[2009] SC (Bda) 57 Civ (4 December 2009)

IN THE SUPREME COURT OF BERMUDA

COMMERCIAL COURT
Civil Jurisdiction

2006: No. 20

BETWEEN:

(1) PHOENIX GLOBAL FUND LIMITED

(2) PHOENIX CAPITAL RESERVE FUND LIMITED

Plaintiffs

and

(1) CITIGROUP FUND SERVICES (BERMUDA) LIMITED

(2) THE BANK OF BERMUDA LIMITED

Defendants

JUDGMENT

Dates of Hearing: 14 September 2009 – 6 October 2009
27 October 2009 – 30 October 2009

Date of Judgment: 4 December 2009

Victor Lyon Q.C. and Larry Mussenden, Attride-Stirling & Woloniecki, for the Plaintiffs

Richard Sheldon Q.C. and Andrew Martin, Mello Jones & Martin, for the 1st Defendant

Narinder Hargun and Alex Potts, Conyers Dill & Pearman, for the 2nd Defendant

Introduction

1. This action concerns the nature and extent of the duties owed by administrators and custodians of investment funds which are classified by the relevant regulations as Bermuda Standard Schemes. More particularly, the nature and extent of those duties have to be looked at in the context of two funds where investments were made which are said to have been in breach of the investment restrictions contained in the relevant prospectus. In this regard, among the many issues to be determined by the Court are the interpretation and application of the Bermuda Monetary Authority (Collective Investment Scheme Classification) Regulations 1998 ("the Regulations"). I should mention that the Regulations were repealed by the Investment Funds Act 2006 ("the 2006 Act"). The plaintiffs (respectively "Phoenix Global" and "Phoenix Capital" or "the Fund", and together "the Funds") are described in the pleadings as mutual investment funds which were incorporated under the laws of Bermuda on 11 and 18 June 1999 respectively. In the promotional literature published by Phoenix Advisors LLC ("Phoenix Advisors"), Phoenix Global was described as an emerging market hedge fund, and Phoenix Capital as a leveraged hybrid money market fund. Phoenix Capital was a daily dealing fund, which required daily calculations of the net asset value ("NAV") per share of the Fund, and Phoenix Global was a monthly dealing fund which required calculation of the NAV at the end of each month, although there is an issue between the parties as to the obligation to calculate the NAV daily on a pro forma basis. The first defendant ("Citigroup") was formerly named Forum Fund Services Limited ("Forum"), and under that name acted as administrator to the Funds. Citigroup's services as administrator were provided to Phoenix Global and Phoenix Capital pursuant to agreements dated 24 June and 29 June 1999 (respectively "the Citigroup Phoenix Global Administration Agreement" and "the Citigroup Phoenix Capital Administration Agreement", and together "the Citigroup Administration Agreements"), which agreements remained in force until Citigroup's resignation as administrator, notice of which was given on 3 May 2002, to be effective on 31 July 2002, which effective date was subsequently extended to 30 September 2002. The second defendant ("the Bank of Bermuda" or "the Bank") acted both as administrator and

as custodian to the Funds (for different periods), pursuant to administration agreements dated 30 September 2002 (respectively "the Bank of Bermuda Phoenix Global Administration Agreement" and "the Bank of Bermuda Phoenix Capital Administration Agreement" and together "the Bank of Bermuda Administration Agreements") for the period from 30 September 2002 to 31 December 2003, and as custodian pursuant to agreements dated 29 May 2001 (respectively "the Bank of Bermuda Phoenix Global Custodian Agreement" and "the Bank of Bermuda Phoenix Capital Custodian Agreement" and together "the Bank of Bermuda Custodian Agreements") for the period from 29 May 2001 to 30 November 2003.

Entities Related to the Funds

2. The first of these to which I will refer is Phoenix Investment & Private Trust Ltd ("Phoenix Investment"), which company was the investment manager for the Funds between June 1999 and June 2004. Phoenix Investment was appointed to give investment advisory and management services to the Funds by agreements dated 24 June 1999 in the case of Phoenix Global, and 30 June 1999 in the case of Phoenix Capital.

3. However, Phoenix Investment appointed a sub-advisor, Phoenix Advisors, a Delaware company with offices in New York. Phoenix Advisors was appointed to act as sub-advisor in respect of both Phoenix Global and Phoenix Capital under investment sub-advisory agreements dated respectively 24 June 1999 and 30 June 1999, to which agreements the Funds were parties. The payments made by the Funds to Phoenix Advisors give rise to one of the claims made by the Funds against both Citigroup and the Bank of Bermuda.

4. Phoenix Advisors in turn had an agreement with a company of similar name, Phoenix Advisors SA, formerly known as Lakeshore Finance SA. That agreement recited that Phoenix Advisors was to act as sub-advisor to the Funds, which were then in the process of being established, that its duties were to include responsibility for marketing and investor acquisition, and that Phoenix Advisors

had been authorised to sub-contract such activities. Phoenix Advisors duly appointed Phoenix Advisors SA as marketing and client development and maintenance representative on behalf of Phoenix Investment and the Funds.

5. Lastly, there was a company named Phoenix Worldwide Growth Fund Ltd ("Phoenix Worldwide") a third company within the Phoenix group, managed and run by Diego Moretti, which was established in June or July of 2002.

The Individuals behind the Various Phoenix Entities

6. The principal individual involved in the operations of the various companies within the Phoenix group at all material times was Patrick Blum, a Swiss national. He was a director of each of the Funds, and was apparently the owner of a company which held a 50% beneficial interest in Phoenix Investment. The other 50% of Phoenix Investment was apparently owned by Maurice Ramseyer, who had a close relationship with and now shares an office with Mr. Moretti, the individual who has taken on the task of seeking to effect recoveries for the class A shareholders of the Funds. I will need to say more about Mr. Ramseyer and his role in these proceedings in due course. Phoenix Investment in turn wholly owned Phoenix Advisors, of which Mr. Blum was the managing director. Mr. Blum was also a director for a period of Phoenix Worldwide, the fund managed by Mr. Moretti. He resigned as a director of the Funds and Phoenix Worldwide at the request of Mr. Ramseyer and Mr. Moretti on 14 October 2003, on condition that he continue to serve, with Mr. Moretti, from October 2003 until such time as Mr. Moretti was able to secure the services of a replacement director, but on the basis that his resignation was to be effective by 31 December 2003 at the latest.

7. Maxim Risman was a director of each of the Funds between June 1999 and October 2000, and was also a managing director of Phoenix Advisors. Seng Liew was a director of each of the Funds between October 2000 and April 2002. Martha DeArteaga was a director of each of the Funds between April 2002 and 14 October 2003, and had been employed by Phoenix Advisors before then. She had

extensive dealings with the administrators, as did a more junior employee employed by the Funds, Kelly Chicas.

8. Mr. Moretti has been a director of each of the Funds since 14 October 2003, and as I have indicated, he is, or presents himself as, the individual driving this litigation for the benefit of the class A shareholders who were the investors in the Funds, and who suffered losses in consequence of the diminution of the NAV of the Funds. Exactly how those class A shareholders will benefit from any recoveries is another matter. The majority of those class A shareholders (some 15% or so chose to redeem in cash rather than take shares in the new company) became shareholders in June or July 2004 in a Cayman Islands segregated portfolio fund company originally named Dynagest Investment Funds SPC ("Dynagest"), and since 18 March 2005 named DM Investment Funds SPC. Dynagest maintained some five separate portfolios, and the illiquid assets transferred from Phoenix Global and Phoenix Capital were held respectively by DM Special Assets Global Fund SPC and DM Special Assets Reserve Fund SPC. Ultimately, DM Special Assets Global Fund SPC was closed following the disposal of all of its illiquid assets, while the DM Special Assets Reserve Fund SPC remains open pending the sale of its last asset. One of the other portfolios within Dynagest contained the assets of Phoenix Worldwide. I will refer to the company holding the assets as Dynagest, whether before or after the name change, and note that that entity is now said to be in liquation. According to Mr. Moretti's evidence, no distinction is to be drawn in relation to the distribution of the proceeds of this litigation, if successful, between those shareholders who redeemed rather than exchange their shares in the Funds for shares in Dynagest and those shareholders who did become shareholders in Dynagest. The latter will have received substantial payments reflecting the substantial recoveries which the Funds were eventually able to make, but for which on their primary case the Funds do not give credit to the defendants, against whom recovery is sought. Given the importance of this re-structuring, not least in relation to the losses said to have been suffered by the Funds and their class A shareholders, I will need to

revert to the detail of the re-structuring, as well as the arrangements for the funding of this litigation and the division of any recoveries from it.

The Pleaded Claims against both Defendants

9. The statement of claim has been amended some five times, four before trial and once during trial, and of the four pre-trial amendments, three were made within the last year. The consequence of the amendments is that major parts of the case for the Funds were not originally pursued, but have been added by amendment. I will endeavour to set out the salient parts of the claims made by the Funds, which will necessarily be a lengthy and detailed process, given the complexity of the statement of claim in its final version.

10. The starting point so far as the Funds are concerned is that Citigroup (and similarly the Bank of Bermuda, when acting as administrator) are said to have owed duties to the Funds in the form of contractual duties, duties of care at common law, and statutory duties imposed by the Regulations. Although the breaches of duty are consistently pleaded as contractual breaches of duty, breaches of a duty of care owed in tort or breaches of statutory duty, I may refer hereafter to breaches of duty in general terms, but where I do so I intend that to cover the different types of breach of duty which are consistently detailed throughout the pleading. It is a critical part of the case for the Funds that both Citigroup and the Bank of Bermuda as administrators were required (whether contractually or because they undertook the responsibility and consequently owed a duty of care to the Funds, or indeed arising independently) to perform the functions and discharge the duties set out in the Regulations. The Funds place particular reliance upon regulation 11 (1) of part B of the schedule to the Regulations (and I will refer to this part simply as part B of the Regulations), which requires the administrator, with the directors, to provide or procure, inter alia, that subscription monies received by a scheme are applied in accordance with its constitution (i.e. its bye-laws), and regulation 11 (2) of part B of the Regulations, which imposes a duty upon the administrator to manage the scheme

in accordance with its constitution, the Regulations, and the most recently published prospectus.

11. I will at this point set out those parts of the Regulations in the terms to which they are referred in the pleading, as follows:

> "*Interpretation*
>
> 1 In this Part unless the context otherwise requires- "constitution" means-
>
> (a) in the case of a mutual fund company its memorandum of association … and bye-laws"…
>
> "securities" means shares of a mutual fund scheme or units of a unit trust;
>
> "service provider" means any person in or from within Bermuda providing services to a scheme and includes a scheme's custodian, administrator … and any other person providing general management, administrative or accounting and auditing services.
>
> *Reports to the Administrator*
>
> 6 (1) For the purposes of this regulation "reportable event" means an event in relation to which a report is required under paragraph (2).
>
> (2) Where a service provider becomes aware that the assets of a scheme have not been invested in accordance with the constitution or that the general management of a scheme is not materially in accordance with the provisions of its constitution such service provider shall -
>
> (a) immediately advise the [BMA] of the occurrence of any such event and the circumstances applicable thereto; and
>
> (b) make a report in writing of such reportable event to the administrator…

Functions

11 (1) The administrator shall, (with the directors in the case of a mutual fund scheme), provide or procure -

(a) that subscription moneys received by a scheme are applied in accordance with its constitution;…

(d) that the income of a scheme is applied in accordance with its constitution;

(e) that the net asset value of the securities, and their issue, conversion and redemption prices, are calculated in accordance with a scheme's constitution and made available to investors or potential investors;

(f) that the investment of the assets of a scheme is in accordance with its stated investment objectives…

(2) It shall be the duty of the administrator to manage the scheme in accordance with -

(a) the constitution;

(b) these Regulations;

(c) the most recently published prospectus…

Delegation

12(1) The administrator shall be entitled to delegate any or all functions or duties to any such person or persons, whether in or outside Bermuda, as it shall consider appropriate but the administrator shall remain responsible for the performance of such person of any duty so delegated"

12. The pleading then refers to clause 154 of the bye-laws of both Funds, which clause provides that the investment restrictions of the Funds shall be as set out from time to time in any information memorandum (i.e. prospectus) issued by the

Funds. The dates of the various prospectuses issued by each of the Funds, some five in all, are set out a little earlier in the pleading.

13. The pleading then refers to the positions of Phoenix Investment and Phoenix Advisors, noting that in the management and investment advisory agreements dated respectively 24 June and 30 June 1999 there was provision, first, that Phoenix Investment would bear all expenses incurred by it in connection with its duties under those agreements, and, secondly, that Phoenix Investment's permission to contract with or consult with sub-advisors as it deemed appropriate was subject to the caveat that this was to be without additional expense to either of the Funds.

14. There is then a pleading concerning delegation by the administrator, a matter that is dealt with in regulation 12 of part B of the Regulations. The pleading indicates that insofar as Phoenix Investment and/or Phoenix Advisors had delegated to them the powers and duties of the administrators to manage the Funds, the administrators remained responsible to the Funds for that management. The arrangements between the Funds, Phoenix Investment and Phoenix Advisors were made at much the same time as the appointment of Citigroup as administrator, and of course substantially preceded the appointment of the Bank of Bermuda as administrator. However, it is then pleaded that first Citigroup and then the Bank had acquiesced in the appointment and/or continued appointment by the directors of the Funds of Phoenix Investment as managers to discharge what were said to be the statutory functions and duties imposed on Citigroup and the Bank as administrators under regulation 11 of part B of the Regulations; in this way it is said that the administrators delegated to Phoenix Investment their functions and duties as administrators within the meaning of regulation 12 of part B of the Regulations, but nonetheless remained responsible to the Funds for the fact that the statutory functions and duties imposed upon the administrators had not been discharged, as further set out in the pleading.

15. There is then a pleading under the heading "Estoppel by Convention" indicating that Citigroup acted as administrator to Phoenix Capital on the basis that a particular part of the Phoenix Capital prospectus of 2001 was true. This was to the effect that Phoenix Capital was subject to the Regulations, that as such it had been classified as a Bermuda Standard scheme, and that the Fund, and its service providers including Citigroup as administrator, conducted their activities on behalf of the Fund in accordance with the Regulations. This is followed by a similar pleading in relation to the Bank, both as custodian and administrator, and it is then pleaded that accordingly Citigroup and/or the Bank of Bermuda are estopped by convention from denying;

a that Citigroup and then the Bank acted as administrator and custodian as those terms were defined under the Regulations;

b that Citigroup and then the Bank conducted their activities on behalf of Phoenix Capital;

c that accordingly, as such an administrator and agent of Phoenix Capital, Citigroup and then the Bank undertook to Phoenix Capital to carry out the functions and assume the duties and responsibilities of an administrator specified in the relevant parts of the Regulations;

d that accordingly, Citigroup and then the Bank were, as towards Phoenix Capital, subject to the contractual duties, or duties of care at common law or under the statutory duties imposed by the Regulations as set out later in the pleading;

e that as custodian and agent of Phoenix Capital, the Bank undertook to Phoenix Capital to carry out the functions and assume the duties of a custodian as specified in the relevant part of the Regulations; and

f that accordingly, as custodian, the Bank was, as towards Phoenix Capital, subject to the contractual duties or duties of care at common law or under the statutory duties imposed by the Regulations as set out later in the pleading.

The Pleaded Claims against Citigroup

16. The pleading then turns to the manner in which the various duties are said to have been owed by Citigroup to the Funds. Dealing firstly with the position in contract, it is pleaded that by accepting each statutory appointment for reward and/or the opportunity of entering into the Citigroup Administration Agreements, Citigroup contracted with the Funds to perform the functions and undertake the duties specified in regulation 11 (1) and (2) of part B of the Regulations until such appointments were terminated. The pleading then turns to the duty of care owed in tort, pleading that by accepting the appointment of administrators of the Funds, Citigroup undertook the responsibility and consequently a duty of care to provide to the Funds the services of statutory administrators to a professional standard of skill and care which required it to perform the functions set out in regulation 11 (1) of part B of the Regulations to a professional standard of skill and care, and without breaching the duties set out in regulation 11 (2) of part B of the Regulations, until such appointments were terminated. The Funds then set out various facts and matters said to be indicative of the assumption of the aforesaid duty of care by Citigroup. These included the fact that Citigroup (under its former name) had authorised or permitted the prospectuses to identify it as administrator, that it charged and received fees by reason of its appointment, and also with reference to that section of the Citigroup Administration Agreements which provided that where Citigroup had been negligent (fraudulent or acting in wilful default or bad faith) in the course of the discharge of its duties as administrator, it would be liable for such negligence.

17. Finally, in relation to the statutory duty, the Funds plead that part B of the Regulations contained a statutory scheme for the protection of a limited class of legal persons, and that as a matter of law the Regulations provide on their proper

construction or by necessary implication for a private law right of action by the Funds against Citigroup for breach of statutory duty, in the event that Citigroup failed to perform the functions or were in breach of the duties set out in part B of the Regulations.

Citigroup's Duties

18. In relation to the contractual duties said to be owed by Citigroup, the Funds refer to and rely upon the express terms of the Citigroup Administration Agreements. The pleading makes reference to the obligation to calculate the NAV on each valuation day as defined in the prospectus. The pleading carries on to refer to clause 2 (a) (2) (xii) of the Citigroup Administration Agreements, pursuant to which Citigroup undertook to "generally perform all the duties usually performed by administrators of companies in Bermuda, including the keeping and making of all statutory returns and records required to be kept under regulations in Bermuda for the time being in force". The Funds maintain that this express term of the Citigroup Administration Agreements imports the duties owed pursuant to the Regulations. As I have indicated, the Funds maintain that the same duties were owed by Citigroup on the basis that it undertook the responsibility and consequently owed a duty of care to provide the relevant services, and alternatively under a directly enforceable statutory duty. Those duties were said by the Funds to include (but were not limited to):

a a duty immediately to advise the Bermuda Monetary Authority ("the BMA") if the assets of each of the Funds were not invested in accordance with its constitution;

b a duty to provide or procure that the subscription monies and income received by each of the Funds were applied in accordance with its constitution;

c a duty to provide or procure that the NAV of the securities held by the Funds was calculated in accordance with its constitution; and

d a duty to manage each of the Funds in accordance with its constitution, the Regulations, and the various prospectuses which had been issued on behalf of each of the Funds.

19. The pleading then refers to further terms which it pleads are included in the terms of the contract said to have been created when Citigroup accepted its statutory appointment and entered into the Citigroup Administration Agreements, or alternatively required by the duty of skill and care previously pleaded, or alternatively required by the Regulations, and alternatively as implied terms of each of the Citigroup Administration Agreements. These are to the effect that;

a Citigroup would properly perform the statutory duties imposed upon it by the Regulations, including the particular duties referred to in the paragraph above; and alternatively

b Citigroup would exercise all reasonable care to ensure that the subscription monies and income received by each of the Funds were applied in accordance with the constitutions of each, and that each of the Funds was managed in accordance with its constitution, the Regulations, and the various prospectuses.

