COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2014/CLE/gen/00911

BETWEEN

STONEDENE LIMITED

Plaintiff

AND

ANSBACHER (BAHAMAS) LIMITED

Defendant

Hon Mr. Justice Ian R. Winder

Appearances: Sean Moree with Vanessa Smith for the Plaintiff

Luther McDonald with Keri Sherman for the Defendant

26, 27 and 28 August 2019 and 25 February 2020

JUDGMENT

WINDER, J

This is the plaintiff's (Stondene's) claim for breach of contract and or negligence in relation to the management by the defendant (Ansbacher) of a portfolio of assets.

Background

1. The parties have agreed a statement of facts and issues which gives the general background and context for the dispute. The agreed Statement of Facts and Issues provided as follows:

   Statement of Facts

   1. On or about the 17th October, 2006, the Plaintiff entered into the Investment Management Agreement ("the Stonedene Agreement") with the Defendant. The Agreement provided that the Defendant was given authority to manage the cash and investments in account no. CO00002618 ("the Stonedene Account") in accordance with the Investment Goals and Guidelines also dated the 17th October, 2006 ("the First IGG").
   2. The Plaintiff sought aggressive long-term capital growth with a higher risk approach. The First IGG required:
      a. A target allocation of up to 70 per cent of the portfolio assets to be invested in equities, to be globally diversified;
      b. A target allocation of up to 25 per cent of the portfolio assets to be invested in alternative investments;
      c. A target allocation of up to 5 per cent of the portfolio assets to be invested in fixed income securities and fixed deposits, typically high yield bond funds and preferred stocks of immediate maturities; and
      d. Any remaining funds to be kept in cash.
   3. On or about the 26th February, 2008, Artemis Asset Holding Limited ("Artemis") opened a bank account ("the Artemis Account") with the Defendant. Pursuant to the account opening forms, the Plaintiff was identified as the beneficial owner of the cash and investments held in the Artemis Account, and Appleby Trust (Cayman) Limited as identified as the Trustee.
   4. By an agreement between Artemis and the Defendant dated the 11th September, 2008 and signed on behalf of Artemis on or about the 17th September, 2008 ("the Artemis Agreement"), Artemis gave the Defendant authority to manage the cash and investments in the Artemis Account in accordance with the Investment Goals and Guidelines dated the 11th September, 2008 ("the Second IGG"). Artemis sought aggressive long-term capital growth with a higher risk approach. The Second IGG required:

a. A target allocation of up to 70 per cent of the portfolio assets to be invested in equities, to be globally diversified and no speculative stocks would be purchased and proper diversification should be maintained;
b. A target allocation of up to 25 per cent of the portfolio assets to be invested in fixed income securities, typically to be invested in fixed-income securities of intermediate maturities (up to 10 years) with a credit quality of A or better and a preference for higher quality bonds and primarily denominated in US Dollars;
c. A target allocation of up to 5 per cent of the portfolio assets to be invested in alternative investments, typically lower risk fund-of-hedge funds denominated in US Dollars, British Pounds or Euro; and
d. Any remaining funds to be kept in cash.

In or about the fourth quarter of 2008, the cash and investments held in the Stonedene Account were transferred to the Artemis Account.

Statement of Issues

1. Whether as a result of the Defendant's actions, inactions or conduct the asset allocations prescribed by the First IGG and/or the Second IGG of the Stonedene Account and/or Artemis Account were breached.
    a. If the answer is yes, did the alleged breach amount to damage to the Plaintiff and if so, the amount of the said damage.
    b. If the answer to (a) is also yes, did the prevailing market and economic conditions amount to mitigating circumstances which would affect the claim or quantum of damages awarded.
2. Whether the Defendant's actions, inactions or conduct relating to the management of the Stonedene Account and/or the Artemis Account amounted to negligence.
    a. If the answer is yes, did the alleged negligence amount to damage to the Plaintiff and if so, the amount of the said damage.
    b. If the answer to (a) is also yes, did the prevailing market and economic conditions amount to mitigating circumstances which would affect the claim or quantum of damages awarded.
3. In the event the Defendant was negligent in managing the Stonedene Account and/or the Artemis Account, did such negligence amount to a breach of the fiduciary duty the Defendant owed to the Plaintiff.
    a. If the answer is yes, did the alleged breach of fiduciary duty amount to damage to the Plaintiff and if so, the amount of the said damage.
    b. If the answer to (a) is also yes, did the prevailing market and economic conditions amount to mitigating circumstances which would affect the claim or quantum of damages awarded.
4. In the event the Defendant's actions, inactions or conduct relating to the management of the Stonedene Account and/or Artemis Account did not amount to negligence, did the Defendant's actions, inactions or conduct

relating to the management of the Stondene Account and/or the Artemis Account amount to breach of fiduciary duty.

a. If the answer is yes, did the alleged breach of fiduciary duty amount to damage to the Plaintiff and if so, the amount of the said damage.
b. If the answer to (a) is also yes, did the prevailing market and economic conditions amount to mitigating circumstances which would affect the claim or quantum of damages awarded.

5. Whether the loss suffered by the Plaintiff in the sum of US$1,848,710.00 is attributable to the Defendant's alleged breaches of contract and/or negligence and/or fiduciary duty.

2. The Statement of Claim which, although subject to some clarification after providing further and better particulars, outlined Stonedene's cause of action. At paragraphs 6 and 7 of the Statement of Claim, it provided:

6. At some point in or about September, 2008 the Defendant acted outside the scope of the Guidelines which resulted in a reduction of the Plaintiff's portfolio from US$5,050,946 on the 31st January, 2008 to US$1,738,959 on the 30th June, 2009. The actions of the Defendant amount to a breach of contract and/or negligent management of the portfolio pursuant to the Guidelines and/or breach of fiduciary duty of the Defendant and/or its agents in that the Defendant and/or its agents:

PARTICULARS OF BREACH OF CONTRACT AND/OR NEGLIGENCE AND/OR BREACH OF FIDUCIARY DUTY

i. Failed to use reasonable skill and care to invest the funds in the portfolio in accordance with the Guidelines resulting in a breach of the Agreement.
ii. Failed to use reasonable skill and care to monitor the investments to ensure that they continued to be within the parameters of the Guidelines resulting in a breach of the Agreement.
iii. Failed to act bona fides in the interest of the Plaintiff.

7. By reason of the breach of contract, negligence and breach of fiduciary duty of the Defendant and/or its agents, the Plaintiff has suffered loss and damage.

