraph 49 above,

it would have been inevitable that Golden Union's offer would have been rejected.

(14) The Defendant regarded Marsoft's advice as prescriptive and failed to appreciate that Marsoft were providing no more than forecasts of returns based on their best professional opinion and economic evaluation, and that the Defendant still had to exercise a business judgment – which, on the material set out above could properly have been nothing other than to retain the *Oinoussian Seaman*.

(15) The Defendant effectively abdicated its decision-making duty to Marsoft and failed to apply any or any proper degree of judgment as to the reasons why Golden Union might be insisting on a sale being agreed within hours, when the whole process had thus far occupied just a few days, and when the whole tenor of the Marsoft February and October Reports was that holding the ship for

another year at least was a very good option, even without seeking and obtaining a suitable long-term charter.

(16) The Defendant failed to consult the ~~Plaintiffs~~ Beneficiaries properly or at all regarding their intention to sell the *Oinoussian Seaman* and prior to do so. Had they consulted the ~~Plaintiffs~~ Beneficiaries they would have been informed that far from a sale to Golden Union at a price of $7.632m net of commissions being in any way appropriate or a good deal and in the interests of Panmar the ~~Plaintiffs'~~ Beneficiaries' father was about to sign a Memorandum of Agreement for the acquisition of a comparable (in terms of age and size) Panamax bulk carrier to be known as the *Sea Challenge* for delivery in March 2003 (after completion of her then charter) and at a price of $8.5m.

(17) The Defendant failed generally to take any or any proper steps to ensure that those of its officers or executives who would or might be called upon to decide at any time whether or not to sell the *Oinoussian Seaman* had any, or any proper or requisite, degree of understanding of –

(a) the Marsoft Reports generally,

(b) the Benchmark IRR and how it had been determined,

(c) the facts affecting the Benchmark IRR,

(d) the Marsoft October Report,

(e) the matters generally relevant to the potential sale or retention of the *Oinoussian Seaman*.

(18) The Defendant failed to discuss with Marsoft properly or at all the Marsoft October Report and to raise with Marsoft the matters various set out therein which are referred to in this Statement of Claim and which were, or ought to have been, obvious and obviously important to the Defendant.

**"Wilful" and "gross"**

68. Further and in any event, the Defendant's breaches of duty were wilful and/or amounted to gross negligence. In setting out the following inferences which are to be drawn the Plaintiffs have no knowledge of the actual understanding of Messrs McMillan and Gilooley relating to shipping generally and Marsoft's advice, the content of Marsoft's quarterly reports, and the Marsoft October Report in particular, but say that the wilfulness of the Defendant's breaches of trust and the grossness of its negligence as set out in the above Particulars are to be inferred from the following:

(1) Neither the Marsoft October Report nor any advice given by Marsoft at the 11th October meeting provided any genuine financial and/or investment reason or basis for selling the *Oinoussian Seaman* from which it follows that the Defendant's decision to sell was not made on financial grounds, but for some other reason which is not known to the Plaintiffs.

(2) The Defendant did not make any effective decision or even attempt to apply its judgment, but in practical terms delegated its duty as Trustee to Marsoft's forecast of the expected IRR as against the Benchmark IRR.

(3) Further and in any event, and despite the obvious importance of the Benchmark IRR in the context of the Marsoft October Report and the Defendant's general approach to the question whether to sell or retain the *Oinoussian Seaman*, the

Defendant applied a Benchmark IRR of 14% to the future expected performance of the ship when that figure was wholly out of date and wrong and –

(a) either the Defendant knew that the current Benchmark IRR was 7.74% and chose to ignore it for some reason unknown to the Plaintiffs which was a wilful breach of trust, or

(b) the Defendant failed to understand the importance of utilising a correct and up to date Benchmark IRR and so failed to seek an updated figure from Marsoft, which was itself grossly negligent.

(4) Further, the Defendant was in fact aware that the Benchmark IRR of 14% was out of date in that –

(a) Marsoft have claimed in the Marsoft Intermediate Report that there was discussion of a new Benchmark IRR at 10%-11%, and

(b) the First Plaintiff had pointed out that very fact during the course of the 11th October meeting.