The Wrongful Payments to Phoenix Advisors

20. The Funds then plead breach of duty on the part of Citigroup, and the first such breach of duty pleaded relates to payments made by both Phoenix Global and Phoenix Capital to Phoenix Advisors. The total sum said to have been improperly paid by Phoenix Capital to Phoenix Advisors was originally put at US $789,649.13 but was reduced during the hearing by amendment to US $678,649.13; the like amount said to have been improperly paid by Phoenix Global to Phoenix Advisors was originally US $760,000, but was reduced by amendment to US $641,000 The Funds plead that these payments were not made

to discharge any bona fide debt owed to Phoenix Advisors by the Funds, a matter which the Funds say should have been obvious to Citigroup from:

a the absence of any documentation justifying such payments as proper corporate expenses of either of the Funds;

b the fact that the management and investment advisory agreements, pursuant to which Phoenix Investment had been appointed to give investment advisory and management services to the Funds, provided that any sub-advisor (and Phoenix Advisors was such a sub-advisor) was to be paid by Phoenix Investment, and not by either of the Funds;

c the fact that the Funds paid substantial fees to Phoenix Investment for its management and investment advisory services;

d the fact that the investment sub-advisory agreement did not provide for any fees to be paid to Phoenix Advisors by the Funds; and

e the fact that the Funds' prospectuses made it clear that any fees payable to Phoenix Advisors were not the responsibility of the Funds.

21. Accordingly, the Funds plead that the payment away of their money to Phoenix Advisors was, in each case, not an application of the Funds' subscription monies or income that was in accordance with their constitutions.

22. The pleaded breaches of duty on the part of Citigroup led to claims that Citigroup had failed to provide or procure that the Funds were managed in accordance with their constitutions and most recently published prospectuses, had failed properly to determine the NAV of each Fund, had failed to make any report to the BMA, and/or failed to take any or any reasonable steps so to ensure that monies and income were applied in accordance with the constitutions of the Funds. Particulars were given which essentially repeated the matters set out above.

23. Hence the Funds claim that each suffered loss and damage by reason of Citigroup's breaches of contract and/or duty, in the amounts referred to in paragraph 20 above. Alternatively, it is pleaded that had Citigroup taken the steps set out in the particulars to prevent the payments to Phoenix Advisors, there was a chance that some or all of the payments would have been prevented, which chance was said to have been lost, so that the Funds claim as damages such part of the sums paid away as the Court may think reflects the value of the lost chance. That "lost chance" claim appears as an alternative to a number of subsequent claims.

Breach of the Phoenix Capital Quality Restriction

24. The Phoenix Capital prospectuses for 1999 and 2001 stated that its investment objective was to obtain maximum total return consistent with preservation of capital, and advised that Phoenix Capital pursued its objectives by maintaining a portfolio of high quality securities. The prospectuses both contained what the Funds describe as an investment restriction under the heading "Quality Information", providing that Phoenix Capital would limit its portfolio investments to those instruments presenting minimum credit risks and of "eligible quality" as determined by the manager under the supervision of the Fund's board. "Eligible quality" was defined with reference to the rating categories used by nationally recognised statistical rating organisations in the United States, but there was a proviso that if the particular security was unrated, it should be of "comparable quality" as determined by the manager. This provision was defined in the pleading as "the Quality Restriction", and the pleading continues that Citigroup was contractually obliged (or alternatively subject to a duty of care and/or a statutory duty) to ensure or take reasonable steps to ensure that the Quality Restriction was adhered to by Phoenix Capital at all times during the life of the Citigroup Phoenix Capital Administration Agreement.

25. The pleading continues that Phoenix Capital had made what purported to be investments in the form of loans to special purpose vehicle companies ("SPVs")

which were described as wholly unsecured, and in relation to which the SPVs subsequently defaulted. I will refer to these loans, as the pleading does, as "Loans to SPVs".

26. The pleading then details the losses said to have been sustained by reason of breaches of the Quality Restriction, with particular reference to the Loans to SPVs. Five entities to which loans had been made were named, only four of which had led to losses. These were Fiducia Group Services Limited ("Fiducia") Astir Trading Limited ("Astir"), Mandarin Trading Limited ("Mandarin"), and Fitben Investments Limited ("Fitben"). The losses respectively were said to be US $8,250,000, US $4,000,000, US $11, 300,000, and US $13,263,381, the total of which amounts to US $36,813,381. I will however refer to the fifth entity, which is Roberlon International Limited ("Roberlon"), to which a loan of US $2,900,000 was made, but which loan was repaid. I refer to Roberlon because at a later stage of the pleading reference is made to that loan in relation to the percentage of the Fund's assets which were said to be illiquid. Roberlon was beneficially owned by Mr. Ramseyer.

27. The pleading continues that Citigroup received or ought to have obtained regular reports on the Loans to SPVs, and therefore ought to have been aware of some six different breaches of the Quality Restriction. Further, the Funds plead that Citigroup was or ought to have been aware that Phoenix Capital's auditors, Ernst & Young, had indicated in their report that they had been unable to satisfy themselves as to the fair value of the promissory notes evidencing the Loans to SPVs.

28. It is then pleaded that Citigroup failed to provide or procure that the Quality Restriction was observed by Phoenix Capital, failed properly to determine the NAV of Phoenix Capital, failed to make any report to the BMA, and/or failed to take any or any reasonable steps to ensure that the Quality Restriction was observed by Phoenix Capital. Particulars of these complaints are given; it is said that Citigroup took the Loans to SPVs at face value without any evidence of such

value, that it failed to draw the breaches of the Quality Restriction to Phoenix Capital's directors or manager (in practical terms, this meant Mr. Blum, the person responsible for the breaches), failed to report the breaches to the BMA, failed to take steps to prevent any further such loans, and failed to take any other steps such as suspending administration, resigning or bringing the matter to the attention of the custodian or the Fund's shareholders.

29. The pleading then turns to the issue of loss, claiming the previously pleaded sum of US $36,813,381. However, the pleading carries on to say that Phoenix Capital will give credit for total recoveries in the sum of US $7,954,654, which amount is described as the sums recovered and assets held at 15 June and 15 July 2004. These dates are the dates of transfer of the assets and liabilities of Phoenix Capital to Dynagest under the re-structuring, and it is then pleaded that Phoenix Capital's losses were "crystallised" at this point.

30. The issue of recoveries is a complex one, but suffice to say at this stage that the recoveries in relation to Fiducia and Fitben (which were related) were said to amount to US $1,015,253. This figure was said to be the value of shares in Chesterae Investments Limited ("Chesterae"), a property holding company, which shares had been acquired by Fiducia and Fitben through a complex series of dealings which I will come to. The actual value of the Chesterae shares was given as US $1,092,000, but there was a minor adjustment, which I will do no more than say at this stage is difficult to follow. There were also two promissory notes from the trust of a Jersey trust known as the Ironzar Trust, which were described as having no market value. The trustee was Equity Trust (Jersey) Limited ("Equity Trust") and I will refer to the Ironzar Trust as Ironzar.

31. Next in terms of recoveries was Astir. Astir had invested the US $4 million which had been loaned to it in a bond ("the Maxcom Bond") issued by a Mexican company, Maxcom Telecomunicaciones. Phoenix Capital effected two recoveries from Mr. Blum in relation to this investment, and sold part of the Maxcom Bond

for a recovery of US $1,412,825. The pleading indicates that at 15 June and 15 July 2004 the remaining part of the bond had a value of US $226,576.

32. Finally, there was Mandarin, which had used the US $11.3 million advanced to it to purchase a painting by Paul Gauguin named "Le paysage aux trois arbres" ("the Painting"). At 15 June and 15 July 2004, the Painting was said to have a value of US $5.3 million.

33. That is Phoenix Capital's primary case in regard to losses suffered by reasons of the Loans to SPVs. However, Phoenix Capital carries on to plead an alternative case, which involves giving credit for the sums recovered and assets held as at 1 September 2008. By that time, the value of sums recovered and assets held had increased to US $27,853,268. The Equity Trust promissory notes which had previously been described as having had no market value were settled for £6,000,000,which equated to US $10,641,600 on 31 January 2006. The building known as Chesterfield House owned by Chesterae had been sold on 29 January 2007 for a net sum of £5,811,544 (equivalent to US $11,372,430), having yielded income of £693,193 (equivalent to US $1,323,915). The total recoveries by this time were accordingly US $23,337,945. As well as the loans made to Fiducia and Fitben, there had been a payment made by Phoenix Capital directly, in the sum of US $1,626,270, which is referred to as "the Chesterfield Investment". The total paid out to Fiducia, Fitben and for the Chesterfield Investment amount to US $23,139,651 (US $8,250,000 + US $13,263,381 + US $1,626,270), so that recoveries marginally exceed the total originally invested, but a claim is maintained in respect of lost interest. In respect of Astir, the remaining bond which had been valued at US $226,576 had been sold for US $426,528, and in respect of Mandarin, the Painting remained unsold, but by 1 September 2008 was said to have a value of US $4 million. The Painting represents the last unrealised asset.

34. In the alternative, it is then pleaded that had Citigroup taken steps to prevent Phoenix Capital from making purported investments in breach of the Quality

Restriction, there was a chance that some or all of the purported investments would have been prevented. That chance having been lost, damages are claimed for the loss of chance.

Breach of the Phoenix Capital Illiquidity Restriction

35. The Phoenix Capital prospectuses for 1999, 2001 and 2002 all contained an investment restriction, providing that Phoenix Capital would not maintain more than a given percentage of its net assets in illiquid securities. That percentage was 25% in the August 1999 prospectus, and 35% in the subsequent prospectuses. The restriction is referred to in the pleading as "the Illiquidity Restriction". The words "illiquid securities" are not defined in any of the prospectuses, but Phoenix Capital maintains that a security is illiquid if it cannot in the ordinary course of business be reduced to cash within a period of 48 hours.

36. The pleading continues that Citigroup was obliged (whether as a contractual duty, a duty of care, and/or a statutory duty) to ensure that the Illiquidity Restriction was adhered to by Phoenix Capital at all times. At the time of Citigroup's appointment as administrator to Phoenix Capital on 29 June 1999, Phoenix Capital had no illiquid securities. It is pleaded that the loans which Phoenix Capital made to SPVs which have been described in paragraph 26 above constituted investments in illiquid securities, and because of their amount represented breaches of the Illiquidity Restriction. Specifically, the pleading complains that Citigroup failed to provide or procure that the Illiquidity Restriction was observed by Phoenix Capital, failed properly to determine the NAV of Phoenix Capital, failed to make any report to the BMA, and failed to take any or any reasonable steps to ensure that the Illiquidity Restriction was observed. In this regard, the pleading complains that Citigroup failed to draw the breaches of the Illiquidity Restriction to the attention of the directors or manager of Phoenix Capital, points out that the BMA had the power to revoke its approval of Phoenix Capital and thereby to prevent it from trading, and refers to the fact that Citigroup failed to take any other steps such as suspending administration, resigning as administrator or bringing the matter to the attention of the custodian

or the shareholders. There is another "lost chance" pleading, where it is said that had Citigroup taken steps to ensure that the Illiquidity Restriction was enforced, each of the Loans to SPVs would have been prevented or that there was a chance of that, which chance was lost, and again damages are claimed for the value of the lost chance.

37. The next relevant part of the pleading first refers to the requirements of the Regulations in relation to a custodian (which Citigroup was not), and there is then a plea premised on the contention that it was Citigroup which had delegated its function to a manager. The pleading then refers to the payments made by the custodian to Phoenix Advisors, which payments have already been referred to. The custodian of the time was originally but is no longer a party to these proceedings.

The Pleaded Claims against the Bank of Bermuda

38. This part of the pleading starts with reference to the underlying agreements which I have referred to in paragraph 1 and pleads that accordingly the Bank of Bermuda contracted with the Funds to perform the functions and undertake the duties specified in regulation 11 (1) and (2) of part B of the Regulations for the period of its appointments as administrators, and to perform the functions specified in regulation 16 (1) of part B of the Regulations for the period of its appointments as custodians.

39. The pleading then sets out the basis upon which it is said that the Bank of Bermuda undertook the responsibility and consequently had a duty of care to provide to the Funds the services of statutory administrators and custodians to the requisite professional standards. In the case of administrators, these included being identified as such in the prospectuses, the fact that the Bank of Bermuda charged and received fees by reason of its appointments, and the fact that clause 9.2 of each of the administration agreements provided that where the Bank had, inter alia, been negligent in the course of the discharge of its duties, it would be liable for such negligence insofar as it caused loss and damage to the Funds or

their shareholders. In broad terms the same (or equivalent) provisions applied to the Bank of Bermuda's role as custodian.

40. The Funds then plead that the Regulations should be interpreted so as to provide on their proper construction for a private law right of action by the Funds against the Bank of Bermuda for breach of statutory duty in the event that the Bank failed to perform the functions or were in breach of the duties set out in the Regulations applicable to administrators and custodians. I could not see a pleading in corresponding terms as against Citigroup, although there are references to "a directly enforceable statutory duty" in that part of the pleading governing claims against Citigroup.

41. The pleading then refers to the relevant parts of the Bank of Bermuda Custodian Agreements, and maintains that the effect of the clauses cited was that the Bank was only authorised to make payments out of the Funds' accounts for their proper corporate purposes.

42. The pleading then refers to that part of the Regulations which imposes a statutory obligation to provide for the safe-keeping of the Funds' assets, and not to comply with instructions from the administrator or manager which conflict with the duty imposed by the Regulations to keep the Funds' assets safe. Finally, in the section regarding the Bank's duties as custodian, it is pleaded that it was an implied term of the Bank of Bermuda Custodian Agreements that the Bank would perform the statutory duties imposed upon it by the Regulations, and that an equivalent duty existed in relation to the duty of care and/or statutory duty.

The Bank's Duties as Administrator

43. The pleading starts with reference to the Bank of Bermuda Administration Agreements, pleading that the Bank expressly contracted with each of the Funds:

a to determine the share prices (the NAVs) in accordance with the bye-laws, and based upon the information supplied by the manager, the Funds and the custodian; and

b generally to perform all the duties usually performed by secretaries, registrars and administrators of companies including the keeping and making of all statutory returns and records required to be kept and made under regulations in Bermuda for the time being in force, as provided for in clause 4 (s) of the agreement.

44. The pleading then refers to clause 9.6 of the Bank of Bermuda Administration Agreements, in regard to the Bank's obligation to use reasonable endeavours to verify pricing information supplied to it.

45. It is then pleaded that the Bank of Bermuda had (whether in contract, as a duty of care owed in tort or under a directly enforceable statutory duty) an obligation properly to perform the statutory duties imposed by the Regulations, specifically identifying those duties which had been pleaded as against Citigroup, and which are set out in paragraphs 18 and 19 above.

Breaches of the Bank of Bermuda Custodian Agreements

46. Under this section, the pleading identifies three separate payments or series of payments in respect of which complaint is made. The first is the payments to Phoenix Advisors, in respect of which it is pleaded that the Bank had, between June 2001 and 13 November 2003, paid out US $760,000 as custodian for Phoenix Global, and US $609,649.13 as custodian for Phoenix Capital. Second is the sum of US $1,806,648, paid by the Bank as custodian for Phoenix Capital on 26 November 2002, as the purchase price of 12,800 shares in Phoenix Global, which the pleading refers to as the Phoenix Global Investment. (The acquisition cost of this investment is given elsewhere in the pleading as US $2,000,000). The third is in about May 2003, when the Bank paid out the sum of US $1,626,270 as

custodian for Phoenix Capital in respect of what was referred to as the Chesterfield Investment.

47. The pleading then refers to the facts and matters to which I have already referred in relation to the payments to Phoenix Advisors, in paragraph 20 above, and matters which were set out later in the pleading (to which I will come) in relation to the Phoenix Global Investment and the Chesterfield Investment.

48. It is then pleaded that the payments to Phoenix Advisors were not made to discharge any bona fide debt owed to Phoenix Advisors by the Funds, and that none of the payments was made for the proper corporate purposes of the Funds, such that the Bank was not authorised to make them, and in respect of which it is said that they were entitled and duty bound to refuse to follow any instructions to make such payments.

49. Particulars are then given of the payments said to have been wrongfully paid by the Bank, in terms of being unauthorised and representing a failure to provide for the safe-keeping of the assets of the Funds. Specifically, the pleading complains that the Bank, despite being entitled to do so, never did demand copies of any documents justifying the payments in question.

50. The pleading then maintains that Phoenix Global and Phoenix Capital suffered loss and damage, put at US $760,000 in the case of Phoenix Global, and US $4,235,919.93 in the case of Phoenix Capital. The amounts pleaded earlier representing payments said to have been wrongfully paid by the Bank as custodian for Phoenix Capital to Phoenix Advisors and for the Phoenix Global Investment and the Chesterfield Investment I calculate to be a lesser figure, albeit more than $4 million. Credit is then given for the value of the Phoenix Global Investment at the time that it was transferred to Dynagest, 15 June 2004, at which date it is pleaded that Phoenix Capital's losses were crystallised. That credit is for the sum of US $395,264. Alternatively, credit is given for the sum realised from the sale of the shares representing the Phoenix Global Investment in the sum of

US $314,983, which sale was said to have occurred on 1 March 2006. It is then pleaded that Phoenix Global had agreed with its former shareholders on 15 June 2004, the time of the transfer to Dynagest, that to the extent that Phoenix Global obtains compensation by reason of its claims in these proceedings, it would pass the benefit of such compensation back to them, and that similarly Phoenix Capital will give credit. Lastly, it is pleaded in respect of the Chesterfield Investment that the recoveries were as set out in paragraphs 30 and 33 above.

51. Finally, that part of the pleading ends with a claim for the value of the lost chance, on the same lines as previously referred to.

Breaches of the Bank of Bermuda Administration Agreements

52. The first of these relates to the payments to Phoenix Advisors, and the pleading claims the sum of US $440,000 as the amount paid out of Phoenix Global to Phoenix Advisors between October 2002 and 31 December 2003, and the sum of US $260,000 paid out of Phoenix Capital to Phoenix Advisors for the same period. The pleading continues with the like complaints which are made in relation to similar claims made against Citigroup and the Bank of Bermuda in its capacity as custodian.

53. The next pleaded claim concerns the breach of the Quality Restriction, referred to in the claim against Citigroup with reference to the Loans to SPVs. As against the Bank of Bermuda in its capacity as administrator, the complaint is made first in respect of the Phoenix Global Investment. The pleading quotes extensively from the Phoenix Global prospectus of 2002.

54. The pleading then moves on to the Chesterfield Investment, pleading that Phoenix Capital does not know whether this was a loan to an SPV, or some other kind of purported investment. That of course is Phoenix Capital's position now, with Mr. Moretti in the driving seat. Presumably Phoenix Capital knew rather more about the reason for the payment it was making and the nature of whatever it was acquiring when the payment was made in May 2003, when Mr. Blum was the

directing mind of the Funds, Phoenix Investment and Phoenix Advisors. (The Bank contends that it was Mr. Ramseyer who knew the nature of the investment that this payment represented, since he was the person who "appears to have had intimate knowledge and conduct of this investment on behalf of Phoenix Capital"). In any event, the same type of particulars are then given in relation to the claims against the Bank of Bermuda in respect of the Phoenix Global Investment and the Chesterfield Investment as were given in relation to the claims against Citigroup in respect of the claims arising from the Loans to SPVs.