AND THE PLAINTIFF CLAIMS AS AGAINST THE DEFENDANT:-

1. Loss and expense incurred in the amount of US$1,848,710 as a result of the failure to manage the investment portfolio arising out of the breach of contract, negligence and/or breach of fiduciary duty of the Defendant and/or its agents;
2. Interest Pursuant to the Civil Procedure (Award of Interest) Act, 1992 on any sum found due at such rate and for such period as the Court shall think fit;
3. Costs; and

4. Further or other relief as the Court deems just.

3. In response to requests for further and better particulars, Stonedene clarified its claim in the following manner:

(1) The period of time during which the Defendant acted outside the scope of the Guidelines is from December, 2006 to September, 2008 ("the Relevant Period"). The Plaintiff retained Clarus Risk Limited ("Clarus Risk") to review the performance of the Defendant during the period of 31st January, 2008 through 30th June, 2009 ("the Report Period"). A report dated the 1st November, 2012 ("the Report") was prepared and forwarded as Appendix 1 to the letter from Appleby (Cayman) Ltd. to counsel for the Defendant. The Plaintiff has yet to receive a substantive response from the Defendant in relation to the Report. In the Report, Clarus Risk found that although part of the decline in value may have been due to capital outflows, the absolute figure for loss attributable to the decline in value of the assets within the portfolio during this period was US$1,848,710, a loss of 39.96%. Further, Clarus Risk constructed a composite benchmark portfolio containing a fair cross-section of investments which would have satisfied the requirements of Guidelines which the Defendant was contractually obliged to follow in relation to the portfolio. As can be seen in pages 5 and 6 of the Report, the actual portfolio selected by the Defendant suffered a lower return and was subjected to greater volatility than the benchmark portfolio. Additionally, the portfolio selected by the Defendant was less successful in rising in value during the best economic period and suffered greater losses during the worst economic period than the benchmark portfolio. Clarus Risk concluded that the Defendant underperformed the benchmark portfolio by US$606,716.59 over the Report Period. The chart on page 7 of the Report illustrated that the Defendant failed to meet the Equities Target Allocation throughout the Report Period and consistently ensured the allocation of the portfolio was well below this figure with the percentage invested in equities as low as 54% throughout the first three quarters of 2008. The Guidelines also required the Defendant to allocate up to 25% of the portfolio to be invested in alternative investments, however it consistently exceeded this figure with the amount invested in alternative investments varying between 34% and 44% during the Report period. Furthermore, the Guidelines require a target allocation of 5% of the portfolio in fixed income securities and fixed deposits yet no fixed income positions were held at any time during the Report period. The Guidelines did not

provide for any cash allocation, but the portfolio consisted of 12% cash allocation during the first half of 2008. Clarus Risk noted that there was no turnover in the portfolio, specifically at paragraph 12 on page 2, *"Given that this period coincided with the financial crisis and this was an actively managed account, and that significant losses were occurring due to manager specific decisions, we believe such inactivity to be highly surprising."*

(2) Although the investment goal of the portfolio was "The client is seeking aggressive long-term capital growth with a higher risk approach..." the holdings during the Relevant Period were static and incompatible with the investment goal. The Defendant failed to invest the holdings and/or adhere to the Guidelines, thus the holdings were static. As stated in the Clarus Risk Report, the portfolio significantly underperformed the benchmark by 17.6% during the Period of Review. The underperformance as adjusted for capital outflows equates to a total return (loss) during the Period of Review of – 39.96%.

(3) The Plaintiff intends to rely that an implied contractual term of the Investment Management Agreement dated the 17th October, 2006 ("the Agreement") was that the Defendant would use reasonable skill and care to invest the funds of the portfolio in accordance with the Guidelines and that as an investment manager of Stonedene, the Defendant had a duty to use reasonable skill and care to invest the funds in accordance with the Guidelines. The Plaintiff claims that the Defendant acted in breach of that implied duty to use reasonable skill and care during the Relevant Period, Specifically that the Defendant did not use reasonable skill and care and caused the portfolio holdings to be static.

4. The Defence of Ansbacher at paragraphs 11 and 14 provides as follows:

11. As to paragraph 6:
    (a) The first sentence is improperly particularised, in that the manner in which the Defendant is alleged 'in or about September 2008' to have 'acted outside the scope of the Guidelines' is not identified.
    (b) In any event:
        (i) it is denied that any allegedly wrongful act or omission on the Defendant's part in or about September 2008 could have resulted in any reduction to the value of the cash and investments held in the Stonedene Account prior to this time;
        (ii) the Defendant could not have acted outside the scope of the Guidelines from the time when the cash and investments held in the Stonedene Account had been transferred to the Artemis

Account, which occurred in or about the fourth quarter of 2008, until 30 June 2009; the provision of investment services by the Defendant in respect of the cash and investments in the Artemis Account during this period were governed by the Artemis Agreement and the Artemis Guidelines; and

(iii) it is averred that any allegedly wrongful act or omission on the Defendant's part in or about September 2008 could not have resulted in any reduction to the value of the cash and assets held in the Stonedene Account from the time when the cash and investments held in that account had been transferred to the Artemis Account in or about the fourth quarter of 2008 until 30 June 2009;

(iv) it is, for the avoidance of doubt, denied that the Plaintiff has title to sue in respect of any and all alleged losses in respect of the cash and assets held in the Artemis Account resulting from the Defendant's purported breach(es) of contract and/or negligence and/or breach(es) of fiduciary duty.

(c) The second sentence, and the purported 'particulars of breach of contract and/or negligence and/or breach of fiduciary duty', do not provide any, or any sufficiently precise, particulars of the Defendant's alleged negligence and/or breach of contract and/or fiduciary duty to enable the Defendant to know the case it has to meet. Without limitation, and insofar as necessary, the Defendant reserves the right to rely on the provisions of the Agreement set out at paragraph 4 above as exempting it from liability in respect of any alleged (but denied) acts or omissions outside the scope of the Guidelines, whether such acts or omissions occurred in or about September 2008 or at any other time.

(d) Save as aforesaid, paragraph 6 is denied. Particularly, but without limitation, it is denied that the Defendant and/or its agents were in breach of contract and/or negligent in relation to the management of cash and investments in the Stonedene and/or Artemis Accounts and/or in breach of fiduciary duty, whether between 31 January 2008 and 30 June 2009 or at all.

...

14. As to paragraph 7, it is denied that the Plaintiff has suffered loss and damage, whether as alleged or at all. Particularly, but without prejudice to the generality of this denial:

(a) it is denied that the sum of US$1,181,710, or any sum, represents the loss in the cash and investments held in the Stonedene Account attributable to the Defendant's alleged (but denied) acts outside the scope of the Guidelines in or about September 2008; and

(b) the purported particular of loss and damage at sub-paragraph (ii) is not a particular of loss and damage, and the Defendant declines to plead thereto.

5. At trial, Stonedene called Fiona Crellin, Jillian Dames and Max Hilton as witnesses in its case. Ansbacher called Nikolai Sawyer and Dr Thomas Walford as witnesses in their case. The evidence of Max Hilton and Dr Thomas Walford were expert in nature.