(5) It is accordingly to be inferred from the Defendant's failure to cause Marsoft to update the Benchmark IRR that no updating thereof that no such updating was necessary or appropriate –

(a) because Marsoft and the Defendant were already aware that the then current figure was 7.4%, and/or

(b) because the Defendant did not want an updated figure because it was aware that any recalculation would necessarily result in a sharply

reduced Benchmark IRR and that in turn would have meant, on the Defendant's prescriptive use of the Benchmark IRR that the *Oinoussian Seaman* would have to be retained, and/or

(c) because the Defendant had already decided to sell the ship.

(6) The Defendant –

(a) either understood fully and correctly the limitations on the precise and exact application of a Benchmark IRR in the context of the forecasts regarding future hire rates and residual values set out in the Marsoft October Report in which case its rigid and precise application of the Benchmark IRR was a wilful breach of trust, or

(b) the Defendant had failed to ensure that it had or obtained, and understood, such limitations in which case the Defendant's rigid and precise application of the Benchmark IRR was grossly negligent.

(7) Further, and in the alternative, if the Defendant's failure to cause Marsoft to recalculate the Benchmark IRR as pleaded above was not deliberate, it resulted from a complete and grossly negligent failure on the Defendant's part –

(a) to appreciate the importance of the Benchmark IRR,

(b) to take any or any proper account of the implications of the matters set out at paragraph 37(9) above,

(c) to consider properly or at all alternatively to appreciate properly or at all that Marsoft's advice meant that a Benchmark IRR of 14% was no longer appropriate and was far too high, and accordingly

(d) that Marsoft should be instructed to re-evaluate the Benchmark IRR in the light of their then advice as set out at paragraph 37(9).

(8) The only plausible way of justifying a sale of the *Oinoussian Seaman* in October 2002 was –

(a) to approach the Benchmark IRR as prescriptive, so that if the ship failed to meet the 14% threshold it would be sold,

(b) to continue to use 14% as the Benchmark IRR, and

(c) to ignore the ability to operate the ship until it was scrapped, during which period it was forecast to earn a return of 14%,

which amount to a complete disregard for the financial interests of the beneficiaries and were a wilful breach of trust.

(9) The Defendant generally –

(a) either understood fully and correctly the true meaning and effect of the Marsoft October Report in which case its decision to sell must have been taken for some ulterior reason and not for any financial reason which is a wilful breach of trust, or

(b) had failed to ensure that its officers understood fully and correctly the true meaning and effect of the Marsoft October Report in which case its decision to sell was grossly negligent.

(10) The Defendant failed –

(a) to discuss with Marsoft the Marsoft October Report and raise the matters set out herein, or

(b) to understand Marsoft's answers if any questions were in fact asked of Marsoft, or

(c) to pay any or any proper heed to such answers if any such answers were in fact given.

(11) Despite its professed concern at the IRR prospectively achievable, the Defendant cannot have asked Marsoft to explain Figure 10 in the Marsoft October Report: had Marsoft been asked to do so it would have advised that Figure 10 showed that there was a very high probability of achieving an IRR of at least 12½% by retaining the *Oinoussian Seaman* through 2003 and down to the First Quarter of 2004.

(12) Had the Defendant intended to give proper and objective consideration, based on financial grounds alone, to its decision whether or not to sell the *Oinoussian Seaman* it would have required Marsoft to carry out the series of appraisals as set out by way of example at paragraph 52 above *et seq.* which require for the generation of a prospective IRR the inputting of just the discrete factors set out at paragraph 19 above, namely –

(a) initial net market value,

(b) daily hire,

(c) operating expenses,

(d) net residual market value, and

(e) period of hire.

(13) Carrying out such appraisals would have demonstrated that the ship was in fact capable of generating a satisfactory prospective IRR (particularly when compared with the returns then available on other investments) in many of the potential circumstances. The Defendant's failure to ask Marsoft to carry out any such appraisals will be relied on by the Plaintiffs as evidence that the Defendant was simply not interested in making any decision based on properly reasoned and objective grounds, but on the contrary had decided even prior to the 11th October meeting to sell the ship.

(14) The Defendant –

(a) either failed at all to consider what returns might be available on alternative investments following the sale of the *Oinoussian Seaman* which was grossly negligent and/or demonstrated a wholly reckless indifference of the beneficiaries' financial interests, or

(b) was fully aware that nothing like the IRR expected over the following 12 months from retaining and operating the *Oinoussian Seaman* would be

available from alternative investments, but nonetheless went ahead with the sale which was a deliberate breach of trust.