55. The pleading moves on to the issue of loss, essentially duplicating the details given in respect of the claims against the Bank in its role as custodian, save for a slightly different figure in respect of the amount of the Phoenix Global Investment. The pleading sets out the alternative credits for recoveries which the Funds have indicated their willingness to give when dealing with the claim against the Bank in its capacity as custodian.

56. The pleading then moves to the claims arising out of the alleged breaches of the Illiquidity Restriction. Reference is made to the various prospectuses, and the Bank's obligation to ensure that the Illiquidity Restriction was adhered to by Phoenix Capital at all times during the life of the Bank of Bermuda Phoenix Capital Administration Agreement is set out against the Bank as it had been against Citigroup. The pleading then sets out that some 71% of Phoenix Capital's assets were in illiquid investments at the time that the Bank became administrator, representing the loans to Astir, Mandarin, Roberlon, Fiducia and Fitben, although in the case of the latter two, the investments were by then in the form of the Ironzar Trust note and the Queensmere Investment, as defined. The pleading then indicates that the percentage of illiquid investments increased to 76.65% with the Chesterfield Investment, and carries on to indicate that the Bank either was or should have been aware that Phoenix Capital was being operated in breach of the Illiquidity Restriction, and pleads the Bank's failure to take any or any reasonable steps to ensure that the Illiquidity Restriction was observed by Phoenix Capital, in the same terms as had been pleaded against Citigroup. This part of the pleading

closes by indicating that Phoenix Capital has suffered loss and damage, now put on the basis of the lost chance argument seen elsewhere.

57. There is then an alternative claim put in respect of the Chesterfield Investment, on the basis that this was an indirect investment in property which was not within the scope of the investments contemplated by the Bank of Bermuda Custodian Agreements.

58. The pleading then moves on to the Phoenix Global Investment, pleading a failure to take reasonable steps to ensure that Phoenix Capital's assets were invested in accordance with the investment objectives set out in its prospectus, and particularly it is pleaded that the Phoenix Global Investment was in breach of both the Quality Restriction and the Illiquidity Restriction. In terms of loss and damage, the same detail is given as was given in respect of the claim against the Bank as custodian.

The Phoenix Global Stop Loss Provision

59. The pleading then turns to a new claim, arising from an investment restriction contained in the Phoenix Global prospectus for 2002, set out in the following terms:

> "In the event the Net Asset Value of [Phoenix Global] has decreased by 25% in any given calendar quarter, the Board will instruct the Manager to invest 100% of [Phoenix Global's] total assets in cash and cash equivalents for the remainder of such quarter."

This particular investment restriction is defined as "the Stop Loss Provision". The pleading then refers to various definitions and continues by citing another passage from the Phoenix Global prospectus for 2002, in the following terms:

> "The Net Asset Value will be determined at the close of business on the last Business Day of each month. A pro-forma Net Asset Value will be prepared at the close of business on each Business Day."

The pleading continues that by reason of the facts and matters referred to, the Bank as administrator was contractually obliged and/or subject to a duty of care and/or a statutory duty to ensure that the Stop Loss Provision was enforced by Phoenix Global when the condition for its application was fulfilled.

60. The pleading carries on to refer to the decline in the value of the Phoenix Global NAV during the early part of 2003. As at 31 March 2003, the NAV stood at US $204.58 per share; as at 30 April 2003, this figure had reduced to US $158.97 per share, a decrease of approximately 22.3%. The pleading continues that on a date thereafter, known to the Bank of Bermuda, but not to Phoenix Global, the NAV stood at US $153.43, at which point there had been a 25% decrease in the NAV, sufficient to trigger the Stop Loss Provision. One of the reasons given for the plea that the date in question was known to the Bank of Bermuda but not to Phoenix Global is that it is said that the Bank prepared a pro-forma Net Asset Value at the close of business on each business day, notwithstanding that this was a monthly dealing fund. The pleading carries on to indicate that at 31 October 2003 the NAV stood at US $55.15 per share, representing a further 64% fall in the NAV.

61. It is then pleaded that the Bank was or should have been aware of the NAV of Phoenix Global on a daily basis, and accordingly knew or should have known immediately when the decrease in the NAV during the second calendar quarter of 2003 amounted to 25%, which the pleading states was in early May 2003.

62. The pleading continues that in breach of the express and implied terms of the Bank of Bermuda Phoenix Global Administration Agreement and/or the contracts arising by reason of the Bank's appointment as administrator and custodian and/or the pleaded duty of care and/or the pleaded statutory duty, the Bank of Bermuda failed to procure that the Stop Loss Provision was enforced and/or failed to take

any reasonable steps so to ensure that the Stop Loss Provision was enforced. Particulars are then given; these are to the effect that:

a the Bank should have drawn the breach of the Stop Loss Provision to the attention of the directors and manager of Phoenix Global;

b the Bank should have reported what were described as plain violations of Phoenix Capital's constitution to the BMA, on the basis that that body had power to revoke Phoenix Global's approval and thereby prevent it from trading; and

c the Bank failed to take any other steps such as suspending administration, resigning as administrator or bringing the matter to the attention of the custodian or the shareholders.

There are further complaints made against the Bank of failing to act in accordance with its initial response to the directors of Phoenix Global, when they resolved to suspend the determination of that Fund's NAV, and in fact suspending the circulation of the NAV from May 2003 until September 2003. Complaint is also made in relation to the terms of the Bank's resignation as administrator, and that the Bank did nothing to prevent the manager from trading in continuing breach of the Stop Loss Provision, as a result of which Phoenix Global's losses increased further in September and October 2003.

63. By reason of these various matters, it is said that Phoenix Global suffered loss and damage which would have been avoided had its investments been reduced to cash in early May 2003. On this basis damages are claimed as the difference between the value of the assets after they had decreased in value by 25% from their 31 March 2003 value, namely US $54,404,352, and the actual value as at 31 October 2003, namely US $18,563,507. Hence the claim is for US $35,840,845, although this is put in the alternative as such part thereof as the Court thinks is the true measure of Phoenix Global's loss under this head. I pause to note that the

calculation of damages here does not appear to have been made on the basis of the NAV in early May, when the Funds claim that the Stop Loss Provision should have been enforced. Alternatively, there is a plea that had the Bank taken steps to ensure that the Stop Loss Provision was enforced, and the NAV circulated to shareholders, there was a chance that some or all of the loss of US $35,840,845 would have been prevented, and that chance having been lost, there is a claim for such amount as reflects the value of the lost chance.

64. Lastly, there are claims for interest, subject to credit being given for recoveries which had been made in respect of interest.

65. Although relatively long and perhaps complex, the above is intended to do no more than provide a summary of the pleaded case on behalf of the Funds, and it may well be that there are areas where insufficient detail has been given.

Citigroup's Defence

66. Having first dealt with the history of its administration of the Funds, Citigroup makes no admission as to the interpretation or application of the Regulations, and denies that it breached any of the Regulations during the period that it provided fund administration services to the Funds. Citigroup further denies that any alleged breach of the Regulations gives rise to a cause of action enforceable by the Funds against it. Having made no admission as to the alleged constitution of the Funds, or the meaning, effect or import of the bye-laws of the Funds, Citigroup denies that the Funds' bye-laws, and particularly bye-law 154, imposed any duty upon Citigroup or that any alleged bye-law breach gives rise to any claim or cause of action against it.

67. The defence then turns to the various roles played by Mr. Blum, and says that it relied upon and was entitled to rely in good faith upon the acts and decisions of Mr. Blum and the other directors of the Funds. Citigroup accordingly denies liability for any loss or damage occurring by reason of the actions and decisions of Phoenix Investment, Phoenix Advisors, the Funds, or their directors.

68. The defence then refers to the unanimous written resolution of the board of directors of Phoenix Global dated 6 November 2001, whereby the directors resolved that Citigroup was to "rely on all future market values" as provided by Phoenix Investment when calculating the NAV of and preparing financial statements for that Fund. Further, Citigroup refers to and relies upon the fact that all previous such reliance on values given by Phoenix Investment was ratified and approved, and it is then pleaded that this resolution was mirrored in a letter agreement between Phoenix Global and Citigroup dated 25 October 2001.

69. The defence then deals with the plea that insofar as Phoenix Investment and/or Phoenix Advisors obtained the powers and duties of the administrators to manage the Funds, the administrators remain responsible to the Funds for such management by reason of the regulations. Citigroup denies that, pointing out that the delegation of powers and duties of the administrator had occurred before its appointment. Citigroup denies that it remained or ever was responsible for the fact that the alleged statutory functions or duties were not discharged, whether as alleged or at all.

70. Citigroup then denies the "Estoppel by Convention" plea, maintaining that such plea, whether by convention or otherwise, is not available in law for the purpose intended by the Funds' pleading. Citigroup further pleads that it acted as Phoenix Capital's administrator on the mutual assumption of law and/or fact to the effect that the delegation of powers and duties previously pleaded had already occurred at the time that Citigroup commenced its role as administrator of Phoenix Capital.

71. There are then denials in respect of the claim that by accepting appointment Citigroup contracted to perform the functions and undertake the duties specified in those parts of the Regulations identified by the Funds, and Citigroup repeats its plea in relation to the similar contention said to give rise to a duty in tort. In relation to the pleading as to the effect of the Regulations, Citigroup denies that on their construction or by necessary implication, the Regulations provide for a

private law right of action, whether as alleged or at all, denies that it failed to perform so as to give rise any such alleged right of action, and denies that either of the Funds has any or any sufficient standing by which to invoke any such right of action.

72. There are then admissions as to the Citigroup Administration Agreements and the duties which the Funds had identified from those agreements. There are then admissions as to the obligation under the Regulations to make statutory returns, and Citigroup pleads that it complied with its statutory duties in this regard. Beyond that, there is a denial, and in relation to the pleaded duty to advise the BMA that the Funds' assets had not been invested in accordance with its constitution, Citigroup pleads that no claim had been made by the BMA that it failed so to comply, and further that Citigroup had never become aware of the alleged breaches of the Regulations by the Funds.

73. Citigroup then denies that any terms could be implied into the Citigroup Administration Agreements, saying that its duties are exclusively set out in those agreements, and there is no proper or justifiable basis upon which to add the implied terms asserted by the Funds.

The Payments to Phoenix Advisors

74. The defence next turns to the allegedly wrongful payments made to Phoenix Advisors, accepting the amount of such payments, but maintaining that Citigroup neither initiated nor authorised any of the payments. The pleading continues that Citigroup believed (and had no reason to believe otherwise) that all of these payments had been properly authorised by the boards of the Funds as payments properly due to Phoenix Investment and Phoenix Advisors under the terms of the management and advisory agreements. Further, Citigroup pleads that it was not expressly aware of the terms under which Phoenix Investment and Phoenix Advisors derived their remuneration and maintains that it acted reasonably in reliance upon the authorisation of the boards of directors of the Funds, and was under no duty to enquire further, and had no actual knowledge of any breach of

duty on the part of the directors. Further, Citigroup pleads that it had no power or authority to prevent, or to refuse to record, the payments authorised and paid by the directors of the Funds.

75. Citigroup then pleads to the further claims arising from the payments to Phoenix Advisors, in the form of failure to manage the Funds in accordance with their constitutions and most recently published prospectus, failure properly to determine the NAV of each Fund, and failure to make any report to the BMA. Those complaints are denied, and in particular, Citigroup pleads that it could not fail or refuse to take those payments into account when calculating the NAV for the Funds, as that would have been a breach of the Citigroup Administration Agreements and would have made a false representation as to the NAV of each Fund. Citigroup pleads that it had no power or authority to demand the payments be repaid prior to calculating the NAV, that it was not aware that the payments were unauthorised and reasonably relied upon the authorisations of the directors, that it was not aware that the payments were in breach of the Funds' constitutions, and that it had no power to suspend administration and was not aware that the payments were anything other than valid, authorised, proper payments by the Funds. Citigroup then denies that the Funds have suffered the alleged losses, denies the "lost chance" plea, and concludes that the payments were authorised and paid away by the boards of the Funds, not by Citigroup.

The Phoenix Capital Quality Restriction

76. This part of the defence denies that Citigroup was under any obligation or had any power to take any steps to ensure that the Quality Restriction was adhered to by Phoenix Capital as alleged, denies that the SPVs subsequently defaulted as alleged, and relies upon the fact of Phoenix Capital's recovery, while making no admission as to the adequacy of such recovery.

77. No admissions are made with respect to the nature of the investments or Loans to SPVs, or whether they were in breach of the Quality Restriction as alleged, and the amount of the losses pleaded by Phoenix Capital is denied, and it is averred

that the total recoveries under the alternative case put forward by the Funds is US $25,177,273 plus the maximum realisable value of the Painting, when compared with claimed losses of US $36,813,381. Citigroup denies that the maximum realisable value of the Painting is US $4 million.

78. There was then a denial of the various fact and matters which the Funds say ought to have led Citigroup to be aware of the breaches of the Quality Restriction. Citigroup pleads that it was not aware that any of the loans were made in breach of the Quality Restriction, that it owed no duty to the Funds to evaluate investments in any particular entity, and that such matters were the responsibility of the directors of Phoenix Capital acting on the advice of Phoenix Investment and/or Phoenix Advisors. Citigroup says that it was the directors of Phoenix Capital who made investment decisions in relation to the investments and informed Citigroup of the value at which the relevant investment was to be reflected in Phoenix Capital's NAV. The defence continues that to the extent there was any evaluation of the need for security, or whether the investment complied with the Quality Restriction, these were matters for the directors, and Citigroup reasonably relied upon their decisions and was entitled so to rely. To the extent that Phoenix Capital suffered loss, Citigroup pleads that those losses are attributable solely and exclusively to its directors, since the Quality Restriction required the manager under the supervision of the board to determine whether the investments were of "eligible quality". So far as Citigroup is and was aware, all investments made were determined by Phoenix Capital's board to be of "eligible quality", and to the extent that the board failed properly to determine that those investments were of such quality, Citigroup pleads that any such claim must lie exclusively against the directors.

79. In relation to the note made by the auditors in the audited accounts for the year ended 30 September 2000, Citigroup pleads that it was aware of the comment, but that the qualification does not inform the reader that any of the investments had been made in breach of the Quality Restriction; the note simply records that the auditor expresses no opinion as to the basis of valuation. Citigroup says that it

relied upon and was entitled to rely upon the auditor's opinion relating to the financial statements presented by Phoenix Capital's directors as being fair and accurate.

80. The further complaints in relation to the Quality Restriction are then denied, with Citigroup saying that it had no power or authority to provide or procure the board of Phoenix Capital to comply with the Quality Restriction, did not fail properly to calculate the NAV, and had no basis upon which to make a report to the BMA. Citigroup pleads that it relied upon and was entitled to rely upon Phoenix Capital's directors for the value of the Loans to SPVs, that the persons who made the investment decisions were the directors of Phoenix Capital and/or Phoenix Investment and/or Phoenix Advisors, that it was not aware of any breach of the constitution of Phoenix Capital in relation to the Loans to SPVs, and lastly in regard to the alleged "lamentable performance" of the Loans to SPVs, Citigroup relies upon the Funds' pleaded cases in regard to recoveries. Citigroup further denies that there is any causal connection between the breach alleged by the Funds and the loss allegedly suffered by them by reason of any of the matters alleged against Citigroup. The defence continues that Citigroup is entitled to be credited with the recoveries made by Phoenix Capital, and denies that recoveries made after 15 July 2004 in respect of the losses alleged by Phoenix Capital should not be directly credited so as to diminish those alleged losses. Further, no admission is made as to the adequacy by which the alleged losses were mitigated and/or reduced by any of the matters pleaded by the Funds. Similar pleas are made in respect of the position both before and after 15 June and 15 July 2004. Finally, in relation to the Painting, Citigroup does not accept the estimated value attributed to it (US $4,000,000). Hence Citigroup does not accept the adequacy of the pleaded recoveries.

The Phoenix Capital Illiquidity Restriction

81. After a formal admission in relation to the content of the prospectuses, Citigroup does not admit Phoenix Capital's assessment of an illiquid security as being one

that cannot in the ordinary course of business be reduced to cash within a period of 48 hours.

82. There are then denials as to Citigroup's obligation to ensure that the Illiquidity Restriction was adhered to by Phoenix Capital at all times. Citigroup repeats that the investment decisions were made by Phoenix Capital's directors on the advice of Phoenix Investment and/or Phoenix Advisors, and says that it reasonably relied and was entitled to rely upon the investment decisions of Phoenix Capital's directors.

83. Citigroup continues that it had no power or authority to provide or procure that the Illiquidity Restriction was observed by Phoenix Capital, and denies that any loss could arise to Phoenix Capital as a result of the investments being in breach of the Illiquidity Restriction. It is also denied that there is a recoverable "lost chance" claim.

Counterclaim

84. Having repeated the pleading thus far, Citigroup sets out the provisions of clause 5 of each of the Citigroup Administration Agreements. Citigroup then relies upon these clauses for:

  a exoneration from liability from reliance in good faith upon the information provided by and instructions authorised by "Authorized Persons", a term which is defined in the agreements and which includes the Funds, Phoenix Investment, Phoenix Advisors and their respective boards of directors;

  b an indemnity from the Funds for any liability, losses, costs and expenses in respect of any claim made against it arising out of such reliance.

Accordingly Citigroup seeks the dismissal of the action and a declaration that by virtue of clause 5 of the Citigroup Administration Agreements it has no liability thereunder for the claims asserted.

The Bank of Bermuda's Defence

85. The defence starts with the claims against the Bank in its capacity as custodian, and admits that the Bank entered into the Bank of Bermuda Custodian Agreements. The Bank then relies upon clause 5 of those agreements pursuant to which the Bank was authorised to make payments provided that such were duly authorised by "Proper Instructions" as defined. The Bank then denies that it was under a duty to investigate that each and every payment made out of the Funds' accounts was for "their proper corporate purposes"; it was sufficient if the Bank was authorised to make payments coming within the description of payments appearing in the clause, provided that such payments were authorised by "Proper Instructions".

86. The Bank then relies upon clause 15 (E) of the Bank of Bermuda Custodian Agreements, by which it was expressly provided that the Bank should not, in the absence of gross negligence or wilful default, be liable to the Funds for any act or omission in the course of or in connection with the services rendered by it. The Bank further relies upon clause 15 (I), which expressly provided that the Bank should be under no duty to supervise compliance with restrictions on the investment powers of the Funds.

87. In relation to its position as administrator, the Bank admits the Bank of Bermuda Administration Agreements, and referred to the services it had agreed to provide under those agreements. The Bank refers to clause 9.2 of the agreements, which provided that the Bank should not, in the absence of fraud, negligence or wilful default on its part, be liable for any loss or damage sustained by the Funds.