6. The evidence of Fiona Crellin as contained in her witness statement was that:

> 2. On or about 17 October, 2006 [Appleby Trust (Cayman) Limited] entered into an investment management agreement ("the Agreement") with [Ansbacher] on behalf of Stonedene.
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> ...
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> 5. On or about 22 September, 2008 the Second IGG was forwarded to [Ansbacher] by courier.
> 6. On or about 12 January, 2009, [Artemis] requested an explanation from [Ansbacher] that the Portfolio was down by 4.8% against the blended benchmark for the period to 30 September, 2008.
> 7. On or about 20 January, 2009, ABL provided to [Artemis] a shareholder notice issued to [Ansbacher] on 5 December, 2008 suspending redemptions in the III Fund Ltd. ("the III Fund") and its trading hub, III Finance Ltd.
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> ...
>
> 9. [Artemis] queried the comment in the Investment Letter which indicated there would be a shift to Fixed Income, noting there was little flexibility in fund redemptions, so only further reduction in equities was possible, which were 56.85% against a target allocation of 70%. [Ansbacher] acknowledged the error and advised that they would update the Investment Letter. Further [Ansbacher] stated that they would reduce the exposure to the equities in the Mutual Funds to increase total allocation to Fixed Income. They also advised that once liquidity returns to the hedge funds they will realign the Portfolio in line with the Second IGG using those funds. [Artemis] responded to [Ansbacher] and requested the amended Investment Letter for the period to 31 December, 2008 immediately.
> 10. On or about 3 February, 2009 [Ansbacher] provided [Artemis] with an amended 2008 Q4 report ("the Amended Report"). In the Amended Report, [Ansbacher] acknowledged that the Portfolio was not managed within the parameters set out in the Second IGG and the only sector showing positive returns was the Fixed Income sector, in which the Portfolio held nil positions, with a target allocation of 25%.
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> ...

13. On or about 11 February, 2009 [Artemis] received an independent report from Nova Wealth, Guernsey ("Nova Wealth") that was critical of the performance of [Ansbacher] and its investment management through Q3 and Q4 of 2008.
14. On or about 24 February, 2009, III Fund issued a notice to shareholders disclosing their proposed restructuring plan which were forwarded to [Artemis] by [Ansbacher] on 25 February, 2009. The plan offered three options to investors:
    - Receive 20% of the cash balance of their investment;
    - Reinvest 20% of the proceeds of the cash balance in another III Fund product; or
    - Decline the 20% cash distribution.
15. On or about 2 March, 2009 [Artemis] requested [Ansbacher]'s recommendation on how to proceed with the III Fund's restructure.
16. On or about 3 March, 2009 [Artemis] advised [Ansbacher] of the concern relating to the drop in value of the Portfolio and that they were of the opinion that the best course of action would be to liquidate as much of the Portfolio as possible.
17. On or about 13 March, 2009 representatives of [Artemis] attended a meeting at the offices of Appleby Trust with representatives of [Ansbacher]. The file note from the meeting dated 17 March, 2009 ("the Memorandum") provided for a go forward investment strategy and a re-balancing of the Portfolio.

7. Jillian Dames, did not provide a witness statement as she gave evidence under the compulsion of a witness subpoena. Her evidence was that:
    (1) She worked at Ansbacher between 2002 to 2009 and left as its Director and Head of Investments.
    (2) The IGG is used as a guide for the investment manager in making decisions that would be in accordance with the overall objectives of the investments portfolio. The IGG accompanies an investment management agreement (IMA) that would be entered into by the trustee and a trust relationship.
    (3) Ansbacher engaged active investment management decision making.
    (4) She was not specifically familiar with Stonedene or with the III Fund or its principals.
    (5) Ansbacher considered Gold to have been an investment in alternatives.

8. The evidence of Nikolai Sawyer, as contained in his witness statement, was that:

> 3. The Investment Management Agreement contained a liability clause, the relevant portions of which are as follows:
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> LIABILITY
>
> You hereby agree that the Investment Manager shall not be liable for:-
>
> a) any loss or expense suffered by the Client under or in connection with this Agreement (including, without limitation, any such loss or expense occasioned by the insolvency or other default of any counter party) unless such loss or expense arises from the negligence, willful default or fraud of the Investment Manager. Any action taken by the Investment Manager to minimize any such loss or expense (including, without limitation, legal costs incurred by the Investment Manager in connection with such action) will be at the sole discretion of the Client. The Investment Manager will be under no obligation to take any such action; and
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> Without prejudice to the previous two paragraphs, the Client hereby agrees:-
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> a) to indemnify the Investment Manager, its officers, directors and employees from and against all actions, costs, proceedings, claims and demands which may be brought against the Investment Manager or any of them directly or indirectly in connection with or as a result of the discretionary investment management services provided to the Client under this Agreement except to the extent that such actions, costs, proceedings, claims and demands are due to the negligence, willful default or fraud of the Investment Manager or one or more of its officers, directors or employees; and
>
> "The Client acknowledges that the Investment Manager shall not be liable to the Client in respect of any failure to provide discretionary investment management services to the Client pursuant to this Agreement to the extent that such failure is the result of circumstances which are beyond the Investment Manager's control and the effects of which the Investment Manager could not with due diligence have avoided..."
>
> ...
>
> 7. A document entitled Investment Goals and Guidelines was prepared by Artemis and executed by its signatories on 11th September, 2008 ("the Artemis Guidelines"). Unlike the Stonedene Guidelines, Ansbacher Trustees (Cayman) Ltd. is not named on the Artemis Guidelines, the Defendant also has no record of receiving the said Guidelines. Nevertheless, the prepared document also contains a statement that "The client understands that the portfolio could demonstrate high volatility in attempting to achieve capital appreciation."
> 8. Subsequent to the execution of the Artemis Agreement, the cash and investments held in the Stonedene Account were transferred to the

Artemis Account. The transfer was a Free Delivery transaction, a custodian operation in which shares are moved from one registered holder to another without any form of payment as there is no change in beneficial ownership. The transfer of the cash and assets held in the Stonedene account was completed in or about the fourth quarter of 2008.

9. By a Sale and Purchase Agreement dated 5th February, 2009, Ansbacher (Bahamas) Limited was sold by the Ansbacher Group and continues to carry on business under the name Ansbacher (Bahamas) Limited. The Ansbacher Group divested itself of all its interests and ceased carrying on business in October 2011.
10. On 4th January, 2010, Appleby wrote to the Defendant claiming a failure to manage portfolios held by Artemis. By letter of 14th January, 2010, the Defendant's attorneys responded requesting information pertaining to the alleged breaches and seeking an explanation for the claim. ...
11. The Defendant denies that it was in breach of the Investment Management Agreements and the Investment Goals and Guidelines and denies that it was negligent in performing its role as Investment Manager for the Plaintiff. Further, the Defendant relies on the Liability clauses contained in the Investment Management Agreements.

...

17. The Defendant's defence is that the Plaintiff's claim cannot succeed as there was no breach of contract or negligence on the part of the Defendant as required under the Investment Management Agreement. The Defendant also contends that there was no negligence on its part in the carrying out of its duties as Investment Manager.

9. Following the submission of individual reports and witness statements, Max Hilton and Dr. Thomas Walford issued a joint statement. The joint statement provided, in part as follows:

Investment Management Issues

6. The Experts AGREED that there is an absence of any material communication in the evidence between the investment manager (the Defendant) and the client (the Plaintiff).
7. The Experts DISAGREED on whether the Defendant was expected to provide active investment management as opposed to passive investment management.
   7.1. MH believed that the clear inference from the Investment Goals and Guidelines ('IGG') statements was that the portfolio should be managed in an active manner with respect to both asset allocation and security selection and that the investment manager was not guided to invest in funds since the IGGs make explicit reference to equities and preferred stocks. MH maintains that the Defendant was expected to add value through active management. It is commonly

accepted that asset allocation policy is a key driver of investment returns, finance literature attributes approximately 40% of the variance of performance between funds to asset allocation. The IGG stipulated asset allocation limits and it was the Defendant's responsibility to trade prudently within these limits, which they failed to do.