(15) There was no genuine and objective financial and/or investment reason to sell the ship: on the contrary there was every financial and/or investment reason to retain it and no professional Trustee, carefully, honestly and reasonably considering the matter exclusively on that basis, could ever have thought otherwise.

(16) The Defendant deliberately and wrongly allowed the ~~Plaintiffs~~ Beneficiaries to believe at the end of the 11th October meeting that a sale was not imminent, yet failed to inform them of the discussions on 17th October (they cannot properly be described as "negotiations") with Golden Union, because the Defendant knew (or at the least strongly suspected), and as was the case, that the ~~Plaintiffs~~ Beneficiaries would have been adamantly opposed to a sale to Golden Union at the price being offered.

(17) Further and in any event, the Defendant wrongly and for no commercial or proper reason allowed itself to be pressed into making a decision to sell to the first offers or within just days of the process of market testing beginning, and when it would have been appreciated by anyone in the Defendant's position who applied his mind to the question of whether to accept or reject Golden Union's offer –

(a) that Golden Union's offer of $8m, when Marsoft had valued the *Oinoussian Seaman* at $7m, was entirely consistent with Marsoft's view as expressed in the Marsoft October Report that the market would be strong for the succeeding year at least and was wholly inconsistent with an immediate sell recommendation,

(b) that there was no reason to accept Golden Union's offer when the Defendant had no particular plans in place as to how to invest the proceeds of sale,

(c) that Golden Union was an experienced operator of ships and would not have offered $8m unless it believed that it could make a good return at that price.

(18) The Defendant's failures and errors as set out above were of such an obvious nature for a professional Trustee that was a subsidiary of a major international bank that the natural and reasonable inference to be drawn is that they were not in fact failures and errors at all but followed a decision on the Defendant's part to sell the ship in any event and irrespective of the financial merits of retaining her.

(19) Alternatively to sub-paragraph (5) above, if the Defendant had not in fact already decided to sell the ship as pleaded in that sub-paragraph but was on the contrary trying to make a proper and objective decision, each of the breaches of duty set out above was individually of such a nature when committed by a professional Trustee, and a *fortiori* when aggregated with one another, as to amount to gross negligence on the part of the Defendant.

69. By reason of the matters set out above the Plaintiffs, as beneficiaries under and Trustee of Panmar, have suffered loss and damage for which the Defendant ought to compensate them, as follows:

**PARTICULARS**

(1) A correct, reasoned and objective decision by the Defendant would have been to respond to the Transfield approach mentioned by Marsoft at page 7 of the Marsoft October Report by instructing its brokers to seek a charter at a level in excess of that offered by Transfield, which would in the event have been readily available.

(2) Had the Defendant in October 2002 retained the *Oinoussian Seaman* on a 6 month charter at the rate offered by Transfield (which was less than the then 4 week moving average of $8,125 per day) a two year charter would have been available at $12,500 per day from April 2003 to April 2005, and a similar charter to April 2007 at $24,000 per day (being average actual fixtures adjusted for size derived from Clarksons' historic data). The ship's market value at April 2007 was $24.5m so that by that time the accumulated cash for the *Oinoussian Seaman's* account would have been $42.634m, leaving a *prima facie* loss of $35.002m (being $42.634m less the net price of $7.632m), from which the Plaintiff will also give credit in respect of whatever return the Defendant actually achieved on the sale price received.

And the Plaintiffs claim:

(A) Reconstitution of the fund of Panmar by the payment thereto of compensation for breach of trust and/or damages as set out at paragraph 69 above.

(B) Alternatively all necessary and proper accounts and enquiries needed to determine what level of compensation is required to make good the losses sustained as a result of the matters hereinbefore pleaded.

(C) Interest

(D) Further or other relief.

(E) Costs.

Dated this 11th day of July 2013

Conyers Dill & Pearman (Cayman) Limited
Attorneys-at-Law for the Plaintiff

~~Maitland~~
~~Attorneys-at-Law for the Plaintiffs~~

This Amended Statement of Claim was filed by ~~Maitland~~ Conyers Dill & Pearman (Cayman) Limited, attorneys at law for the Plaintiffs, whose address for service is care of their attorneys, P. O. Box 2681, Boundary Hall, 2nd Floor, Cricket Square, George Town, Grand Cayman, KY1-111 ~~PO Box 1034, 4th Floor, Harbour Place, Grand Cayman KY1-1102~~.

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