The Regulations

88. In relation to the Regulations, the Bank admits that service providers, including custodians and administrators, to the fund industry in Bermuda were subject to part B of the Regulations. The Bank denies breach of any of the Regulations, and

denies that even if there were such a breach, any such breach gives rise to a cause of action which is enforceable by either of the Funds.

89. The Bank then denies that by reason of clause 4 (s) of the Bank of Bermuda Administration Agreements, the Bank was contractually obliged to perform the statutory duties referred to in the Regulations. The Bank pleads that upon its proper construction, clause 4 (s) is concerned with administrative matters performed by secretaries, registrars and administrators of companies generally under the Companies Act 1981, and not with the specific statutory duties applying to administrators of schemes appointed under the Regulations.

90. The Bank further denies that the statutory duties referred to in the Regulations were imported into the Bank of Bermuda Administration Agreements by way of implied terms, saying that there was no necessity to imply such terms.

91. The Bank next denies that any of the statutory obligations relating to custodians under the Regulations are to be imported into the Bank of Bermuda Custodian Agreements by way of implied terms, saying again that there is no necessity to import such terms.

92. Closing this section, the Bank pleads that its statutory functions as set out in the Regulations were to be performed with the directors of the Funds, and the obligation of the administrator in respect of those functions was similarly with the directors, to provide or procure the provision of those statutory functions. In relation to the affairs of Phoenix Global and Phoenix Capital, the Bank pleads that the decisions relating to the making of investments, the obligations to ensure that the investments restrictions were complied with, and the steps to be taken to rectify any such infringements were given by the Funds to Phoenix Advisors, Phoenix Investment and the board of directors. The Bank pleads that this was achieved by means of the constitutional documents, and sets out in some detail how the Funds had arranged their affairs. In relation to Phoenix Global, the Bank identifies the relevant prospectus, to which it refers, and the particular

management and investment advisory agreement referred to in clause 2 of the agreement, of which certain terms were set out. The Bank next refers to the investment sub-advisory agreement referred to in paragraph 3 above, and next to the Bank of Bermuda Phoenix Global Administration Agreement, pleading that that agreement did not impose any duty upon or give any contractual right to the Bank to supervise the manager and/or the investment sub-advisor in relation to the making of investments on behalf of Phoenix Global and/or to ensure that the investment restrictions were complied with. The Bank refers particularly to clause 5 of the agreement in relation to the performance of its duties.

93. The pleading then undertakes a similar exercise in relation to Phoenix Capital, referring to the corresponding documents. In relation to the Bank of Bermuda Pheonix Capital Administration Agreement, the pleading refers to what the Bank had agreed to do pursuant to that agreement, and says that the Bank did not agree to supervise the making of any investment decisions and/or to ensure that the manager and/or the investment sub-advisor would comply with the investment restrictions set out in the prospectus, again referring to clause 5 of the agreement. The Bank concludes that by means of the management structure set out in the prospectus, and the terms of the various agreements, the directors of the Funds had "procured" that the functions relating to the making of investments and/or compliance with the investment restrictions were to be carried out by the manager and the investment sub-advisor, and not by the Bank in its capacity as administrator.

94. The pleading turns next to the alleged delegation, and denies that the Bank delegated any of its contractual or statutory powers of duties to Phoenix Investment and/or Phoenix Advisors, whether as alleged or at all. The Bank says that the only delegation it undertook was in relation to certain accounting and valuation services which were delegated to the Bank of Bermuda (New York) Ltd. The Bank avers that it was the Funds, by their directors, who delegated any or all of their powers or duties to Phoenix Investment and/or Phoenix Advisors. The pleading carries on to deny that the Bank was, became or remained responsible to

the Funds for the performance by Phoenix Investment and/or Phoenix Advisors of their powers or duties, whether pursuant to the pleaded section of the Regulations or at all, and denies that the Bank acquiesced in the alleged appointment and/or continued appointment by the directors of the Funds of Phoenix Investment as manager to discharge the alleged statutory functions and duties of the Bank as administrator. Finally in this section, it is denied that any instructions given by the directors of the Funds or by the manager or investment sub-advisor to the Funds to the Bank in its capacity as custodian were either the instructions of the administrator, or instructions given by a manager to whom the administrator's statutory duty of management had been delegated, whether as alleged or at all.

95. The pleading then turns to the Funds' plea of estoppel by convention, and after a general denial, the Bank denies that it approved the contents of Phoenix Capital's 2001 prospectus, denies the existence of the alleged shared assumptions of law and fact that the Bank owed any obligations imposed by the Regulations, or that any alleged breach of those obligations would be enforceable by Phoenix Capital. The Bank then denies that it approved the terms of Phoenix Capital's 2002 prospectus as the alleged listing sponsor, and finally denies that the referenced prospectuses contained any statement of the sort described in the Funds' pleading. The Bank also denies that any alleged estoppel gives rise to a cause of action on the part of Phoenix Capital, and there are then denials that the Bank is estopped from denying the various matters covered in the Funds' pleading.

96. The defence continues that the Funds are estopped by convention and/or conduct and/or their representations from alleging that the Bank undertook to the Funds to perform the alleged or any duties of management of the Funds or their assets or investments. In support of this plea, the Bank relies upon section 91 (1) of the Companies Act 1981 and the bye-laws of the Funds in relation to the management of the Funds by their directors; the Bank of Bermuda Custodian Agreements and the Bank of Bermuda Administration Agreements in relation to the role of the manager; and the various prospectuses in relation to both of those matters. The plea continues that it was in reliance on those matters that the Bank entered into

the specified agreements, proceeded to perform services in accordance with those agreements, did not perform management tasks which were the responsibility of the Funds' directors, manager and/or investment sub-advisor, and did not charge for and was not compensated for the performance of management tasks.

97. There is then a denial of the alleged statutory contract, the alleged common law duty of care, and the alleged statutory duty.

The Bank as Custodian

98. The pleading then turns to the claims against the Bank in its capacity as custodian, in relation to the payments made to Phoenix Advisors, the payment for the Chesterfield Investment, and the payment for the shares in Phoenix Global. In relation to the payments to Phoenix Advisors, the Bank pleads that those were payments which were authorised by "Proper Instructions" and hence within the class of payments referred to, such that the Bank as custodian was entitled to make those payments. Similarly, in respect of the Chesterfield Investment, the Bank pleads that it was authorised to make the payments and was not entitled or duty bound to refuse to make them, again relying upon the "Proper Instructions" provision. The Bank pleads that it understood, and Phoenix Capital well knew at all material times, that the payments were made in connection with the investment in shares of Chesterae and/or certain real estate in West London, and the Bank says that it was authorised to make this payment and that Phoenix Capital ratified and/or affirmed the making of such payment.

99. In relation to the Phoenix Global share purchase, the Bank admits that it paid out the sum of US $2,000,000 (not US $1,806,648) as the purchase price of 12,800 shares in Phoenix Global. Again, the Bank relies upon the "Proper Instructions" provision, and that the investment was authorised, ratified and affirmed.

100. The Bank next relies upon clause 15 (E) of the Bank of Bermuda Custodian Agreements, relieving it from liability as custodian in the absence of gross negligence or wilful default. The Bank also relies upon clause 15 (I) to the effect

that it was under no duty to supervise compliance with the restrictions on the investment powers of the Fund.

101. In relation to the Chesterfield Investment, the Bank denies that Phoenix Capital sustained the alleged or any loss, and pleads that Phoenix Capital received fair value and/or consideration for the payment of US $1,626,270. The Bank relies upon the Funds' pleaded case on recoveries in this regard to support the plea that the Chesterfield Investment appears to have been worth more than was paid for it.

102. The pleading continues with a denial that the Chesterfield Investment was not or alternatively did not reasonably appear to be an investment within the relevant definition in clause 5 of the Bank of Bermuda Custodian Agreements.

103. Next, in relation to the Phoenix Global Investment, the Bank denies that Phoenix Capital sustained the alleged or any loss, pleading that Phoenix Capital received fair value and/or consideration for the payment. The Bank relies upon the recoveries effected by the Funds, and notes that the Phoenix Global Investment increased in value over a period of several months, and still had substantial value at subsequent dates. There is then a pleading denying that Phoenix Capital has any valid claim in respect of any alleged loss sustained by virtue of its purchase of shares in Phoenix Global and the subsequent diminution in value of those shares, in circumstances where Phoenix Global is also a plaintiff to the proceedings and itself claiming damages for precisely the same loss. The Bank avers that the principle of no reflective loss bars any alleged claim by Phoenix Capital. There is also a denial of the "lost chance" claim.

The Bank as Administrator

104. The pleading then turns to the claims against the Bank in its capacity as administrator, and starts with the payment to Phoenix Advisors. The Bank pleads that these were properly made by the Bank in its capacity as custodian, and that there was no duty upon the Bank in its capacity as administrator to supervise the

custodian to ensure that the custodian complied with its contractual obligations to the Funds.

105. There is then a denial that regulation 11 (1) (a) requires the administrator to vet each and every payment made by the custodian, that there had been a breach of such regulation, or that any such breach would give rise to a claim which can be pursued by the Funds. The Bank then denies that the terms which the Funds had set out in their pleading were the terms, either express or implied, of the Bank of Bermuda Administration Agreements, and denies that it owed any such obligations as a matter of contract, common law, or statute, as alleged or at all. This is followed by a denial that if there were such terms, the Bank had failed to comply with them. In particular, the Bank avers that it was entitled to determine the NAV on the basis of the information received from the manager, and to rely upon that information. The Bank pleads that the Funds' directors and the manager had full knowledge of the payments made to Phoenix Advisors, and makes reference to the common directors of the manager and the Funds.

The Phoenix Capital Quality Restriction

106. The pleading then turns to the alleged breach of the Quality Restriction, pointing out that the passage relied upon by the Funds in the prospectus is not under the heading of "Investment Restrictions" but under the heading of "Quality Information". The Bank then pleads that the passage relied upon does not constitute an investment restriction, that the determination of "eligible quality" is to be made by the manager under the supervision of the board of directors, and that the administrator has no role to play in such determination, and that it is a matter for the manager to re-assess and determine whether the Funds should continue to hold the security if an investment ceases to be "eligible quality". The Bank pleads that the administrator has no role to play in that process. The Bank then denies that it was obliged to ensure that the "Quality Restriction" was adhered to by Phoenix Capital, whether contractually, or as a matter of common law or statute.

107. The Bank then pleads that the determination of the issue whether to make the Chesterfield Investment and/or the Phoenix Global Investment was a matter for the manager, and not for the administrator. The Bank does not admit that the Phoenix Global Investment represented substantial as opposed to moderate credit risks or was not of "eligible quality".

108. There is then a denial that the Bank should have refused to take into account Phoenix Capital's investments at their face value. The Bank refers to the fact that Phoenix Capital's board of directors, Phoenix Investment and Phoenix Advisors maintained that those investments were properly valued at face value, and denies that the Bank had any proper basis for refusing to account for those investments at face value at any material time. The Bank relies upon the Funds' own admissions in relation to recoveries to the effect that the investments did in fact have very substantial value at all material times.

109. In relation to the pleaded case for the Funds that the Bank had failed to draw the breaches of the Quality Restriction to the attention of the directors or manager of Phoenix Capital, the Bank then denies that the manager was unaware of the loans and other investments, since all investments made by Phoenix Capital (including the loans) were made at the direction of the manager; similarly, the Bank denies that the directors were unaware of the loans, referring to the comment made by Ernst & Young in 2001, and the fact that with that knowledge the directors had resolved to approve the making of the loans by their unanimous written resolution made on 29 November 2001. The Bank further relies upon the fact that the investments in the loans had been proved by the shareholders of Phoenix Capital at the third annual general meeting of shareholders held on 29 November 2001. The Bank also relies upon the express approval by the directors of Phoenix Capital by unanimous consent of directors in lieu of meeting dated 10 October 2002 of the investments in the loans and the basis upon which they would be accounted for by the Bank. That consent authorised the administrator to accept from the manager the prices of any and all illiquid assets held by the Fund which the administrator was unable to price. The Bank then pleads that it is no longer

open to Phoenix Capital to contend that the loans were not of "eligible quality" or that the value attached to the loans ought to have been different. The Bank then avers that as a result of Phoenix Capital's representations and/or conduct, and/or by virtue of the limitation of liability, Phoenix Capital is estopped from asserting/or has waived any alleged right to assert any claim against the Bank arising out of any alleged illiquidity of its investments, any alleged lack of "eligible quality" of its investments, and/or the alleged basis upon which the investments were accounted for at all material times. There are then further pleas covering denial of loss, and in relation to the value of the investment with reference to the pleaded recoveries. There are similar pleas as were made in relation to the claims against the Bank in its capacity as custodian.

The Phoenix Capital Illiquidity Restriction

110. The pleading then turns to the issue of the Illiquidity Restriction, and the Bank starts by denying that it was obliged to ensure that the Illiquidity Restriction was adhered to by Phoenix Capital, whether as a matter of contract, common law, or statute. The pleading refers to the fact that all the investments complained of had been made prior to the Bank becoming administrator, and refers to the fact that the making of the loans had been expressly considered and approved by Phoenix Capital's directors, as previously pleaded. There are then denials of breach of duty or that Phoenix Capital suffered loss as a result of the alleged breaches of the Illiquidity Restriction. Finally, the claims in respect of the Phoenix Global Investment in this regard are denied.

The Phoenix Global Stop Loss Provision

111. The pleading next turns to the Stop Loss Provision, and the allegation that the Bank as administrator had a duty to ensure that the Stop Loss Provision was enforced by Phoenix Global when the conditions for its application were fulfilled. The pleading refers to the terms of the relevant provision, noting that it provides for the directors to instruct the manager, and pleading that the administrator has no role to play in the operation of the restriction. The Bank denies that it was obliged to ensure that the Stop Loss Provision was enforced, whether as a matter

of contract, statutory duty or common law and denies that it was in breach of any of the relevant Regulations, or that any such breach gives rise to any cause of action which can be maintained by Phoenix Global.

112. The pleading then refers to the levels of the NAV at 31 March and 30 April 2003, and pleads that it was not contractually obliged to and did not in fact prepare a pro forma net asset value at the close of business on each business day. The Bank refers to the delay in receiving information from the manager in relation to the NAV for 31 May 2003, and pleads that it completed that NAV on 20 June 2003. The pleading then deals with the various matters which occurred both before and after the completion of that calculation, which include the following:

a on 4 June 2003 the Bank received directors' resolutions from Phoenix Global's attorneys, Wakefield Quin, seeking to suspend the NAV calculation from 1 May 2003;

b on 5 June 2003 the Bank advised Wakefield Quin that it had received cash and had executed but not finalised trades for May and June 2003. Wakefield Quin advised that in the circumstances the suspension of NAV could not be backdated to 1 May 2003. In relation to the basis given by the directors for suspension of the NAV calculation, namely that there existed a state of emergency, the Bank asked Wakefield Quin for details of the state of emergency as determined by the directors;

c on 26 June 2003 Wakefield Quin notified the Bermuda Stock Exchange ("the BSX") and the BMA of the suspension of the NAV calculation and the suspension of dealing;

d on 3 July 2003 the Bank advised the directors of Phoenix Global that it did not consider that a state of emergency existed to warrant the suspension of the calculation of NAV, and advised the BMA of the then existing position;

e on 14 July 2003 the Bank advised the BMA of its concerns about the suspension of the NAV calculation and dealing in Phoenix Global;

f on 15 July 2003 the Bank mailed to Phoenix Global's shareholders the disclosure statement which had been published by the BSX;

g on 29 July 2003 the Bank met with representatives of the BMA to advise that body of the current position with respect to both Funds and potential breaches of the Regulations. The Bank indicated its desire to resign as administrator and custodian of the Funds at that time but was requested by the BMA to remain as administrator until the BMA could complete its investigations, to which the Bank agreed;

h on 11 August 2003, the Bank again met with the BMA to review the position in relation to the Funds;

i on 19 August 2003 the BMA formally requested that the Bank maintain its relationship as administrator for Phoenix Global;

j on 18 September 2003 the Bank wrote to Phoenix Global pointing out that it was, as at 31 May 2003, in breach of the Stop Loss Provision;

k on 23 September 2003 Mr. Blum advised the Bank that the directors of the Funds were committed to ensuring that the existing instances of non-compliance were remedied and to ensure that previous mistakes were not repeated. He advised that all shareholders had been made aware of the losses and had consented to the Fund continuing to trade in non cash investments for the remainder of the quarter;

l on 13 October 2003, at the Bank's insistence, the directors of the Funds sent letters to the shareholders. In relation to Phoenix Global, they

advised the shareholders that the Bank considered (although the directors did not agree) that the Fund had been in breach of its investment obligations, with particular reference to the Stop Loss Provision, and indicating that the directors were taking steps to ensure that the Fund was in compliance with the existing investment restriction.

113. Having regard to those matters, the Bank denies that it was in breach of any duties imposed upon it under the Bank of Bermuda Phoenix Global Administration Agreement and/or the Regulations and/or at common law or otherwise. The Bank says it took all reasonable steps that an administrator could be expected to take in the circumstances after the Bank had realised that there was a potential breach of the Stop Loss Provision by Phoenix Global.

Alternative Defences

114. In the alternative the Bank pleads that the actions taken by it after the discovery of the potential breach of the Stop Loss Provision by Phoenix Global cannot be categorised as amounting to "fraud, negligence or wilful default" within the meaning of a clause 9.2 of the administration agreement, and pleads that in the absence of fraud, negligence or wilful default, the Bank is not liable for any acts or omissions in connection with the services rendered by it under the administration agreement. There are then denials of loss, and an averment that Phoenix Global's alleged losses, if any, were caused by the acts or omission of it, its board of directors, Phoenix Investment and Phoenix Advisors.

115. There is then a plea of contributory negligence, in predictable form, and which I will not set out in detail, but which covers the acts of the Funds, their directors and Phoenix Investment and Phoenix Advisors, as well as the specific instructions given to the Bank as administrator.

116. Next is a plea that the Funds unreasonably failed to mitigate their alleged losses, in the case of Phoenix Global by failing to implement the Stop Loss Provision, and in respect of both Funds in relation to recoveries.

117. Next, the Bank seeks statutory relief from liability and/or limitation of liability and/or indemnity, under the provisions of section 98 B and/or section 281 of the Companies Act 1981, and/or bye-laws 149, 150, and 151 of each of the Fund's bye-laws.

118. Finally, there is a plea based on the maxim "ex turpi causa non oritur actio", that to the extent that any or all of the Funds' claims plead and/or rely on their own alleged fraud, dishonesty, or illegal acts or omissions, such claims are barred on public policy grounds and pursuant to the maxim.