7.2 TW maintained that we have seen no investment procedures document so we cannot be certain as to what investment management services the Defendant was seeking to provide. There was no reference to active or passive investment management in IGGs or any of the documents provided as evidence. Furthermore investment in funds (which was used in this portfolio) would normally result in a low level of activity particularly as the stock selection would be undertaken within the investment funds. This was also in line with the general practice of investment managers which were using an Open Architecture approach which TW had been responsible for introducing at his time at RBC (2000-2006). It is TW's opinion that offshore managers tend use this approach more commonly than onshore managers and it is a standard approach of many offshore Private Banks. Finally TW would regard the management as "Active", although at a low activity level, and notes that and agrees with the definition of "passive" management from Investopedia where "passive" management is described as synonymous with index replication which in his opinion was not practiced here.

8. The Experts AGREED that from the evidence provided in the valuations there was no investment activity between Oct 2007 and Jan 2009.

9. The Experts DISAGREED that it was normal activity levels given the events of 2007/8/9.

9.1 MH noted that there was no trading after July 2007 until Q2 2009, following the global financial crisis of 2008. MH believes that the absence of any trading activity during 2008 was highly unusual given the magnitude of the economic events which were unfolding. MH believes that for the Defendant to have made no trades over an almost two year period is unprecedented in his experience of working with hundreds of investment accounts across offshore jurisdictions. MH also noted that the adoption of a 'buy and hold' strategy does not alter the concept of 'active risk'. The active risk for the investment account was that it was not invested in specific weightings detailed in the IGGs. This was the responsibility of the Defendant and even in the absence of trading activity the industry standard is to consider this as active risk.

9.2. TW is of the opinion that industry norms for investment management in offshore locations tends to follow the "buy and hold" strategy when funds are used. TW also noted that there were periods during 2008 that it was widely considered that the financial markets would recover (reference RBS rights issue in April 2008). It is further noted that the

account opening agreements for Artemis were signed in February 2008 and the actual transfer of the investments was not made until 4Q 2008. Hence it may have been likely that any potential trades were held off pending the transfer which was being organised. It would be normal investment policy to seek to cease any trading during a period of a corporate action or custodian transfer so as to avoid settlement failure.

10 The Experts NOTED that the valuations that had been given to each expert's party were different layouts and had different totals. Further research was undertaken and it proved that the securities values matched those obtained from the fund managers were correct for the valuations provided by the Plaintiffs. However these valuations did not reflect the cash and deposits held in the portfolio and these appeared to be correct in the Defendant's valuations. A corrected set of portfolio value figures were therefore calculated.

...

12. The Experts AGREED that any withdrawals from or additions to the portfolio will result in material differences in the performance figures that result.
13. The Experts AGREED that investment managers would normally use third party funds to gain exposure to markets which may not be within the management specialisation of the Investment Manager hence explaining the use of Funds for this investment portfolio.
14. The Experts AGREED that it is normal that funds used in client portfolios are usually approved by a product committee within the investment manager and at such a meeting they would typically consider such matters as manager credibility, past performance, peer performance and investment risk profile for the selection and monitoring of investment holdings.

...

16. The Experts AGREED that there was no evidence of any communication until 22nd September 2008 between the investment manager (Defendant) and the client (Plaintiff). This appeared to be very odd.
    16.1. MH characterised the apparent lack of communication between the investment manager (Defendant) and the client (Plaintiff) as negligent, especially when considering the volatility of the market. MH believes that the lack of communication from the Defendant contributed to a break down in trust and confidence in the Defendant to fulfil their obligations. The IGGs make explicit reference to quarterly presentation being sent to the client, we see no evidence of this being met.
    16.2. TW noted that no explanation for this was evident from the evidence however it was also known that the ownership of the bank had changed and a considerable period of time had passed since the relevant period. It would be normal for a cover letter to be sent with quarterly valuations giving news and investment views of the

manager. There would also be correspondence concerning the instructions for the transfers out of the portfolio. None of these have been provided and TW assumes that the file has been mislaid.

Investment Objectives

...

19. The Experts AGREED that the IGG (if written and accepted by the investment manager) represent a definition of the investment management style and service that should be used in the management of the portfolio.
20. The Experts AGREED that the IGGs describe a normal asset allocation for an aggressive long-term capital growth portfolio with a higher risk approach.
21. The Experts AGREED that a change in the IGGs did not require an immediate change in the portfolio asset allocation.
22. The Experts DISAGREED that this was normal and reasonable management in this case.
    22.1. MH noted that the change in the IGGs did not represent a small change given that the allocation to Alternatives was reduced from 'up to 25% of assets' to 'up to 5% of assets' and that alternative funds be 'typically lower risk fund of hedge funds'. This change is in marked contrast to how the portfolio was invested at the time the second IGGs were agreed to.
    22.2. TW noted that the change in the IGG was as provided by MH above but that the Credit Crunch of 2008 was at its worst and with substantial illiquidity in the markets it would meant accepting very poor prices on sale or the fund being suspended so no sale was possible. For example the III Fund had suspended redemptions at the next available dealing date after the new IGG was issued on 12th September 2008.

...

24. The Experts AGREED that no trade was placed for the portfolio that led to an IGG breach. All the alleged breaches were "passive" and the result of the appreciation of specific assets relative to others.
25. The Experts AGREED that if a good performing asset class was reduced the moment it breached an IGG limit and continued to perform well, the manager would have to make multiple small trades which would be inefficient and costly for the client.
    25.1. MH considered that it was the duty of the Defendant to monitor such breaches and ensure that the client was informed and the client's consent was sought and granted to maintain such a position.
    25.2. TW noted that the client file was not available and a degree of reasonableness would normally be expected to apply.
26. The Experts DISAGREED that any alleged passive breaches of the IGGs needed to be immediately drawn to the attention of the Client.
    26.1. TW did not consider that this was normal practice in investment management firms (and particular in offshore firms) where the

alleged breach was "passive" and in any case the clients were being kept informed by quarterly valuations.

26.2. MH considered it necessary that: the investment manager monitor their compliance with the IGGs; that any breaches of the IGGs be immediately communicated to the client and that consent should be sought

The Holding in Gold Bullion

27. The Experts AGREED that a holding of gold bullion could be considered an alternative investment. The Experts AGREED on the statements in paragraph 7.57 of Walford 1.

28. The Experts AGREED that Gold Bullion would normally be considered part of a precious metals investment or even a raw materials or commodity holding.

29. The Experts DISAGREED that there was any evidence to suggest that the holding in Gold Bullion was not part of the managed portfolio.