Summary of the Pleaded Claims

119. In broad terms, therefore, the claims in respect of the payments to Phoenix Advisors are made against both Citigroup and the Bank of Bermuda, in amounts which reflect the periods for which they were service providers, and different amounts are claimed as against the Bank arising from its roles as custodian and administrator. As against Citigroup, claims are made in respect of the Loans to SPVs, by reason of the alleged breaches of the Quality Restriction and the Illiquidity Restriction. As against the Bank claims are made against it in respect of its roles as custodian and administrator in relation to the investment by Phoenix Capital in Phoenix Global and the Chesterfield Investment. Lastly, there are claims made against the Bank only in its capacity as administrator, in consequence of the alleged breach of the Phoenix Global Stop Loss Provision.

Review of the Witness Statements

120. For the Funds, the principal witness of fact was Mr. Moretti. He described his personal background and his involvement with the Funds, which went back to his relationship with Mr. Ramseyer. In 1998, Mr. Ramseyer had been running his own asset management business, then known as Lakeshore Finance SA, the company which later changed its name to Phoenix Advisors SA. Mr. Ramseyer had asked Mr. Moretti to join his company as its investment manager, but at that point the latter had declined. In 2002, Mr. Ramseyer made another proposal to

Mr. Moretti, and this ultimately led to his becoming the manager of Phoenix Worldwide. Before agreeing to this, Mr. Moretti had traveled with Mr. Ramseyer to New York to meet Mr. Blum at the offices of Phoenix Advisors. Mr. Blum was of course a director of Phoenix Worldwide.

121. Mr. Moretti described how he took all the investment decisions for Phoenix Worldwide. The Bank of Bermuda was both custodian and administrator for Phoenix Worldwide, but those roles were in fact undertaken by the Bank's Luxembourg office. It was Mr. Moretti's association with the Bank of Bermuda Luxembourg which led him to recommend to Mr. Blum that he should consider using the Bank as administrator for the Funds following Citigroup's resignation in 2002.

122. Mr. Moretti described how he first became aware that there were problems in relation to the Funds during the summer of 2003, when he was on vacation and received a call from a client of his who had invested in Phoenix Global, and from this conversation he said that he learned that the NAV of Phoenix Global had been suspended. He said that other similar calls followed, and he discussed matters with Mr. Ramseyer, who had similarly been contacted for the same reason by other clients. It was Mr. Ramseyer who had spoken to Mr. Blum at this stage and received assurances from him, and it was Mr. Ramseyer who remained in contact with Mr. Blum as the summer progressed. Matters came to a head when the NAV for Phoenix Global for 30 September 2003 was published, in about the second week of October 2003. This showed that the NAV (and Mr. Moretti used this term to describe the NAV per share, although according to the experts, NAV means the entire net asset value of a fund) had decreased from US $155.97, the last published figure, which was for 30 April, to US $75.02. This drop led to discussions between Mr. Moretti and Mr. Ramseyer as well as with investors in the Fund, and agreement was reached that Mr. Moretti should replace Mr. Blum as controller of the Funds. A meeting then took place in Geneva at which Mr. Blum agreed to resign, and it was at this point, on 14 October 2003, that Mr. Moretti became a director of the Funds. He says that after he was appointed he

received the Funds' files from Mr. Blum, but that these were not complete. Mr. Moretti said that he asked Mr. Blum on a number of occasions for complete copies, without success, and Mr. Moretti reached the conclusion that nothing more could be obtained from Mr. Blum.

123. Thereafter, Mr. Moretti's statement is essentially a process of reconstruction, based on his examination of the documents, and no useful purpose is served by duplicating those matters which eventually found their way into the statement of claim. He dealt with the payment of fees to Phoenix Advisors, the alleged breaches of the Phoenix Capital Quality Restriction, the Loans to SPVs, the Chesterfield Investment and the purchase of shares in Phoenix Global. Mr. Moretti then dealt with the defaults in the Loans to SPVs, saying that all of them had defaulted, and he set out the history of those defaults. He referred briefly to the Illiquidity Restriction before turning to losses and recoveries. As part of his narrative under this heading, Mr. Moretti dealt with the position in relation to Fiducia and Fitben, describing how following defaults on their promissory notes in January 2002, the two promissory notes had been exchanged by Phoenix Capital on 13 February 2002 for shares in Queensmere Holdings Ltd ("Queensmere"), and a promissory note issued by Ironzar, acting through its trustee, Equity Trust. Mr. Moretti referred further to the complex legal position, and explained that he had reached a settlement which had led to promissory notes being issued in favour of Phoenix Capital by Equity Trust, acting in its capacity as trustee of Ironzar, and what Mr. Moretti referred to as "the shares of Chesterae". The two promissory notes had face values totalling £8,500,000. Mr. Moretti indicated that Chesterae was the owner of a building called Chesterfield House, and gave the net value of the building in February 2004 as £600,000. Mr. Moretti said that at the date of the Funds' liquidation he could not value the Equity Trust promissory notes as they were untradeable and he was unable to say whether Equity Trust would repay them one day. Mr. Moretti did not say if he had taken any steps such as those which were taken later, and which achieved a substantial settlement. These included contact and no doubt discussion with the trustee of Ironzar and Simon Halabi, who dealt with that matter. This is no doubt why the

statement of claim indicates that these notes had no market value as at 15 July 2004. At this stage of his witness statement, Mr. Moretti limited himself to the recoveries which had been made "at the date of liquidation", which I understand to mean at the time of the re-structuring.

124. Mr. Moretti then turned to Phoenix Global, and dealt in detail with the Stop Loss Provision, and the events of June and July 2003. Again, this is his reconstruction of events, with, if I may say so, his emphasis and assumptions, and in relation to those matters, which I will come to when I make findings of fact, I think it better to rely upon the contemporaneous documents and the recollection of those witnesses who had personal experience of these events.

125. Mr. Moretti then turned to what he refers to as the liquidation of the Funds, saying that the Bank's resignations forced the Funds to stop operating in Bermuda, because it was impossible for him then to find any new service provider. He explained the alternatives that were given to shareholders, and said that the shareholders could either require redemption in cash, which he said would involve the appointment of a liquidator, or they could accept redemption in kind in the form of shares in a separate legal entity, which turned out in due course to be Dynagest. As I understood it when Mr. Moretti gave oral evidence, the final arrangements were somewhat different than indicated in his witness statement, insofar as some investors did redeem in cash without the need for the appointment of a liquidator.

126. Finally, Mr. Moretti did deal with the recoveries which represented the Funds' alternative case on recoveries. Mr. Moretti said that the illiquid assets had been handled by Dalifax Asset Management Ltd ("Dalifax"), the manager of Dynagest, and set out the various recoveries which had been achieved subsequent to the re-structuring. As I have indicated previously, the only asset which remains unsold is the Painting.

127. Mr. Moretti then put in a second witness statement, which was admitted without objection subject to the proviso that further discovery was required, in relation to the documents referred to in that second witness statement. This witness statement dealt primarily with the position of the class A shareholders in the Funds, in relation to whom Mr. Moretti exhibited a list of such shareholders, numbering just over 100. The list showed the name of the beneficial owner, their country of origin, the Fund in which that investor had invested, the holding bank, and the source of the introduction. Mr. Moretti advised that save for a few investors introduced by Mr. Blum, the investors had been introduced either by Mr. Ramseyer and his colleague Fabrizio Izzo, or by Mr. Moretti and Patrice Van den Esch, an investor who had become a director of the Funds in place of Mr. Blum. Mr. Moretti confirmed that these proceedings are being conducted solely for the benefit of the shareholders named in the document he produced.

128. Mr. Moretti then carried on to explain the funding of the action. At an earlier stage of the proceedings, an order for security for costs had been made by Kawaley J. Mr. Moretti indicated that at that time the DM Special Assets Reserve Fund SPC had one last remaining asset, the Painting, and the intention had been to sell this at auction, and to fund the security for costs order from the sale proceeds. In the event, the Painting did not sell, so that certain of the investors agreed to fund the litigation, on the basis that any recoveries would first be applied to repay them. Mr. Moretti produced a highlighted list of investors, identifying those of the investors who had agreed to fund the litigation. Of the 107 investors listed, there were 12 who had agreed to be what Mr. Moretti described as financing investors. I comment that while Mr. Moretti's account may well deal accurately with the position following the order for security for costs (which was in September 2007), substantial fees would no doubt have been incurred by then, at least in Bermuda.

129. Mr. Moretti then refers to the Bank's case at about the time that the Funds maintain that the Stop Loss Provision should have been enforced. The Bank had said that it had been informed by Mr. Blum that the class A shareholders knew of

the losses suffered by Phoenix Global, had approved the suspension of the Phoenix Global NAV, and were happy for the Stop Loss Provision not to be invoked. Mr. Moretti acknowledged that he could not speak to whatever Mr. Blum may or may not have told the Bank, but maintained that the underlying statement was not correct, which he did on the basis of the calls which he had received from investors at the relevant time.

130. Mr. Moretti then turned to consider the roles of Mr. Ramseyer, Mr. Izzo, Mr. Van den Esch and himself. He explained his own role as an introducer of Phoenix Global to shareholders in Phoenix Worldwide, saying that when he introduced such shareholders to Phoenix Global, his fees were paid by Phoenix Advisors, and he said that once a shareholder had invested in Phoenix Global, neither he nor Mr. Van den Esch acted on their behalf, or represented them. He said the position was the same in relation to Mr. Ramseyer and Mr. Izzo. The only exceptions to this were when investors occasionally asked the introducers for particular information, in which case the introducer concerned would contact Mr. Blum with a view to ascertaining the requested information.

131. Mr. Moretti then responded to what he referred to as the various documents produced and comments made by the defendants to the effect that Mr. Ramseyer and Mr. Izzo were convicted money-launderers. He described the fact that while Mr. Ramseyer was working for the Swiss Bank Corporation in Geneva, he had introduced one Pavel Borodin to the Swiss Bank. Mr. Borodin had been indicted in Switzerland on corruption charges and had also been indicted by the Swiss authorities for money-laundering. According to Mr. Moretti, Mr. Ramseyer and Mr. Izzo had been joined in the proceedings because they had managed Mr. Borodin's account at the Swiss Bank. Mr. Moretti then referred to the plea bargain to which Mr. Ramseyer and Mr. Izzo had agreed. Mr. Moretti finished this part of his witness statement by saying "There has never been an allegation made against Mr. Ramseyer or Mr. Izzo of laundering money and no such charges have ever been brought or levied against either of them". I can say at this point that such a declaration flies in the face of the documentation produced, and was

understandably the subject of cross-examination, to which I will come in due course.

132. Finally, in terms of matters of substance, Mr. Moretti addressed the fact that separate and apart from the Loans to SPVs which gave rise to claims in these proceedings, there were some smaller loans which had been granted to other legal entities. Mr. Moretti described these as having occurred because investors had approached Mr. Ramseyer or Mr. Izzo seeking a short term loan from the Funds against a pledge of their shares in the Funds. He said that the reason for this was that the shares in the Funds had no rating, and consequently no lending value for a bank. Mr. Moretti referred to the fact that some of the loans had been signed for by Mr. Izzo or Mr. Ramseyer since they were acting as corporate directors for some of the corporate investors they had introduced. He noted that none of these loans had defaulted in respect of either principal or interest. Although Mr. Moretti referred to these loans as "some smaller loans", and some were at relatively modest levels, this was not invariably the case. Timeway Enterprises Limited borrowed amounts of US $2,000,000, US $1,700,000 and US $3,000,000. There was also a loan of 1 million Swiss Francs to Dalifax Associated Inc. by Phoenix Global.

133. The second, relatively minor, witness of fact for the Funds was James Hindess, who at the material time had been the engagement partner at Ernst & Young with ultimate responsibility for the audits for the two Funds. Mr. Hindess referred to the fact that the first full financial year audit for the Funds was for the financial year ending 30 September 2000, and he did recall that for this audit there had been difficulties in obtaining evidential support for the pricing of Phoenix Capital's investments.

134. Mr. Hindess then set out the position in relation to the payments to Phoenix Advisors, quoting from the notes to the financial statements, as well as the witness statement of Melanie Cashin and an email which she had sent. Mr. Hindess had no independent recollection of the underlying factual matters, but noted that the

email sent by Ms. Cashin referred to the fact that Ernst & Young had raised the issue of the payments to Phoenix Advisors with Citigroup, and had specifically pointed out that the payments were not allowed by the offering documents. Mr. Hindess said that this would be in keeping with his firm's audit practices, and that before being satisfied regarding the appropriateness of such payments, they would have wanted to see board approval for them. In relation to the Loans to SPVs, Mr. Hindess confirmed that the reason his firm had been unable to issue an opinion as to the accuracy of Phoenix Capital's financial statements was primarily because of their inability to obtain sufficient evidential support to be satisfied as to the fair value of the various promissory notes, which had been valued by the manager at face value. Mr. Hindess commented that in his experience it was extremely rare for an auditor to be unable to issue an audit opinion, and he recalled that his firm had expended a great deal of effort seeking evidential support for the valuation of the promissory notes. Mr. Hindess did not recall whether his firm had been made aware that any of the Loans to SPVs had defaulted, although he did say that typically in the event of default the value of the loans would be zero. He was not able to recall having been made aware whether either of the Funds was in breach of any investment restrictions in their prospectuses.

135. Mr. Hindess then referred to the fact that following his firm's denial of an audit opinion regarding Phoenix Capital's 2000 financial statements, they had engaged in discussions both with Citigroup and Phoenix Capital with a view to seeing how the same situation could be avoided for the following year's audit. Mr. Hindess said that his discussions had been primarily with Citigroup, and that the position ultimately was that the lack of evidence in regard to the value of the promissory notes held by Phoenix Capital persisted, and as a result, Ernst & Young did not audit Phoenix Capital's 2001 financial statements and resigned as auditor.

136. I next turn to the witnesses of fact for Citigroup, of whom there were two. The first was Edith Conyers, who had worked for Citigroup's predecessor in name, Forum, from September 1997. At that time Forum had been formed relatively

recently, and Ms. Conyers was the general manager. Ms. Conyers described the operation and staffing of Forum, and the process by which Forum had been engaged to act as administrator to Phoenix Global and Phoenix Capital.

137. Ms. Conyers described the roles of manager and administrator as she understood them to be at the material time, noting that she understood the management agreement as between the Funds and Phoenix Investment to place the responsibility on the latter for the development of the Funds' investment strategy, as well as for management of the Funds' assets within their investment objectives. Ms. Conyers indicated that from an operational perspective, she had little involvement in the Funds, and that matters were only brought to her attention as and when difficulties arose. She described the difficulties of dealing with Mr. Blum, as well as the fact that issues had arisen in relation to the qualified opinions given by the auditors to the Funds in relation to certain of the Funds' investments. Eventually, these difficulties led to Forum giving notice of resignation, to be effective on 31 July 2002, later extended to 30 September 2002. So far as I can see, Ms. Conyers did not make any reference to the Regulations in her witness statement. She indicated that her experience of the BMA was that at the relevant time that body did not make pro-active enquiries of service providers, and that in the absence of suspected illegal activities or material issues, they expected self-regulation. She also indicated that she was aware that the approach of the BMA was now changing so that they were becoming more pro-active.

138. The second witness of fact for Citigroup was Ms. Cashin, who was employed by first Forum and then Citigroup between January 2000 and March 2008. She referred only in general terms to the various investments in the form of loans which had been made by Phoenix Capital, saying that such investments had already taken place by the time that she was informed of them, that she had no ability to identify the relative quality of such loans, and that she did not believe that it was her job to do so. Ms. Cashin referred to the fact that it had been necessary for her to contact Mr. Blum or one of the other directors of Phoenix Advisors in relation to the late payment of interest on the loans, and said that in

some instances the loans were simply rolled over, with the effect that an earlier loan accruing interest became a larger loan inclusive of accrued interest. In relation to the payments made to Phoenix Advisors, Ms. Cashin did not regard these payments as being particularly unusual, and did not understand them to have been questioned by the auditors. Ms. Cashin referred to the circumstance of Forum's resignation as administrators in much the same terms as had Ms. Conyers, and like Ms. Conyers made no reference to the Regulations in her statement that I could see. She also referred to the fact that at the relevant time the BMA did not make pro-active enquiries of service providers, but that the BMA was in the process of changing so as to be more pro-active.

139. Ms. Cashin also put in a supplemental witness statement, in which she referred to and revised the figures she had previously given in relation to the payments to Phoenix Advisors. Citigroup had originally admitted the amount of the payments pleaded on the assumption that the Funds had accurately reflected the payments being made from the Funds' records. The revised figures were ultimately agreed, and led to the amendment made during the course of trial to reflect the agreed figures. Ms. Cashin also dealt with the email to which Mr. Hindess had referred in his witness statement to the effect that before being satisfied regarding the appropriateness of the payments to Phoenix Advisors, Ernst & Young would have wanted to see board approval for them. Ms. Cashin did not specifically recall the email, but referred to another email, sent to a member of the audit staff at Ernst & Young on the same day, 16 April 2002, in which she said "The Board will sign a resolution indicating the Manager is allowed to get paid the Research Fees that it has taken monthly". Ms. Cashin indicated that she assumed that this was all that had been required to satisfy the auditors' requirements, that she did not know if such a resolution had in fact been passed, but had assumed that the issue had been resolved to the auditors' satisfaction.

140. There were some six witnesses of fact for the Bank of Bermuda, two of whom produced two witness statements. The first was Allen Bernardo, who was employed by the Bank between 1982 and late September 2003. In 2001, Mr.

Bernardo had been the managing director of Bank of Bermuda (Cayman) Limited and Bermuda Trust (Cayman) Limited, but in July 2001 he had returned to Bermuda to take up an appointment as the Bank's Country Head of Global Fund Services for Bermuda and the Cayman Islands.

141. Mr. Bernardo's witness statement was expressed to be concerned mainly with the issue of the Stop Loss Provision between May 2003 and October 2003, although in truth his statement was more concerned with the events of that period without reference to the Stop Loss Provision. He indicated that he was not in a position to comment on the allegations made against the Bank in its capacity as custodian, or relating to the work carried out by the accounting and valuation ("A & V") team at the Bank's office in New York. Neither did Mr. Bernardo recall being troubled with any operational issues between October 2002 and May 2003. He did have a recollection of the various issues which had arisen between 5 June 2003 and 18 September 2003 and which had been brought to his attention. He set out that recollection with particular reference to the various emails which had been sent, most of them internal only, during the period that the Bank was wrestling with the issue of how to proceed once it became aware, firstly, that Phoenix Global's directors were trying to suspend dealing and the determination of the NAV for the months of May and June 2003, and, secondly, after the A & V team had been able to determine the Funds' NAV as at 31 May 2003, on about 19 June 2003. During and after this period there had been extensive discussions within the Bank, with Mr. Blum on 3 July 2003, and with the BMA on the same date, following that conversation with Mr. Blum. Mr. Bernardo referred to the correspondence which had followed, in the form of a letter to the directors of Phoenix Global, which had been copied to the BMA and to the BSX. He then indicated that on about 8 July 2003, Mr. Blum had indicated to Linda McLennan of the Bank that he was willing to accept the Bank's position, to the effect that the directors would instruct the Bank to calculate and distribute the NAV, but that dealing in the Fund's shares would be suspended.

142. Mr. Bernardo then referred to the further disclosure which Fraser Ross of Wakefield Quin had made to the BSX in his capacity as attorney for the Fund. He also referred to the advice which Mr. Ross had given to the Bank on 10 and 11 July 2003.

143. Mr. Bernardo next referred to the in-house discussions which had followed these communications, which led the Bank to decide that it needed to inform the BMA of these latest developments. This took place in the form of a telephone call from Mr. Bernardo to Marcia Woolridge-Allwood at the BMA.

144. At much the same time, the Bank was in communication with its Luxembourg affiliate, which had its own concerns about Phoenix Worldwide, and whether there had been breaches of that fund's investment restrictions. In the course of their enquiries, Bank of Bermuda Luxembourg had started an enquiry on all the parties involved in what it referred to as "the Phoenix relationship", which included Mr. Ramseyer, and had discovered the action of the Swiss authorities against Mr. Ramseyer for money-laundering. Following further discussion in-house, the Bank took the view that it should lodge a suspicious activity report with the relevant authority in Bermuda. Mr. Bernardo also received information on 23 July 2003 from Fotis Moustopoulos, a member of the Bank's A & V team in New York, to the effect that he had reviewed certain of the loan agreements entered into by Phoenix Global and Phoenix Capital, and had noticed that a number of these had been signed by Mr. Ramseyer. Following further communications in-house, particularly with the Bank's compliance department, a Suspicious Transaction Report was filed by the Bank with the Financial Investigations Unit of the Bermuda Police ("the FIU") on 28 July 2003. The Bank also arranged a meeting with the BMA, which was scheduled for 29 July 2003. At this meeting, Mr. Bernardo explained that the Bank was extremely uncomfortable with the issues which had been raised in a report prepared for the Bank by Gail Wright, who was the company secretary of the Funds, and Mr. Bernardo indicated to Ms. Woolridge-Allwood that the Bank would like to resign its positions as administrator and custodian to the Funds as soon as possible. He

said that Ms. Woolridge-Allwood had specifically told him that while the BMA appreciated the Bank's position, they would prefer that the Bank remain as the named administrator until the BMA could complete its investigation and prepare their plan of action.

145. Mr. Bernardo also referred to a payment instruction which had been received from Phoenix Global on 31 July 2003, to debit its account and credit an account at the Bank of New York in Singapore. The enquiries which the Bank put in hand in relation to this transaction led to Mr. Blum contacting Ms. McLennan, demanding to know why these questions were being asked, and accusing the Bank of "acting like a policeman". A further suspicious transaction report was lodged with the FIU as a result of this exchange.

146. There was a further meeting with the BMA at the Bank's offices on 11 August, which Mr. Bernardo did not attend, although he was aware that it had occurred and had read the minutes of the meeting. Those minutes indicated that one of the issues that had been discussed at the meeting was the potential breach by Phoenix Global of the Stop Loss Provision. The minutes also indicated that Ms. Woolridge-Allwood had again stated that the BMA preferred that the Bank should not resign until after the BMA had met with the Funds' directors. The Bank then received a formal letter from the BMA confirming its position.

147. Mr. Bernardo then referred to a meeting which had taken place on 3 September 2003 between Mr. Blum and Munro Sutherland of the BMA, to which the Bank was not invited. Mr. Bernardo had had a subsequent telephone conversation with Mr. Sutherland in which he thought that Mr. Sutherland had also asked that the Bank should continue in its role for the time being.

148. At this time the Bank also met with Mr. Blum, and Mr. Bernardo advised that Mr. Blum had informed the Bank that he had agreed with the BMA that he would not accept any new subscriptions into the Funds until the matter had been cleared up. Mr. Blum had also stated that approximately US $14,000,000 in loans made by

the Funds would be "liquidated into cash" by the end of September 2003. Mr. Blum advised the Bank that Phoenix Global would be open for redemptions on 30 September 2003, but that he only expected a maximum of US $2,000,000 in redemptions at that stage. Mr. Blum had also confirmed that the Funds' underlying investors were fully aware of the losses that Phoenix Global had made, and that Mr. Blum had kept in regular contact with them.

149. The Bank did not tell Mr. Blum at that stage that it was going to resign, because there had been an internal decision made that the Bank would need to consider its position further, depending on Mr. Blum's responses at that meeting, and this would require discussion internally, with the BMA, and potentially with the Bank's internal and external lawyers.

150. The Bank's A & V team in New York continued to monitor Phoenix Global internally, and to provide a daily statement of changes in cash and securities. On 15 or 16 September 2003, the Bank discovered that contrary to what Mr. Blum had told them on 3 September 2003, he was still continuing to trade and had not converted all of the Funds' assets into cash. At this point the Bank took advice and concluded that it had no choice but to resign, notwithstanding the BMA's requests that the Bank should stay on.

151. Mr. Bernardo dealt finally with the allegations that the Bank had failed to monitor or enforce the Stop Loss Provision between May and October 2003, saying that the Bank had not agreed to provide an investment restriction monitoring service to Phoenix Global, and neither had it been paid a fee for performing such a service. He gave the reasons why such a service was not provided by the Bank and why, in his view, the Bank would not have agreed to provide such a service. The first reason was that the Bank's role as administrator was purely historical, or "after the fact". He said that since an administrator was not generally involved in investment decisions, compliance with investment restrictions was not a function that an administrator could usefully or meaningfully perform, pointing out that in the case of a monthly dealing fund such as Phoenix Global, it might take as long

as four to six weeks after a breach had occurred before the Bank would be in possession of sufficient information to enable it to consider the issue, always assuming that the investment manager was prepared to provide the relevant information on a timely basis. In summary, he said that the administrator had no power to prevent a breach of an investment restriction. The second reason given by Mr. Bernardo was that neither did the administrator have the power to enforce compliance with investment restrictions, either before or after their breach; the most it could do would be to identify and report the breach to the investment manager or to the directors of the Fund, who would in all probability already know of the breach. Mr. Bernardo said that the Bank had no contractual right to inform the Funds' shareholders, unless specifically authorised to do so by the Funds' directors. He did not make any reference to the course suggested by the Funds in the pleadings of notification to the BMA or resignation.

152. Mr. Bernardo said that he did not think that he had focused on the question of the Stop Loss Provision between 19 June 2003 and 18 September 2003, and said that he was much more concerned with the reason for suspending the NAV, as well as the various circumstances which had given rise to the Bank's money-laundering concerns and reporting obligations. He was conscious of the fact that reference had been made to the Stop Loss Provision in the Bank's resignation letter of 18 September 2003, which he had signed, but noted that the letter had been drafted by the Bank's lawyers, and said that he was not sure to what extent there may have been discussion of the Stop Loss Provision by other members of the Bank's staff prior to that date.

153. The next witness for the Bank was Ms. McLennan. Her witness statement indicated that she is a chartered accountant, and from September 2001 until June 2004 had been the head of investor services for the Bank. This involved informing the shareholders of a fund of the NAV of their fund on a periodic basis, processing subscription applications and redemption requests, dealing with shareholder queries, and maintaining the class A share registers.

154. Ms. McLennan had only become aware of the proposed relationship between the Bank and the Funds in late September 2002, following her return from vacation. There were apparently any number of logistical difficulties which meant that the Bank did not in fact begin to perform all the required services under the Bank of Bermuda Administration Agreements until after the operative date, none of which impacts these proceedings. Ms. McLennan referred to there having been some delays in receiving the NAV from the Bank's A &V team, and said that there were some complaints about that and the quality of the investor services provided by the Bank, but she believed that these complaints had mostly been resolved by April 2003.

155. In early May, Ms. McLennan had received an email from Mr. Moustopoulos, which referred to the fact that Phoenix Global had suffered a loss in its NAV for 30 April 2003, and his concern that that loss might have a negative impact on Phoenix Capital's dividends for the April period, by reason of the Phoenix Capital investment in Phoenix Global. This caused some technical and logistical difficulties for the Bank, because Phoenix Capital operated as a fund with a fixed price of US $100 per share, and difficulties arose when its price per share dropped below $100. At that point Ms. McLennan did not regard the drop in the NAV as being any cause for concern, on the basis that the previous month had been extremely good, and funds suffered losses as well as gains.

156. Ms. McLennan's witness statement then covered the events between 4 June and 18 September 2003, breaking these down into different periods and reviewing the email communications, in particular, in some detail. I would not propose to duplicate the narrative which I have summarised from Mr. Bernardo's statement. Ms. McLennan was particularly involved in the discussions in relation to the suspension of the NAV and the reasons for it. One of the matters that Ms. McLennan referred to was the fact that when Mr. Ross sent material through on 12 June 2003, in relation to the proposed directors' resolutions relating to the suspension of the determination of the NAV, he also sent a revised copy of Phoenix Global's prospectus, which included a proposed amendment to Phoenix

Global's Stop Loss Provision, whereby the trigger percentage changed from 25% to 35%. Ms. McLennan also referred to telephone conversations she had had with Mr. Blum and Ms. DeArteaga on 24 June 2003. In the course of one of those conversations, Mr. Blum had advised that he was himself the manager of the underlying clients accounting for 95% of the funds invested in Phoenix Global, and that therefore any instructions to cancel redemptions and notification of the suspension would come from and go to him. This was something that Mr. Blum had said that he had not wanted to tell the Bank previously, and was a matter of concern to Ms. McLennan. Finally, Ms. McLennan advised that the determination of the NAV of Phoenix Global was finally reinstated with effect from 30 September 2003.

157. The next witness for the Bank was Ms. Wright, who, as I have indicated, acted as company secretary for the Funds throughout the material period. Ms. Wright was one of the recipients of many of the internal emails within the Bank from early May until late August, and she was then out of the office on vacation until shortly after the Bank's resignation letters of 18 September 2003. She was particularly concerned in relation to the resolutions concerning the suspension of the NAV, and had numerous communications with Mr. Ross of Wakefield Quin throughout this period, both by email and telephone. Ms. Wright also liaised closely with Ms. McLennan throughout this period. In broad terms, her witness statement complemented but did not add to the witness statements of the other Bank of Bermuda witnesses, and I would not propose at this stage to refer to it in any more detail.

158. The next Bank witness was Mr. Moustopoulos, who was at the material time the senior account manager responsible for the A & V services provided by the Bank of Bermuda's New York office to the Funds. Mr. Moustopoulos served two witness statements. He gave a general description of how A & V services were provided at the time, indicating that the primary function of A & V services was to calculate a fund's NAV and communicate this figure to the investment manager, and to the investor services team within the administrator, who would in

turn inform investors in a fund of the NAV per share. That figure would be used by investor services as the relevant figures for the purpose of any subscriptions or redemptions for the relevant period.

159. In relation to the suggestion that the Bank had an obligation to prepare a pro forma NAV on a daily basis, Mr. Moustopoulos indicated that so far as he was aware the Bank was not under any contractual obligation to undertake this, whether under the terms of the Bank of Bermuda Administration Agreements or otherwise, and did not do so. He doubted that the Bank would have had the ability to undertake this service, since he said they were not provided with sufficient information on a daily basis by the investment manager to enable them to do so. His view was that if anyone had a responsibility (bearing in mind the terms of the Phoenix Global prospectus) to prepare a pro forma NAV on a daily basis, it would have been the investment manager or the investment advisor, the only parties who would have been privy to the relevant information on a daily basis.

160. Mr. Moustopoulos also confirmed that the A & V team would normally receive trade files from the Funds' investment manager after the investment trades had been executed. He said that it would have been almost impossible for an accountant in the A & V team to scrutinise every single trade, whether on a daily basis or a monthly basis, with a view to considering the quality of that investment, or whether it had been made in breach of any of the relevant Fund's investment restrictions. Mr. Moustopoulos recalled that the Funds had multiple brokers acting on their behalf during the period that the Bank acted as administrator.

161. In relation to the NAV calculation for the Funds, Mr. Moustopoulos described the process; the NAV would first be calculated by the portfolio accountant, that calculation would then be reviewed by a supervisor or account manager, and then sent to the investment manager for information and comment. It was only after the NAV had been approved by the investment manager that the NAV would then be communicated to the investor services team, for distribution to shareholders.

Mr. Moustopoulos reiterated that it was not the function of the A & V team to offer investment advice to the Fund or to the investment manager, nor to comment on the quality or commercial wisdom of any particular investment, or indeed the performance of a fund over time. That, he said, was the function of the investment manager. Neither did he feel it was the A & V team's function to provide a service whereby it monitored or sought to enforce compliance with the Funds' investment restrictions. He said that that was the function of the Funds' directors, the Funds' investment manager, and at the end of the year the Funds' auditors. While he acknowledged that for reasons of internal risk management the Bank would make efforts to monitor a fund's compliance with its investment restrictions, he distinguished between that internal exercise and a service offered to clients, which he said the Bank would not undertake, on the basis that it would not generally be in a position to discover any potential breach of an investment restriction until a very considerable period of time after it had occurred. The Bank would therefore not be in a position to prevent a breach of any investment restriction before it occurred; nor would it have any power to do so.

162. Mr. Moustopoulos referred in his statement to the various unlisted investments held by the Funds, and by Phoenix Capital in particular. He was aware that Phoenix Capital had invested in the Painting, as well as in a shopping mall in England, through Queensmere. He was also aware that Ernst & Young had taken the view that they could not support the value of the promissory notes appearing in Phoenix Capital's financial statements, such that they had qualified their audit opinion for the year ended 30 September 2000. He dealt with the Bank's concerns in relation to the appointment of a replacement auditor for Ernst & Young.

163. Mr. Moustopoulos then dealt with the various problems which his team had encountered during the early part of their appointment, before turning to events after the NAV for Phoenix Global as at 30 April 2003 had been calculated. He shared Ms. McLennan's concern as to the impact of the diminution of Phoenix Global's NAV on Phoenix Capital.

164. Thereafter, Mr. Moustopoulos was a party to the Bank's internal communications, and his evidence in this regard was consistent with that of the other Bank employees. Mr. Moustopoulos then commented on the Stop Loss Provision, the Chesterfield Investment, and the payments to Phoenix Advisors, but in regard to these matters, was really acting more as advocate than witness.

165. In Mr. Moustopoulos' second witness statement, he dealt with the Phoenix Capital investment in Phoenix Global, and repeated his view of the A & V team's function in relation to monitoring or enforcing compliance with Phoenix Capital's investment restrictions. Again, in this regard, Mr. Moustopoulos' comments were really more as advocate than witness.

166. The next witness for the Bank was Craig Perry, who was employed by the Bank as a senior account manager in the custody department. Mr. Perry described his background, the structure of the custody team between 2001 and 2003, and referred to the contractual documents, although he personally had not read these when he first started work on the account. He advised that the Bank was not the only custodian, and that a very small portion of the Funds' assets were in fact transferred to the Bank to hold as custodian, most of the Funds' assets being held by other parties, and he named some five of these.

167. He referred to the custody operating memoranda prepared within the Bank, and then addressed questions which are ultimately ones for the Court. He referred in particular to the payments to Phoenix Advisors, and to the Chesterfield Investment. He closed by giving an overview of the custody department's perspective throughout the relevant period.

168. Mr. Perry also signed a second witness statement, in which he dealt with the Phoenix Capital investment in Phoenix Global, pointing out that when Phoenix Capital made that investment, it appeared to have done so in its own name, rather than through the Bank of Bermuda as custodian. He referred to the

documentation which supported this view. Consequently, he took the view that there was no reason why anyone within the Bank's custody department should have refused to process the payment.

169. Lastly, there was a relatively short witness statement from Dollita Smith. She worked in the Bank's custody department at the material time as a custody supervisor, and it was in this capacity that she was involved with the second part of the payment for the Chesterfield Investment, on 16 May 2003, when she arranged for the transfer of the US dollar equivalent of £850,000, which was described as being for the balance of the purchase price of the shares of Chesterae, in accordance with a request from Ms. Chicas. However, Ms. Smith had no independent recollection of the transaction, and understandably so given the volume of transactions she was involved in processing. Thereafter, her statement simply refers to the relevant documentation.

The Experts' Reports

170. The starting point is the order for directions which was made by Kawaley J on 12 June 2008, and repeated in an order I made on 19 September 2008, which contained different time frames. The orders provided that the parties have leave to rely on the expert evidence of one expert each in relation first, to investment fund administration, and, secondly, to forensic accountancy. It will no doubt be helpful to set out the issues to be dealt with under each of these topics, not least because the orders provided that the expert evidence be on those issues only. In relation to investment administration, the evidence was to cover:

a the duties usually performed by administrators of investment fund companies in Bermuda, as pleaded at paragraphs 19.2 and 68.2 of the statement of claim; and

b the standard of reasonable care to be expected of administrators as pleaded at paragraphs 21.2, 69, 71(b), and 84 of the statement of claim (in light of

the allegations of breach of duty pleaded at paragraphs 25, 33, 41, 81, 87, 94 and 106 of the statement of claim);

In relation to forensic accountancy, the evidence was to be in relation to the nature and quantum of the Funds' alleged losses, as pleaded at paragraphs 34.1 and 107.2 of the statement of claim.

171. There are a number of other matters to which I should refer before turning to the content of the experts' reports. The first is that each of the experts for the parties produced a report on investment fund administration, but John Ellis, the expert for the Funds, also produced a supplemental report dated 9 September 2009, and leave was sought for this document to be admitted when the trial began on 14 September 2009. Essentially, the supplemental report exhibited and referred to the Chancellor Offshore Funds Manual 1999 ("the Chancellor Manual") and the code of conduct for collective investment schemes introduced by the BMA in December 1994 ("the BMA 1994 Code"). Mr. Ellis also referred in this supplemental report to the Bank of Bermuda's compliance and operations manuals, which he said were broadly consistent with his view of an administrator's responsibilities. Although objection was taken to Mr. Ellis's supplemental report going in, I took the view that it should go in, and it was a matter for counsel for the defendants to cross-examine Mr. Ellis as to the further material exhibited as they saw fit.

172. The second matter relates to the forensic accountancy report, in relation to which there are in fact also a number of issues. The first is that in her report, the Bank of Bermuda's expert, Wanda Forrest, conducted a forensic accountant analysis with a view to quantifying Phoenix Global's net trading losses, as they related to the Stop Loss Provision claim. In doing so, Ms. Forrest considered the liquidity of Phoenix Global's portfolio between 12 May 2003 and 19 June 2003, and also whether the Bank could reasonably have been expected to calculate Phoenix Global's NAV on a pro forma daily basis. It seemed to me arguable that the last of these two exercises went beyond the strict terms of the relevant orders, but as I

originally understood it, objection was not taken by the Funds in relation to that aspect of matters. It now appears from the closing submissions for the Funds that they do take objection to this part of Ms. Forrest's report.