29.1. TW is of the opinion that Gold Bullion is not a usual holding considered and used by investment managers as part of a managed portfolio and noted that when the portfolio size was reduced through withdrawals that this was the one holding which was not sold. It was preserved intact through to the end of the period under consideration. If, it was part of the managed portfolio, TW considers that it would have been sold down to preserve the appropriate weighting. Also see Walford 1 paragraph 4.29 where the holding in the III Fund was reduced to the 25% determined in the prevailing IGGs at that time for Alternative Investments.

29.2. MH stated that the holding in Gold Bullion was reported within the valuation of the managed portfolio and MH believes that the managed portfolio remit and fees applied to this holding.

...

31. The Experts AGREED that Gold Bullion is categorically neither an Equity nor Fixed Income asset.

31.1. MH stated that since the IGGs stated that the asset classes were: Equities, Fixed income, Alternatives and Cash, gold could be reasonably considered to be Alternatives. With the valuations provided by the Defendant, gold was shown within the Asset Class, 'Options'. This was an error on the part of the Defendant along with the value of gold which was consistent incorrectly valued.

32.2. TW noted that the Gold Bullion is referred to in the Precious Metals sector and the III Fund as in the Hedge Fund sector in the Plaintiff's Valuations. Neither of these sectors are mentioned in the IGGs. It is evident from the sale completed of the III fund (See Walford 1 paragraph 4.29) that the manager considered that the total portfolio as the denominator in the percentage calculation.

The Holding in III Fund

32. The Experts AGREED that the III Fund would normally be considered an alternative investment.

33. The Experts AGREED that there is very little public information on the III Fund and hence it was difficult to be categorically certain about the characteristics of the fund and in particular what it was doing in 2007-9.
34. The Experts AGREED that the III Fund was probably part of the managed portfolio but there is no evidence to show how and why this fund was originally selected over all the other funds available in the market.
35. The Experts AGREED that the III Fund was, from the available information, a "defined risk" fund investing in lower risk assets (bonds and debt) and had the characteristics of an absolute return fund (reference Trustnet Offshore website where it is quoted as having an α of 2.11 and β of -0. 14).
    35.1. MH added that if the underlying assets were bonds, while this may be considered lower market risk, hedge funds investing in bonds had a propensity to deploy significant leverage and/or be illiquid and therefore exhibit significant credit, counterparty and liquidity risks (among others).
    35.2. TW noted that the exact characteristics of the III Fund are unknown but note that it is recorded by Trustnet Offshore as having an investment objective of "to achieve significant capital appreciation while maintaining a controlled level of risk. The Company attempts to achieve its objective through the investment in and trading of a broad range of financial instruments under the direction of the advisor."
36. The Experts DISAGREED that it was reasonable to have 25% invested in a single holding.
    36.1. TW had the experience at RBC where exposure to certain sectors such as alternatives were achieved through a single holding in either of a "fund of funds" or "absolute return funds". TW also noted that up until December 2008, a single holding of an absolute return fund was often considered a reasonable single holding for a portfolio. This was dispelled by the Madoff saga; this surprised the markets when revealed on 11th December 2008 and was a serious event for a number of fund holders.
    36.2. MH referenced that the IGGs refer to Alternative Investments (note the plural) and referred to the quoted index (Tremont Hedge Fund Index) which has 448 constituents. MH's experience working with similar fiduciary and family office investment accounts is that it was and remains unusual to invest directly into hedge funds as such an investment requires significant due diligence to appraise operational, financial, counterparty, credit and liquidity risk in addition to evaluating performance. To choose to invest exclusively in a single hedge fund, when the quoted benchmark index is highly diversified is extreme and in MH's experience unprecedented. As a comparison, the quoted equity index, the S&P 500 has a similar number of constituents and it

would be equally inappropriate to have active exposure to the US equity market via a single equity, e.g. Philip Morris.

37. The Experts DISAGREED that it was reasonable to have 25% invested in the III Fund.
    37.1. MH's belief is that position size should be commensurate with conviction and that this should be based on investment analysis and evaluation which was absent from any of the documents provided by the Defendant.
    37.2 TW requoted his answer in 36.1 above.
38. The Experts AGREED that there is no research or material relating to the III Fund in the evidence provided.
    38.1. TW noted that he had been in touch with the manager to seek some information on the fund and they were not prepared to divulge any information even historical information that would have been in the public domain.
    38.2. MH stated that it would have been the responsibility of the Defendant to have conducted sufficient research and due diligence on the III Fund to warrant investment.

Investment Results

39. The Experts AGREED that the time period that would normally be necessary for assessment of an aggressive long-term capital growth portfolio with a higher risk approach would be greater than 3 years.

...

41. The Experts AGREED that the Stonedene portfolio suffered a reduction in value as a consequence of the holding in the III Fund.
    41.1. TW was of the opinion that the loss was only partly attributable to the III Fund and furthermore that this fund was eventually sold at profit, so no loss had been incurred.
    41.2. MH believes that the appropriate book cost or reference value for the III Fund was its value at the time the IGG were agreed to: $1,773,815.60. The proceeds realized from the III Fund beginning with the initial reduction in October 2007 through to the final distribution of the redemption vehicle was $1,179,537.58. This represents a loss of 33.5% during a period where the hedge fund index (described in the IGGs) appreciated by 10.78%. The opportunity cost to the Defendant to being invested in this asset over this period was $785,515.53.
42. The Experts DISAGREED that the portfolio's relative underperformance was primarily attributable to the holding in the III Fund.
    42.1.TW was of the opinion that the holding was not out of line with the depreciation of many hedge funds at that time and also of many of the equity funds.
    42.2.MH believes that the holding was in breach of the IGGs and furthermore that concentrating exposure to an entire asset class and over 25% of the portfolio to a single fund was irresponsible and negligent.

Analysis and Disposition

10. Stonedene's complaint is that Ansbacher:

    (1) acted outside the scope of the IGG's, specifically as it relates to the holding of alternative investments in both the Stonedene Portfolio and the Artemis Portfolio

    (2) failed to conduct proper due diligence on investments held by the Portfolios;

    (3) failed to provide timely and accurate valuations; and

    (4) failed to preserve documentation in relation to the contractual and investment arrangement between the parties

    resulting in loss in the amount of US$1,848,710.00 and damages resulting from the failure to manage the Portfolios arising out of the breach of contract, negligence and/or breach of fiduciary duty of the Defendant and/or its agents.

11. Ansbacher's case was that there was no breach of the Investment Management Agreements and the Investment Goals and Guidelines. It denies that it was negligent in performing its role as Investment Manager. Stonedene, Ansbacher says, failed to take into consideration the effect of the global financial crisis of 2008, which crisis prevented the Bank in some instances from making redemptions from various funds and also the fact that its significant withdrawals from its account prevented the allocation of its assets from being aligned with the target allocations in the Investment Goals and Guidelines. Ansbacher says that notwithstanding the effect of the crisis and withdrawals by Stonedene, its management of the portfolio was in accordance with the industry standard and cannot rightly be said to amount to a breach of contract and/or negligene and/or a breach of fiduciary duty. Ansbacher also relies on the exclusion of liability clauses contained in the IMA's.

12. Ansbacher says that:

    (1) There was no breach of the First IGG by it as it reduced the holding in alternative investments to under 25%. The same never increased beyond 5% and any such increase was caused by accretions to the Fund.