173. I should also make reference to an application made at the end of August 2009, and argued before me on 4 September 2009. This was an application on behalf of the Funds to have access to what were referred to as "the soft copies" of the valuations in the report prepared by Ms. Forrest. As I understood it, the application sought to have access to the electronic form of the spreadsheets which had been reproduced in Ms. Forrest's report. I declined to accede to the application, in part because I felt there was a distinction to be drawn between the difficulty which the Bank maintained there was in producing pro forma daily NAVs, and the calculation of loss in relation to the Stop Loss Provision undertaken by Ms. Forrest. In relation to the former, I had the doubt expressed above as to whether the issue was within the terms of the relevant order for expert evidence; in relation to the latter I noted that in the skeleton argument produced by counsel in support of the application, the following statement was made:

> "In addition, the Plaintiffs do not take issue with the accuracy of Ms. Forrest's primary calculations of the NAV. Rather, the Plaintiffs merely wish to test her "secondary" conclusion regarding the difficulty of calculating and refreshing such a NAV on a daily pro-forma basis. It is therefore logical and in the interests of consistency for Mr. Ellis to base his review on the same valuation model(s) used by Ms. Forrest."

I confess that I did not at that stage focus upon the fact that the Funds had chosen not to produce an expert's report on the forensic accounting aspects of the case, an issue which came into play on the application which I will refer to next.

174. This was that the Funds made application during the course of the hearing to put in a second supplemental report by Mr. Ellis, dated 25 September 2009, which report was said to be in rebuttal to Ms. Forrest's report. The first intimation that

an application would be made to admit this second supplemental report was given at the end of the day on Friday, 25 September 2009, and the application was argued on Monday, 28 September 2009.

175. I took the view that this second supplemental report should not be allowed in, in circumstances where the third week of trial was about to start, without there having been any suggestion that the application was going to be made. This was not a report which would have been prepared in a day or so; it comprised approximately 50 pages, and must have taken some considerable time to produce. But more to the point, it seemed to me that counsel for the Funds had made a decision or election many months previously not to adduce expert evidence on the issue of forensic accounting. Had they done so, the entire process would have been different, not least in terms of the sequential delivery of reports, and the subsequent meeting of experts. Further, it also seemed to me that there was a real danger that the Bank would be prejudiced in relation to factual matters covered in the further report, which it had not had an opportunity to put to its witnesses of fact. Had the application been made before trial, I would no doubt have allowed the witnesses of fact to put in supplemental witness statements dealing with those factual matters raised in the report, or alternatively to cover such matters in evidence in chief. By the time of the application, the oral evidence of all the witnesses of fact had concluded. I made it clear to Mr. Lyon during the course of argument that he was not precluded in any way from cross-examining Ms. Forrest as he saw fit, but did not allow this further report in. The transcript gives a fuller description of my reasons than set out above.

176. I next turn to the content of the various experts' reports, but I should say at this stage that I have taken the view that given the length of the reports and the length of this judgment, both thus far and with reference to the likely length of the finished product, it seems to me that I should keep my comments in relation to the content of the reports as brief as possible. I will deal very briefly at this stage only with the experience and approach of the various experts.

John Ellis

177. Mr. Ellis had a degree in mathematics and had worked in a considerable number of previous positions within the fund industry, starting with his employment with the Standard Life Assurance Company in July 1974. He did not have a professional qualification beyond his degree in mathematics, and referred to and relied upon "standard industry practice" in his report. He referred to two guides or codes published after the material time of the events covered in these proceedings. These were the AIMA guide of September 2004 and the BMA code of August 2008. Mr. Ellis said that he considered them relevant because they articulated standard practices that in his opinion were followed by reasonable administrators prior to the publication of those particular documents.

178. I should mention that none of Mr. Ellis's work experience had been in Bermuda, and indeed Mr. Ellis had not been to Bermuda before this case. That in itself may be seen as surprising, when one bears in mind the terms of the order for expert evidence, which makes reference to the duties usually performed by administrators of investment fund companies in Bermuda; similarly, in relation to the standard of reasonable care to be expected of administrators, it seems to me that the words "in Bermuda" are implicit. Be that as it may, Mr. Ellis reviewed the Regulations in considerable detail, and proffered his view as to the obligations imposed by the Regulations, which he did with reference to his understanding of an administrator's duties. In his supplemental report, Mr. Ellis submitted that the Chancellor Manual, which had been published in February 1999, supported the views which he had expressed in his first report to the effect that administrators of investment funds in Bermuda at the relevant time had an investor protection role, and were responsible for monitoring a fund's investments and payments for compliance with investment restrictions and other provisions in its prospectus. In relation to the BMA 1994 Code, Mr. Ellis noted that the Regulations set out the functions of the administrator in virtually identical terms to the function of the manager as set out in the BMA 1994 Code. Finally, Mr. Ellis opined that the Bank of Bermuda's compliance and operations manuals were broadly consistent

with his view of what an administrator's responsibilities were, including the administrator's investor protection role.

Jeremy Bond

179. Mr. Bond was the expert for Citigroup. He described himself as a retired chartered accountant, who had qualified in England in 1987, having obtained a degree in economics in 1983. Mr. Bond began working in the fund industry in the early 1990s, and was a co-founder of Fulcrum Limited ("Fulcrum") in Bermuda in September 1995, and remained with that company until it was sold in June 2007. Mr. Bond drew heavily on his experience with Fulcrum in preparing his report. He took issue with the report prepared by Mr. Ellis on the basis that that report did not take sufficient account of the normal practice of fund administration in Bermuda, the regulatory environment prevailing in Bermuda during the period in question, and the practicalities of providing fund administration services to a fund which invests in relatively sophisticated instruments.

180. In relation to the Regulations, Mr. Bond said that in discharging his responsibilities during his career as a fund administrator in Bermuda, he had no need to be familiar with the Regulations, and that they played no part in the day to day performance of Fulcrum's functions. Mr. Bond noted that his experience of the BMA was consistent with the witness statements of the Citigroup witnesses.

181. Mr. Bond essentially rejected the notion that the administrator fulfils a "gatekeeper" function by providing the first check on fund management actions, as advocated by Mr. Ellis.

Andrew Collins

182. Like Mr. Bond, Mr. Collins was a chartered accountant, although he was a fellow as opposed to a member of the Institute of Chartered Accountants of England and Wales. Like Mr. Bond, he had experience in the fund industry, including Bermuda-based experience. From July 1998 until December 2001, he had been managing director of a fund administrator, Butterfield Fund Services in Guernsey,

and from January 2002 until January 2007 he had been managing director of Butterfield Fund Services in Bermuda. Whereas Fulcrum, of which Mr. Bond was the co-founder, had approximately $7 billion in assets under administration when the company was sold in 2007, Butterfield Fund Services in Bermuda administered hedge funds with assets of over $50 billion. Mr. Collins had also worked in Cayman, and so had experience of fund administration in three significant offshore jurisdictions.

183. In a nutshell Mr. Collins' view was that it would not normally have been the obligation of an administrator in Bermuda in 2002 and 2003 to monitor a hedge fund's compliance with its investment restrictions, in the absence of an express term in the administration agreement that it would do so. Neither did Mr. Collins believe that it would have been the obligation of an administrator in Bermuda at the material time to seek to enforce a hedge fund's compliance with its investment restrictions, in the absence of an express term to this effect. He said that those obligations would normally have fallen to the fund's board of directors, investment manager, and investment sub-advisor. Mr. Collins concluded that the Bank had acted with the requisite degree of skill and care to be expected of a reasonably competent fund administrator in relation to the matters which are the subject of complaint in these proceedings. Mr. Collins indicated in terms that he disagreed with the majority of the opinions expressed and conclusions reached by Mr. Ellis in his report, for the reasons which he then gave in the body of his report.

Wanda Forrest

184. Ms. Forrest is qualified as a certified public accountant in the state of Maryland and her education included Bachelor of Science degrees in education and business management, as well as a Masters degree in business administration. She had been a director of KPMG LLP based in Washington DC, before becoming a consultant with the Huron Consulting Group in Washington in 2003.

185. Ms. Forrest set out a summary of the conclusions in her report in the following terms:

a Phoenix Global's NAV temporarily decreased 25% from its 31 March 2003 NAV on or about the close of trading on Tuesday, 6 May 2003. It increased slightly through Thursday, 8 May 2003 and then fell permanently below the 25% level on or about the close of trading on Friday, 9 May 2003:

b Assuming that Phoenix Global's entire portfolio could have been readily converted to cash as of Monday, 12 May 2003 (and Ms. Forrest's opinion was that a substantial portion of Phoenix Global's portfolio at the time was illiquid, and could not have been readily liquidated for full value), she calculated Phoenix Global's net trading losses for the period between 12 May 2003 and 31 October 2003 to have been US $30,523, 435;

c Assuming that Phoenix Global's entire portfolio could have been readily converted to cash as of Thursday, 19 June 2003, (again, subject to the caveat mentioned above), Ms. Forrest calculated that Phoenix Global would not have suffered a net trading loss for the period between 19 June and 30 June 2003. Her calculation was that the assets of Phoenix Global actually increased in value by approximately US $910,000 through that period;

d It was Ms. Forrest's opinion that some of the investments in Phoenix Global's portfolio, both as of 12 May 2003 and as of 19 June 2003, could have been converted to cash relatively quickly. However, she said that it was uncertain as to the amount that the Fund could have received when liquidating such investments. She said that the Fund held a group of investments that it would probably not have been able to liquidate quickly, if at all, and the requisite negotiation would likely have resulted in significantly less cash if liquidated than the value assigned to them in the

portfolio. Assuming liquidation dates of 12 May and 19 June 2003 respectively, her view was that it was likely that approximately US $15,000,000 or US $12,000,000 of the Fund's net assets would not have been able to be quickly converted to cash or converted for full value; and

e Her opinion was that it was unlikely that the Bank of Bermuda as administrator would have reasonably been able to make accurate and timely calculations of Phoenix Global's NAV on a pro forma daily basis.

Comment on the Experts' Reports in Relation to Investment Administration Practice

186. Mr. Ellis's report essentially dealt with the effect of the Regulations, in terms of the obligations which they sought to impose upon the appointed administrators at the material time, and of course that is precisely the issue for the Court. It does seem to me that with all respect to Mr. Ellis, there was very little in terms of expert opinion in his report which is likely to assist the Court in reaching its conclusion on that absolutely fundamental aspect of the case. And the same can equally be said in regard to the reports of Mr. Bond and Mr. Collins. If indeed the Funds are correct in the interpretation which they give to the Regulations, then it may very well be that the fact that administrators in Bermuda at the material time paid little or no regard to the Regulations – and that was the gravamen of their evidence - would be of little consequence, if the Regulations did indeed impose upon administrators the obligations for which the Funds contend. So at the end of the day, it may well be that there is limited assistance to be gained from the experts' reports in relation to this aspect of matters.

Credibility of the Witnesses of Fact

187. I would not propose to set out in any great detail the oral evidence of the witnesses of fact, for much the same reason as caused me to deal with the experts' written reports relatively briefly, namely the length of this judgment. However, I would propose to deal at this stage with the issue of credibility of the witnesses.

188. I will deal firstly with Mr. Moretti, and the first comment I would make is that I bear in mind in relation to the issue of his credibility that English is not Mr. Moretti's first language. That said, he did appear to be perfectly competent in English. Indeed, Mr. Moretti wrote any number of letters in English which demonstrated his understanding of sophisticated business matters. In its closing written submissions, Citigroup described Mr. Moretti as being shrewd and intelligent, and I would not dissent from that description.

189. Mr. Moretti's credibility was attacked by counsel for the defendants on any number of occasions, and I have adverted to one such subject earlier in the judgment, which is the issue of whether Mr. Ramseyer or Mr. Izzo had been convicted of money-laundering charges. I referred in paragraph 131 to the statement made by Mr. Moretti in his second witness statement, and referred in general terms to the documentation produced. That documentation was in fact exhibited by Mr. Moretti to his eighth affidavit sworn on 9 September 2009, and declared in terms that Mr. Ramseyer and Mr. Izzo had been guilty of money-laundering, in a document signed by the public prosecutor for the Canton of Geneva in Switzerland. The original documents were in French, in which Mr. Moretti is fluent, so there could be no question of his misunderstanding what the documents said in clear terms. When these documents were put to Mr. Moretti by Mr. Sheldon, Mr. Moretti accepted (in relation to Mr. Ramseyer) that he had been found guilty of money-laundering, but sought to explain that finding by saying that it could have occurred for different reasons. When Mr. Sheldon referred Mr. Moretti to the statement which I identified, and suggested that it was "plain wrong", Mr. Moretti said "No, this is my opinion." Mr. Moretti then confirmed that he understood the difference between fact and opinion, and when it was suggested that his comments were both wrong and misleading, asked what damage it did.

190. The reality is that Mr. Moretti's statement in relation to Mr. Ramseyer's and Mr. Izzo's convictions for money-laundering came before the documents were

produced. It does seem clear to me that in making that statement, Mr. Moretti was in effect trying to achieve damage limitation in relation to an issue which was exercising the defendants. Whether that issue has any relevance is another, entirely different, question.

191. There is another area where it seems to me inevitable that I must conclude that Mr. Moretti lied, and that is in relation to his contact with Mr. Ramseyer. The trial started on Monday, 14 September, 2009 and the morning was spent dealing with procedural matters. These continued for only a short while into the afternoon, when Mr. Moretti was called as the first witness for the Funds. Towards the end of the afternoon, Mr. Moretti was asked when he had last spoken with Mr. Ramseyer, and his answer was "Before I left Geneva, I think. Yeah, just before I left Geneva on Sunday." The following morning, when Mr. Sheldon continued his cross-examination, he asked Mr. Moretti whether he had had any contact with Mr. Ramseyer since the adjournment the previous day, and Mr. Moretti answered:

> "No. Speaking about Ramseyer, I would like to rectify something I said yesterday. If I remember correctly, you asked me at some point, when was the last time I spoke to him, and I think I answered just before boarding the plane in Geneva which is not correct. I spoke to him while I was on the island during the lunch break yesterday to ask him to find out as soon as possible from Trinity the document you were requesting."

192. It seems to me absolutely inconceivable that Mr. Moretti could genuinely have forgotten on the afternoon of 14 September, when he was asked when he had last spoken with Mr. Ramseyer, that he had in fact had a telephone conversation with him just a few hours previously. I accept and understand that Mr. Moretti's untruth might not have become apparent had he not chosen to volunteer such when he gave evidence on the second day of the trial. But that does not, in my view, detract from the fact that in the event he did lie, and the following day indicated as much. I do not think that there can have been any question of Mr.

Moretti misunderstanding the question. He clearly understood it, and equally clearly, given his evidence the following day, answered the question untruthfully.

193. Another example of Mr. Moretti's witness statement being proved materially incorrect concerns the time of and the circumstances under which he became aware of the suspension of Phoenix Global's NAV. In his witness statement, Mr. Moretti said that he had first become aware that there were problems in relation to the Funds when he was on holiday, and received a call from an anxious client of his who was invested in Phoenix Global, and who told him that the NAV of Phoenix Global had been suspended. When he was asked as to the date of his holiday, he said this was likely to have been late June or early July of 2003.

194. In fact, there had been a meeting of the board of directors of Phoenix Worldwide held on 1 June 2003, which Mr. Blum appears to have participated in by telephone. The purpose of that meeting was to take note of the suspension of Phoenix Global's NAV, which in turn led to the suspension of Phoenix Worldwide's NAV. When presented with the minute of this meeting, Mr. Moretti accepted that the statement in his witness statement was incorrect. In other words, he lied in his witness statement.

195. Mr. Moretti's integrity was also attacked in relation to the issue of the proceedings taken by Mandarin against Wildenstein and Co, and particularly to the role played by Mr. Ramseyer in relation to those proceedings.

196. Another issue where Mr. Moretti's credibility was attacked was in relation to a loan made by Phoenix Global to a company named Dalifax Associated Inc. The loan was made on 21 September 2001, in the sum of $1,000,000 Swiss Francs, and the signatory on behalf of Dalifax Associated Inc., was one Frédéric Stierlin. Mr. Moretti said that he did not know who Mr. Stierlin was, and when he was asked who was the beneficial owner of Dalifax Associated Inc., said that he did not know. He was then taken to the affidavit which he had sworn on 22 July 2008 where he said:

> "the position in relation to Dynagest is that I am the beneficial owner of Dalifax Associated Inc., which owns the entire share capital of Dynagest which subsequently changed its name to Dalifax Asset Management Ltd."

Mr. Moretti did then confirm that he was indeed the beneficial owner of Dalifax Associated Inc., but said that he did not know whether there might be two different companies, on the basis that he did not know Mr. Stierlin and knew nothing of the loan in question. That may be the case, but it is no reason for the answer "I don't know", when Mr. Moretti was asked who was the beneficial owner of Dalifax Associated Inc, and the true position is that he was.

197. Then there is the statement which Mr. Moretti made in the affidavit which he swore on 24 April 2007, in which he said that whilst he and Mr. Van den Esch were directors of the Funds "we have no personal interest in either of the Funds or the litigation". In fact, Mr. Van den Esch's name appears on the list of class A shareholders which Mr. Moretti exhibited to his second witness statement.

198. Next is the position in relation to Mr. Moretti's own trading after he became a director of the Funds in October 2003. When he was being cross-examined in relation to the need for an audit, he said that there was no trading in the Funds, so that no NAV was needed. And Mr. Moretti's denial of his trading was not just in response to the question in relation to the need for the Funds to be audited. After Mr. Moretti had been asked why he had not chosen to implement the Stop Loss Provision after the NAV had gone down by some 37% by the end of November in the last quarter, the question was put to him in these terms:

> "Q. But in fact, it was more than that. You not only did not convert the assets into cash or cash equivalents, you were, in fact, positively trading?
>
> A. I was not trading at all."

199. Mr. Moretti was then shown a number of documents which showed him to have been trading actively on behalf of the Funds in November and December 2003. And these were not just one or two trades. Mr. Hargun took Mr. Moretti through the documents which had come from the Bank's NAV accounting documentation for the months of October, November and December 2003. These showed, and Mr. Moretti conceded, that he had entered into any number of trades during this period, nearly all of which resulted in losses, such that the trading loss for December alone was $2,350,191. So it is incredible in the light of all of this trading that Mr. Moretti should have earlier answered that there had been no trading in the Funds.

200. There are two other aspects of the trading to which I would just make reference at this point. The first is that Phoenix Capital seeks to recover those very losses from the Bank, because Mr. Moretti had chosen not to redeem Phoenix Capital's investment in Phoenix Global at the first opportunity. Instead, he retained the investment on behalf of Phoenix Capital, and, wearing his Phoenix Global hat, continued to trade and incur substantial losses.

201. The second matter is that all the December trading occurred at a time when the NAV of Phoenix Global had gone down 37% in that last quarter. When Mr. Moretti was asked why he had not converted Phoenix Global's assets into cash or cash equivalents (in accordance with the Stop Loss Provision), his response was that he could not at the time, that he did not know the positions and did not have the authority. One might have thought that at the least he would stop trading.