(2) The allocations required by the Second IGG could not be effected as redemptions in the III Fund were suspended on the 5 December, 2008.

(3) There is no evidence that the Second IGG was accepted by the Defendant prior to 31 December, 2008 as required.

(4) It was not negligent in its management of the Portfolio and no question of breach of fiduciary duty arises.

(5) The Plaintiff did not suffer a loss of $1,848,710 as a result of any action by Ansbacher any loss was occasioned by prevailing market and economic conditions and in particular the stock market crash of 2008.

The Expert Evidence:

13. As indicated, each of the parties relied on expert testimony. Both witnesses clearly had sufficient knowledge and skill to be deemed experts in finance and investments. Neither of their expertise or fitness to give evidence were seriously challenged by their opponents. I accepted that Dr Walford, a more senior gentleman, was highly regarded in the field. Whilst both men were impressive as witnesses, Mr Hilton was more convincing as a witness both in his demeanor and dealing with the evidence. I preferred Mr. Hilton's evidence in the few areas where his differed from Dr Walford's.

The Claim in Breach of Contract

14. Stonedene claims that there has been a breach of contract. The allegations of breach are that Ansbacher:

(1) acted outside the scope of the First IGG and the Second IGG, specifically as it relates to the holding of alternative investments

(2) failed to provide timely and accurate valuations

(3) failed to conduct proper due diligence on investments held by the Portfolios and

(4) failed to preserve documentation in relation to the contractual and investment arrangement.

15. The allocation of assets under the First IGG (17 October, 2006- 11 September 2008) required the portfolio to be held in as follows:

    Equities (<70%) Alternatives (<25%) Fixed Income (<5%)

    The Second IGG (11 September 2008) proposed a slightly different allocation of Alternatives and Fixed Income and required the portfolio to be held as follows:

    Equities (<70%) Alternatives (<5%) Fixed Income (<25%)

16. There was an assertion by Ansbacher that the Second IGG was not effective at all material times because whilst it was executed by Stonedene and dated 11 September 2008, there was no evidence of it being accepted by Ansbacher. I am prepared to find, and do find, that the Second IGG was in fact sent to Ansbacher by courier and accepted by it.

17. It is common ground, among the experts that the portfolios were being managed outside of the limits identified in the IGGs. It was also agreed that it would be normal to allow some flexibility in the asset allocation, of up to 5%, where the breach was a consequence of over (or under) performance. This, the experts accepted would be classified as a passive breach. Stonedene conceded that "a passive breach does not always result in a breach of contract" but contends that "the persistence of a passive breach without client approval may result in negligence".

Classification of Gold

18. Much of the contention between the parties revolved upon whether the holdings in gold was to be classified an alternative investment. This classification impacted the percentage holdings of the assets in the Stonedene Portfolio and therefore the determination of whether there was alignment with the IGGs. The experts, surprisingly, were at odds on this issue.

19. According to Stonedene, while there is some debate within the industry as to what precious metals should be classified as, the IGG's only allowed for investment in

Equities, Fixed Assets and Alternatives, and it was readily accepted that gold would never be classified as an Equity or Fixed Asset. Accordingly, only two options exist, either Ansbacher was investing in a product completely outside of its mandate or gold was considered an alternative. Stonedene's case is therefore that Ansbacher treated and considered gold an alternative and cannot now be saying that gold was not a part of the alternatives in the portfolio.

20. This is a compelling case, which I accept.

21. In a letter dated 21 January, 2009, Jillian Dames (then Jillian Dorsett) who was Ansbacher's Director and Head of Investment Services wrote to Tanya Dube of Appleby (for Stonedene). The said letter stated, in part, as follows:

> ...
> *The target and actual asset allocation as at 30 September 2008 are as follows:*
>
> | | *GG's* | *Actual* |
> |---|---|---|
> | *Equities:* | *70%* | *56.85%* |
> | *Fixed Income:* | *5%* | *0%* |
> | *Alternatives:* | *25%* | *43.15%* |
>
> *The allocation of equites is below the parameters set I the Goals and Guidelines whilst there is no allocation to Fixed Income ad an overeweight exposure to Alternatives.*
>
> *Going forward, ideally we would bring the account into further alignment with the intended Goals and Guidelines. However the allocation to Hedge Funds is not redeemable, as redemptions have been suspended, which precludes us from reducing exposure here. We do recommend an increase in exposure to Fixed Income at the expense of Equities to reduce the inherent risk in the portfolio. As the recession is expected to deepen further in 2009 before any recovery can be possible. We will also be adding to Fixed Income and reducing the Alternatives allocation which will shift the portfolio down to a less risky one. However, this aspect will not be attainable until Hedge Fund redemptions resume.*

Ansbacher, it seems, wrote acknowledging that the portfolio was in breach of the IGGs. Ansbacher specifically cited the target asset allocation of alternatives and actual asset allocations at 30 September, 2008 to be 25% and 43.15% respectively, representing a 18.15% variance from the First IGG allocation. Stonedene says, which is not accepted by Ansbacher, that this was the first time

that it was informed that the portfolio was in breach of the IGGs, even though the portfolio was operated outside of the allocations since its inception. Jillian Dames' letter clearly considered gold to be an alternative investment in calculating the asset allocations. Dames, in her oral testimony confirmed that gold was considered an alternative by Ansbacher.

22. Ansbacher says that it is completely false and misleading to say that this (letter of 21 January 2009) was the first time that Stonedene was advised by Ansbacher of the breach of the IGG's as they were in receipt of the valuations. The valuations clearly showed the percentage investments. Ansbacher says that the reference to gold as an alternative investment was an error of Jillian Dorsett who said she was not familiar with the fund. Further, they say that it was obvious that gold was not considered an alternative investment otherwise it would have been sold in 2007. Ansbacher also argues that

> "Gold was not considered to be an alternative investment as ... June 2008 the holding in gold was about 6.5% and in September about 8.4%. Under the Second IGG, the holding in alternative investments was only to be 5%. The gold holding alone would have exceeded the allocation for alternative investments. Yet there was no effort, directive or complaint to sell or trade the gold before 2013.

I did not accept that Ansbacher's submission. Firstly, it would be inappropriate to equate Jillian Dames' unfamiliarity with the Stonedene Account in 2019 when she gave her evidence to the contemporaneous letter written January 2009, some ten years earlier. At that time she would certainly have had the file and the details of the portfolio before her. Secondly, in email correspondence dated 9 April 2009, Perpetua Roberts, on behalf of Ansbacher, acknowledged on that the target asset allocation for alternatives on that date was 5% and the current asset allocation was 39.57%. This clearly indicated that Ansbacher treated gold as an alternative.

23. Ansbacher also sought to point out here that somehow the absence of any complaint by Stonedene from the inception in 2006 to 2009, was some sort of

acceptance or waiver of any breach. I also did not accept that submission which was not supported by the pleadings. On balance, its seems clear that notwithstanding what may be an industry-wide dispute concerning the classification of gold, gold was considered by Ansbacher to have been an alternative, in which case the portfolio was not managed in accordance with the IGGs. This, in my view, is the cumulative effect of the correspondence of Jillian Dames of September 2008 and her oral testimony as well as the email correspondence of Perpetua Roberts of April 2009.

24. Further there was no question as to whether the holding in gold formed part of the portfolio being managed by Ansbacher. Their fees, which was based upon the value of the assets under management, included gold in the calculation of that fee.

The over weighted investment in the III Fund

25. Ansbacher acknowledged that it was outside of the bounds set by the IGG. The portfolio was heavily invested into the III Fund (up to 40% at one time) which was accepted to be an alternative investment. Ansbacher argued that if gold was not considered an "alternative investment" for the purposes of the account, the holding of alternative investments would have consisted solely of the III Fund. The evidence is that, having been under 25% in May 2007, there were no further acquisitions on behalf of the account and any accretions above 25% were due solely to the performance of the III Fund.

26. On the evidence, even if gold was not considered to be an alternative investment, the performance of the III Fund would have resulted in a passive breach of the IGGs. Mr. Hilton stated, and I accepted, that the persistence or treatment of a passive breach must be discussed and agreed to between the investment manager and the client. Even Dr. Walford, who did not believe that it was necessary to send a mandatory notification to the client after a passive breach, conceded that in the event gold was classified as an alternative, the actual asset

allocation would have been far outside of the limits of the IGGs and client notification would have been necessary.

27. I accept therefore that Ansbacher failed to invest the Portfolios in accordance with the IGGs and their failure to do so amounts to a breach of contract which would entitle Stonedene to recover damages for any resulting loss suffered.

Negligence

28. There is little dispute between the parties as to the law relative negligence in this dispute. It is the area of professional negligence characterized as the *Bolam Test*. The *Bolam Test* derives from the oft cited passage of ***McNair J*** in the case of ***Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, 586*** where it was stated:

> But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

29. It is accepted therefore that the duty of care of Ansbacher, as investment manager, was to exercise such skill, care and diligence as is usual or necessary in or for the ordinary or proper conduct of the profession. It was the ordinary skill of an ordinary competent investment manager. Stonedene says that Anbacher breached that duty of care in that it:

    (1) acted outside the scope of the First IGG and the Second IGG, specifically as it relates to the holding of alternative investments

    (2) failed to provide timely and accurate valuations

    (3) failed to conduct proper due diligence on investments held by the Portfolios and

    (4) failed to preserve documentation in relation to the contractual and investment arrangement.

30. As it relates to (1) and (2) above the Stonedene's allegations mirror that of breach of the contractual duty. In respect of the duty to conduct proper due diligence on the investments, Stonedene asserted that there was no active management of the portfolio and a failure to conduct due diligence on the III Fund.

Whether Ansbacher was required to provide Active Management

31. The Experts disagreed as to whether Ansbacher was expected to provide active investment management with respect to the portfolio. Mr Hilton's evidence was that they were required to do so whilst Dr Walford contended that this was not expected. According to Stonedene:

> It is clear from both the IMAs and the IGGs that the Defendant was being remunerated to actively manage the Portfolios. When looking at the fees charged by the Defendant it could not seriously be contended that this rate of remuneration was being charged merely to hold the assets. Despite this duty to actively manage the Portfolios, the Experts did agree that there was no investment activity between October, 2007 and January, 2009.

32. Ansbacher case was set out, in paragraphs 41 and 48 of its submissions, as follows:

> 41. It is humbly submitted that there was no breach of contract by the Defendant. The term "active management" cannot be arbitrarily inferred into the agreement between the parties as the Plaintiff seeks to do. The documentation is clear as to what was required of the Defendant. It is also submitted that the management of the portfolio, from the evidence, was in accordance with contractual documentation.
>
> ...
>
> 48. The evidence is that the investment in the fund remained constant save for the reduction of the holding in the III Fund shortly after the portfolio came under the Defendant's management. The evidence of Dr. Walford was that it is quite common in offshore funds to invest in a fund which would usually result in low activity as the stock selection would be undertaken within the fund itself. There is no evidence to indicate how the III Fund came to be initially acquired but the continued retention of the investment in it without any objection being made by

the Plaintiff indicates that the Plaintiff accepted that the investment was within the guidelines. The Experts agreed that investment managers would normally use third party funds to gain exposure to markets which may not be within management specialization of the Investment Manager thus explaining the use of Funds within the portfolio.

33. Stonedene complained that Ansbacher did not adequately monitor the extent of the investment in the III Fund and did not engage in any proper due diligence with respect to this holding. Whilst it is accepted that Ansbacher acquired the portfolio with the investment already made, the Experts agreed that due diligence is required of an investment manager who has agreed to inherit legacy business. Dr. Walford stated:

> "As an investment manager, one is responsible for the holdings, my Lord, and therefore you should presumably know what you are holding, and the reasons for continuing to do so."
> "Normally, you would make sure you understood what the background and history was of the relevant companies and holdings. Some you may already be familiar with, some you may not be, and you may then wish to actually go and carry out some research on them."

Dr. Walford admitted in his testimony that there was no evidence that the Ansbacher conducted any due diligence before entering into the First IMA.

34. The Experts agreed that the Artemis Portfolio suffered a reduction in value as a result of its holding in the III Fund. Dr. Walford agreed that an investment manager ought to take note of the underperformance of a hedge fund marked for a period of four consecutive years, specifically past performance. Ansbacher says that it was unable to participate in the last redemption cycle for the III Fund on 30 September, 2008 as the Second IGG was sent by courier on 22 September, 2008 and redemptions of the III Fund were suspended on 5 December, 2008. Stonedene asserts that Ansbacher ought not to have been investing in the III Fund without any information or knowledge about it. Stonedene argues that it was reflective of a history of failing to adjust the portfolio asset allocation in a timely manner when found in breach of the IGGs. Stonedene points to the fact that it was not until six months after entering into the First IMA and First IGG that Ansbacher divested a

portion of the III Fund investment in an attempt to reduce its holding in alternatives to comply with the First IGG.

35. According to Dr Walford's testimony:

> "I would have expected to see at least the question being asked as to what this fund was, and held. The fund represented 40 percent of the portfolio on it being acquired, and it being brought into Ansbacher Bahamas; but given that I got the complete brush off when I tried to find any details about it I would assume that that must have been what probably happened to Ansbacher when they made a similar inquiry."

Respectfully, an investment manager, holding 40% of a $4 million portfolio invested in the III Fund, being unable to obtain information from the III Fund ought not to properly maintain such an investment and seize the opportunity when possible to redeem. I accept the evidence of Mr. Hilton, who was able to obtain a copy of the Offering Memorandum and the Prospectus of the III Fund, that the Fund indicated periods of extreme illiquidity and made it unreasonable for Ansbacher to have invested 25% of its alternative asset allocation in a single holding of the III Fund. This is especially so where the holding, in gold, already accounted towards the required holding in alternatives.

36. I did not accept Ansbacher's speculative submission, unsupported by any evidence, that

> "If Ansbacher were unable to get details on the fund they had a decision to continue to hold something that had been chosen by the client (or previous manager) or sell something which may annoy or irritate the client."

There was no evidence of any communication with the client with respect to any concerns regarding the III Fund. In fact, Stonedene complains that although the III Fund was suspended on 5 December, 2008 and notification of the suspension was sent by fax and e-mail on the same date, Ansbacher did not communicate the notice to Stonedene until 20 January, 2009. Stonedene says, and I accept, that

this is reflective of a beach of the duty of care as investment manager with respect to the III Fund.

Valuations

37. There is no dispute that the valuations provided on behalf of Ansbacher for the client were laced with errors. That fact is plainly seen in the fact that the valuations provided for Mr Hilton differed from those provided to Dr Walford. Both were provided by Ansbacher. It was in fact the experts themselves who had to make the proper calculations. An internal memorandum dated 9 March, 2009 prepared by Jillian Dames stated:

> "Valuation errors – pricing continues to be a challenge in timely production of these. Other problems were corrected during the consultancy period, and some have recurred since particularly security set up discrepancies."

According to Ms Dames, in her evidence:

> "Well, typically, ideally, an investment platform would contain automatic data feeds into the system to then generate an output that gives a proper valuation of a client's portfolio; but the system that we were using was not specifically designed to investment management. It was more of a banking system, which mean that the data feeds weren't happening the way they should have. A lot of manual involvement was required to produce the valuations."

According to Dr. Walford:

> "There was a gross error in the value of gold. It was out by a factor of a hundred. Frequently that is a problem that happens, because bonds are often quoted in hundreds, as opposed to the actual pricing per bond unit; but it is a frequent problem that the valuation teams have within investment banks. It is not the first time I have come across errors of this sort."

38. I readily accepted the submission of Stonedene, that the production of timely and accurate valuations to the client is a duty of any investment manager and this was not done in this case, resulting in a breach of duty.

Preservation of Documents

39. Stonedene complains that Ansbacher failed to preserve documentation in relation to the contractual and investment arrangement. Ansbacher accepts that it has not preserved documentation relative to arrangements between itself and Stonedene. Ansbacher bemoans a change in ownership in 2011 which it says caused material to be misplaced. I did not accept Ansbacher's response as acceptable in all the circumstances. Ansbacher had been put on notice of this complaint since 4 January 2010 and threatening a claim. Whilst the Sales Agreement for the Sale of Ansbacher may have been entered into in February 2009, the sale was not concluded then. One would have thought that due diligence in the purchase would have flagged this potential claim.

40. The ordinary prudent investment manager, with ordinary skill ought to have specifically sought to have preserved the material relative to this portfolio in light of threatened legal action. The testimony of Dr Walford, is instructive:

> "Q. ... Last line of questioning, Dr. Walford. We note the lack of correspondence which is, there is a lack of correspondence which both Mr. Hilton, and you have acknowledged. In your experience, when you worked at investment institutions, and you received information of a potential dispute or claim what was the procedure which you, if you were managing the account, or if you were in a position to do that, what would be the position in relation to all documents in relation to the particular account that was after notification of a possible suit or a possible claim made in relation to that?
> A. Well, my Lord, like any reasonable and diligent manager, I would ask for the files to understand what happened in the situation.
> Q. Would you ask for the preservation of those files?
> A. It's normal bank process that when a complaint is made if it runs through the compliance side as well as the bank management side, bank management got a chance to resolve the issue in the first instance; and it would go to compliance if that is not successful. But yes, the file should be kept. But files are in any event kept for six years under the regulatory environment we find ourselves in."

41. I am satisfied therefore that in all the circumstances, Ansbacher failed in its duty to exercise such skill, care and diligence as is usual or necessary in or for the

ordinary or proper conduct of the profession of investment management. A reasonably competent and experienced investment manager would have provided accurate valuations, acted in accordance with the asset allocation in the IGGs, notified the client in the event the IGGs moved far outside of the allocations and preserved its documents in relation to the managed investments.

Exclusion Clauses

42. Ansbacher seeks to rely on an exclusion clause contained in the IMAs. Under the terms of the First IMA which was in force up to 17 September, 2008, there was no exclusion for claims arising in breach of contract or negligence. The Second IMA came into effect on the 17 September, 2008 and purported to exclude claims for breach of contract but not claims of negligence or willful default. I did not consider the reliance on the Second IMA to be a serious resistance to claims for Breach of Contract. Firstly, the First IMA, which grants no exclusion, was the governing documents for the period during which Stonedene alleges Ansbacher to have breached the contract and or was negligent. Secondly, none of the IMA's purport to exclude claims for negligence. Finally, I accept the force of the authority of ***Suisse Atlantique Societe d' Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361*** which was advanced by Stonedene. At page 432, Lord Wilberforce stated:

> "One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent. To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not and the courts are entitled to insist, as they do, that the more radical the breach the clearer must the language be if it is to be covered."

I am not satisfied that it has been shown that, as a question of contractual intention, the breaches alleged by Stonedene is to be excluded. As a Court, I would insist

that breaches going to the very basis of the IMA, would have required clearer language to be covered by the exclusion clause. As Stonedene asserts, it is difficult to contemplate that the parties would agree, as contended by Ansbacher, to a clause so wide in scope that it would essentially deprive Stonedene from a remedy for breach of contract. In any event, having found against Ansbacher in negligence, the exclusion clauses could not bite against such a claim.

Breach of Fiduciary Duty

43. Stonedene also raised issues of breach of fiduciary duties. Having regard to my determination as to the claim of breach of contract and or negligence consideration of this claim becomes unnecessary as the only real issue is whether these breaches resulted in losses or damages to Stonedene.

Damages

44. Ansbacher says that the loss was caused by the liquidations imposed on the Investment Manager by instructions from the Claimant to remit funds elsewhere in 2009 when the markets were liquid. The loss, they say, was not caused by any negligence in the management by the Defendant and there is no evidence to the contrary. They say that by the time of the Second IGG, trading in the III Fund was suspended. The files of the Defendant that could not be found were not the cause of any loss occasioned to the Plaintiff.

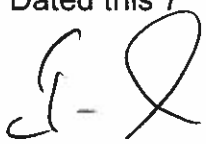
45. I accept the evidence of Mr Hilton on this issue, and will find that the breaches by Ansbacher led to the losses in value of the portfolio of Stonedene. Hilton says that this amounted to a loss of $1,848,710. Whilst I accept that the lapses by Ansbacher, both in contract and in its duty of care to Stonedene, did indeed cause loss, I must nonetheless recognize that the nature of Mr. Hilton's assessment, in the midst of a global economic crisis, was not an exact science. The market was extremely volatile. Mr. Hilton's analysis had the benefit of a hindsight vision which would not have been available in real-time. In the circumstances I would reduce

the assessment by Hilton by 40%. I therefore give judgment to Stonedene in the amount of $1,109,226.

46. The said sum shall bear interest at a rate of 3% per annum from the date of the filing of the Writ of Summons to the date of judgment and shall bear interest at the statutory rate thereafter.

47. Stonedene shall have its reasonable costs, such costs to be taxed if not agreed.

Dated this 7th day of September 2020



Ian R. Winder

Justice