202. Then there was Mr. Moretti's evidence in relation to the values placed upon the assets of Phoenix Capital at the time that these were transferred to Dynagest. In relation to a number of these assets, entirely different figures were given for the re-structuring exercise, and for the value placed on those same assets for the purpose of establishing loss in these proceedings. Perhaps not too much emphasis should be placed on this last example, because in his closing submissions, Mr. Lyon was not prepared to accept that the Equity Trust promissory notes had any

value for the purposes of the claims being made in these proceedings, when for the purposes of the re-structuring, they were given the face value of the promissory notes, some £8,500,000, equivalent to US $15,422,400. And that figure is not an academic one; it governed the cash payments to those class A shareholders of Phoenix Capital who choose to redeem in cash, and the number of shares in Dynagest for those class A shareholders (some 85%) who chose effectively to redeem in kind.

203. There were other less obvious examples of Mr. Moretti's evidence being, to say the least, unreliable, so that the position is that there were many issues on which Mr. Moretti's evidence was wrong, to a greater or lesser extent. Not all of these errors were in relation to critical matters, but I do not think that matters. I have come to the conclusion that quite apart from errors, Mr. Moretti lied in his evidence on a significant number of occasions. Suffice it to say, looking at his evidence as a whole, that I do not regard it as being reliable. Put another way, it seemed to me that Mr. Moretti was always prepared to give evidence which he perceived would be to the advantage of the case which was being put forward on behalf of the Funds, without the appropriate regard for the truth of the underlying matters. In short, Mr. Moretti seemed to me to be quite prepared to lie if he perceived that to do so would be for the benefit of the case he was pursuing on behalf of the Funds. In my view, this means that all of his evidence must be looked at with this finding very much in mind.

204. I have also considered the consequence of such a finding, bearing in mind that much of Mr. Moretti's evidence depended upon the contemporaneous documents, and was essentially a re-construction of the events of the material time. However, there was one important area where this was not the case, and this was in relation to the valuations ascribed by Mr. Moretti to those assets of Phoenix Capital which were transferred to Dynagest at the time of the re-structuring. I shall come to that aspect of matters in due course, when I consider the issue of loss. But when I do that, I shall treat Mr. Moretti's evidence as to value with considerable caution, and will bear in mind my conclusion above that Mr. Moretti was quite prepared to lie

if he perceived that to do so would be advantageous to the case he was putting forward on behalf of the Funds.

205. The only one of the witnesses of fact called by the defendants who was the subject of serious criticism was Mr. Bernardo, about whom the Funds' closing submissions said this:

> "He was a defensive witness, who found it hard to answer a straight question with a straight answer. He was even prepared to lie if he felt this would assist the Bank of Bermuda's case."

A transcript reference was given in relation to this last contention.

206. I should make it absolutely clear that I do not agree with that characterisation of Mr. Bernardo's evidence. I did not find that he was defensive, or that he found it hard to answer "a straight question with a straight answer". Certainly, there were times when he was obviously taking his time in formulating his answer, but my own view is that in large part this was because the questions which were being put to him, particularly in relation to the Regulations, were based on an interpretation of the Regulations to which he did not subscribe. And in relation to the suggestion that he was prepared to lie if he felt that this would assist the Bank's case, I have re-read that part of the transcript which was said to support this conclusion, and which concerned Mr. Bernardo's use of the word "determined". I do not think for one moment that that passage properly leads to the inference which the Funds say should be drawn from it.

The Oral Evidence of the Experts

207. First, I should say that Ms. Forrest's evidence was not essentially challenged, so much as clarified, and though there remain questions as to the scope of her report, I certainly accept that part of her report dealing with the evidence in relation to the nature and quantum of the Funds' alleged losses, as pleaded. In relation to the question of the feasibility of the Bank producing pro forma daily NAVs, I note

that Ms. Forrest was cross-examined on this subject, and said in terms that the NAV binders that she had reviewed showed there to have been delays in the receipt of information by the Bank. Specifically, Ms. Forrest said that in relation to the calculation of the April NAV, she saw pricing coming in the day before the NAV was put together. It seems to me that this is factual evidence on which I am entitled to rely, not least because it was elicited by counsel for the Funds.

208. In relation to the evidence of the other three experts, as to the duties usually performed by administrators of investment fund companies in Bermuda, and the standard of reasonable care to be expected from them, all three experts referred in their reports to the law on the instruction of experts reflected in the judgment of Cresswell J in the case of *The Ikarian Reefer* [1993] 2 LlLR 68, and confirmed that their reports were consistent with those principles. Obviously, it is paramount that an expert should help the Court on the matters within his expertise, but in my view it is particularly important that the evidence of the expert should be his independent view, presented to the Court by way of objective unbiased opinion in relation to the matters within his expertise, and subject to the caveat that he should never assume the role of an advocate. I do regret to have to say that I take the view that Mr. Ellis did on occasion assume the role of advocate on behalf of the Funds, with particular reference to the effect of the Regulations.

209. The closing submissions for the Funds referred to his personal circumstances, and the fact that he was giving evidence for the first time as perhaps contributing to his being "clearly confused at times by the experience", as the Funds put it. But in my view, it went further than that. At times, Mr. Ellis seemed to be positively evasive when he was being pressed on a particular point. I had more than one exchange with Mr. Ellis when it seemed to me that his answers were being framed with reference to his view of the Regulations and their effect, rather than the question that was being put to him. One example of this was on 29 September 2009, when Mr. Ellis was being cross-examined by Mr. Sheldon as to the effect of the August 2008 Code of Conduct for Fund Administrators ("the 2008 Code"), the code which replaced the Regulations. It was put to Mr. Ellis that if his

interpretation of the Regulations were correct, the 2008 regulations would effect what Mr. Sheldon described as a "massive reduction in the regulatory duties of an administrator." Mr. Ellis was unwilling to accept that the regulatory regime had been reduced, when that clearly must have been the case, if one were to accept the Funds' view of the effect of the Regulations.

210. Another example of an occasion when Mr. Ellis was less than helpful to the Court was in relation to the issue of calculation of the NAV, with particular reference to the duties owed by Citigroup pursuant to the Citigroup Administration Agreements. Mr. Ellis had used these agreements to support his statement that the NAV calculation was to be in accordance with the constitutions. In fact, the agreement referred to the calculation being performed "on each valuation day as defined in the prospectus". Mr. Ellis refused to accept that he had made an error in his report in this regard.

211. When Mr. Ellis was being cross-examined on the issue of when valuation services should be performed, he was taken to the Bank of Bermuda Phoenix Global Administration Agreement, and after being pointed to the relevant terms, there was the following exchange:

> "Q. So, the only valuation which is conducted under the prospectus, under the bye-laws and under the administration agreement is a valuation at the end of each month. That's right, isn't it?
>
> A. I contend that all funds have a net asset value at all times".

It was only after Mr. Ellis had been reminded of his duty to the Court and asked to answer the question which had been put to him that he agreed that the premise of the question was indeed correct.

212. But I should spend some time dealing with the cross-examination of Mr. Ellis, particularly because the Bank in particular placed substantial reliance upon the fact that in his oral evidence, Mr. Ellis had essentially withdrawn much of the evidence set out in his written report, because he had not had sight of material documents.

213. The fact that Mr. Ellis had not seen a number of the material documents seems to have arisen from the manner in which he was instructed and the manner in which he had prepared his report. This was prepared under the auspices of LECG Ltd, which Mr. Ellis described as a professional services firm. Mr. Ellis was not himself employed by LECG, but was assisted by two of their employees, Messrs. Hadi and McKean. Mr. Ellis indicated that these gentlemen had assisted him with all parts of his report, and also said that they had assisted in "going through the evidence to find relevant testimony and relevant other papers". They would then show Mr. Ellis what they determined to be the relevant evidence in the context of the questions which were being framed by the London solicitors for the Funds, Berwin Leighton Paisner.

214. One of the statements which Mr. Ellis had made in his written report was that the Bank had failed to report plain violations of Phoenix Global's constitution to the BMA, which had the power to revoke its approval of Phoenix Global, and thereby prevent it from trading. Mr. Ellis was taken to the chronology contained on pages 73 and 74 of his report. This moved from the events of 29 July 2003 to those of 18 September 2003, without any reference to the meeting which had taken place between the Bank and the BMA on 11August 2003. In that regard, Mr. Ellis was taken to the pertinent part of Mr. Bernardo's witness statement which had referred to the meeting, and was also taken to the minutes of that meeting.

215. Mr. Ellis agreed that the information contained in those minutes was important, and said that if he had read the minutes he would have remembered them, so this was an important document to which Mr. Ellis's attention had not been drawn. More critically, Mr. Ellis had no recollection of having seen the letter from the

BMA to the Bank dated 19 August 2003, which put into writing the BMA's request that the Bank should not resign. Mr. Ellis then withdrew his criticism of the Bank for not resigning at an earlier stage.

216. Another matter where Mr. Ellis appears to have reached a conclusion on the basis of an inadequate review of the documentation was the factual assumption which Mr. Ellis made in his report that in relation to the breach of the Stop Loss Provision, the Bank did not bring the matter to the attention of the shareholders.

217. Again, Mr. Ellis was taken to relevant material which he did not recall having previously seen. These included copies of the letters sent by the Funds' attorneys, Wakefield Quin, to the BMA and the BSX on 26 June 2003. Neither had Mr. Ellis seen the letter signed by Mr. Blum, sent to the shareholders of Phoenix Global a few days later, notifying them that the Fund had suffered substantial losses, for which reason the directors had decided to suspend the calculation of the NAV of the Fund for the months of May, June and July 2003. There was then a letter from the Wakefield Quin service firm, Harbour Financial Service Limited, dated 10 July 2003, which sent to shareholders the disclosure statement which had been sent to the BMA and BSX. Having being referred to these various documents, Mr. Ellis conceded that reasonable disclosure had been made of the suspension and the losses suffered by the Fund.

218. The next area of cross-examination concerned Mr. Ellis's statement that when it was asked to suspend the determination of the NAV, the Bank should have satisfied itself whether the suspension was permitted, seeking legal advice and guidance from the BMA if it was uncertain. Mr. Ellis was unaware that the whole issue as to whether the suspension could legally take place had been the subject of emails and advice from the Fund's attorney, Mr. Ross of Wakefield Quin. Mr. Ellis was unaware that the board and the Bank as administrator were being given this legal advice, and accepted that it would be reasonable for the administrator to follow the legal advice given to the Fund by its attorney. Mr. Ellis conceded that

the steps in fact followed were entirely consistent with what he had said in his report he would have expected to have happened.

219. And not all of the concessions which Mr. Ellis made in cross-examination were in consequence of his being shown documents which he had not seen before. In relation to the Stop Loss Provision, Mr. Ellis accepted that if the NAV were to be effectively suspended, then the Stop Loss Provision would not be triggered.

220. I think at this stage, I have gone into sufficient detail to demonstrate that Mr. Ellis had not been shown important documents which he ought to have seen, and at least in relation to this aspect of his cross-examination, Mr. Ellis very fairly conceded that had he been shown the documents in question, the conclusions in his report would have been quite different. He did this in response to Mr. Hargun's conclusion in this area, which I will deal with by setting out that part of the transcript which contained the denouement in the following terms, which I set out verbatim despite some minor errors in the transcript:

> "Q. Now, as I say, a large number of documents which I've shown you, you have not seen. And the question I have for you is that had you seen these documents before you wrote your report, might you have changed your view that the Bank acted unreasonably?
>
> A. I think I would most certainly have changed my views regarding the actions of the Bank, yes.
>
> Q. And in light of those documents, would you consider that certainly the way the Bank behaved that was one reasonable way to behave?
>
> A. I think it's very much in line with the way I described is what I would expect a reasonable administrator would do".

221. And Mr. Bond too was giving evidence for the first time, but did not display the adversarial attitude which I found Mr. Ellis to show at times. In the closing

submissions for the Funds, it was suggested that "there must be a question as to whether his original expert report was given wholly independently of the interests of Citigroup". Complaint is made that Mr. Bond's report gave a seriously incomplete account of how the Regulations impacted on Fulcrum. In his closing address, Mr. Sheldon understandably took exception to this attack, not least because it had never been put to Mr. Bond that he was in some way partial or lacked independence. I agree with Mr. Sheldon that this attack on Mr. Bond and the manner in which he discharged his duties as an expert is wholly unjustified.

222. Finally, there was Mr. Collins, who was described in the Funds' closing submissions as not being a satisfactory expert witness, and the comment was made that "he tended to give speeches in support of what he perceived to be (the Bank's) case instead of answering the question put." Certainly, there were times when Mr. Collins went further than answering the question which had been put to him, but I did not feel that in doing this he was trying to advance the Bank's case in a way which was inappropriate for an expert. My impression was that he felt the additional comments would be of assistance to the Court, and of the three expert witnesses, I found the evidence of Mr. Collins to be the most helpful. He was certainly the expert with the greatest experience, and there was nothing about the manner in which he gave his evidence which suggested to me that he was taking a partisan position on behalf of the party which had appointed him.

223. In the Funds' written closing submissions, an even stronger attack was made against Mr. Collins than had been made against Mr. Bond, and, again understandably, Mr. Hargun for the Bank took exception to it. The issue arose from Mr. Lyon's cross-examination of Mr. Collins in relation to the Stop Loss Provision, and in particular to the issue whether the obligation upon the directors and the manager of Phoenix Global arose at month end, or during the course of the month, if the provision were to be triggered. Mr. Collins was cross-examined in relation to a part of his report which the Funds said was clearly premised on the assumption that the directors and the manager had the necessary knowledge to implement the Stop Loss when the NAV fell by 25% on any particular day

because the "Manager should have known the daily NAV on a daily basis". The Funds contended that Mr. Collins' attempts to deny this in cross-examination were "unconvincing, dishonest and in flagrant breach of his duty as an objective expert assisting the court". By any standards, those are most serious complaints to make against an independent professional, and I have already indicated that I found Mr. Collins to be the most helpful of the three experts in relation to fund administration practice in Bermuda. He was cross-examined very vigorously by Mr. Lyon, particularly in this area. Mr. Collins maintained his position, but in doing so I did not find his evidence to be either unconvincing, or dishonest, or to be in flagrant breach of his duty as an objective expert assisting the Court. I agree with Mr. Hargun that there were never grounds for making a complaint in those terms, and it should not have been made.

Comment on the Expert Evidence

224. None of the above does more than put into context the issues which have to be determined in this case. The reality is that those issues will, for the most part, be determined on the basis of questions of law rather than questions of expert evidence, and accordingly are matters for the Court.

Findings of Fact

225. In the normal course of a judgment, I would at this stage set out my findings of fact on the particular issues in dispute between the parties. In this case there are few if any critical issues of fact in dispute, and in factual terms the material evidence is largely drawn from the contemporaneous documents, and the issues between the parties relate in part to the meaning of such documents, but most significantly to the meaning and application of the Regulations, to which I will now turn. Where it is necessary for me to set out the facts in relation to a particular head of claim, I will do so.

The Regulations, Their History and Effect

226. In their written submissions, the Funds say that the Regulations are central to this case, and this is clearly right. Indeed in respect of many of the claims made by

the Funds, those claims rest on the interpretation given to the Regulations by the Funds, and particularly in regard to the provisions of regulation 11 of part B of the Regulations, the most of important of which seem to me to be regulation 11 (1) (a) and (f), and regulation 11 (2). Those parts of regulation 11 (1) which I have identified require the administrator to provide or procure that subscription monies received by a scheme are applied in accordance with its constitution, and that the investment of the assets of a scheme is in accordance with its stated investment objectives. Regulation 11 (2) imposes a duty on the administrator to manage the scheme in accordance with the constitution, the Regulations, and the most recently published prospectus. The terms of regulation 11 are set out in paragraph 11 of the judgment.

227. In the written submissions for the Funds, reference is made to the fact that there was a brief introduction and summary of the history of the Regulations and the BMA 1994 Code which preceded it in the Bank's compliance manual of June 2002. I would quote from that document as follows:

> "The Bermuda Monetary Authority (Collective Investment Scheme Classification) Regulations 1998 ("the Regulations") were signed by the Minister of Finance on Monday, 9 February, 1998. The Regulations were introduced under Section 29 of the Bermuda Monetary Act 1969 ("the Act") and provide for the regulation of collective investment schemes operating in or from within Bermuda. For the purposes of the Act, a collective investment scheme currently means a mutual fund as defined in the Companies Act 1981 or a unit trust scheme as defined in the Stamp Duties Act 1976, respectively.
>
> The Regulations provide for three classifications of collective investment schemes; Bermuda Recognised Schemes, Bermuda Standard Schemes and Bermuda Institutional Schemes. A Bermuda Recognised Scheme is essentially comparable to a scheme now recognised under the Companies Act 1981 as a United Kingdom Class Scheme. Bermuda Institutional

Schemes are a special category of collective investment schemes which are offered only to institutional or sophisticated investors. Bermuda Standard Schemes essentially meet the requirements contained in the Code of Conduct for Collective Investment Schemes issued by the Bermuda Monetary Authority ("the Authority") in consultation with the Bermuda International Business Association in December 1994.

The Regulations introduce a formal regulatory structure for the different classifications of collective investment schemes and apply a different level of regulation depending on the classification. Bermuda Recognised Schemes are subject to a comprehensive regulatory environment and offer the potential to be marketed in jurisdictions recognising Bermuda's regulatory and supervisory system. Bermuda Institutional Schemes are subject to a less comprehensive regulatory and supervisory environment because of the sophistication and expertise of the investors in those schemes. Bermuda Standard Schemes are subject to the level of regulation and supervision as provided for in the Code of Conduct for Collective Investment Schemes which has been in operation since December 1994.

Unless otherwise exempted by the Authority, all collective investment schemes must comply with the provisions of these Regulations….."

228. So one sees that the author of the extract quoted above recognised the different levels of regulation applicable to the different classes of scheme, with the Bermuda Recognised scheme being heavily regulated, the Bermuda Institutional scheme being less heavily regulated, and the Bermuda Standard scheme being subject to the same level of regulation as had been provided for in the BMA 1994 Code. This would no doubt explain the right of action given to an investor or former investor in a Bermuda Recognised scheme in terms not duplicated elsewhere in the Regulations, to which I will refer in due course.

229. The Chancellor Manual, to which Mr. Ellis referred in his supplemental report, also described how the Regulations essentially re-stated the provisions of the BMA 1994 Code and made them mandatory, in the following terms:

> "*Bermuda Standard Schemes*. The Bermuda CIS Regulations pertaining to "Bermuda Standard Schemes" in essence restate and make mandatory the voluntary Bermuda Code of Conduct, which is described above and will not be repeated here. The Bermuda CIS Regulations replace the "manager" with an "administrator," bowing to normal usage, although that service provider's functions and duties are virtually unchanged from the Bermuda Code of Conduct."

230. What is interesting about the quote from the Chancellor Manual is how it refers to the replacement of the word "manager" with that of "administrator", without any reference to the practice applicable to Bermuda Standard schemes constituted as the Funds were, with both managers and administrators. But it does not seem to me accurate to describe the change from the BMA 1994 Code to the Regulations as if the one were merely a re-statement of the other, at least if the effect of the Regulations is as the Funds contend. The fact is that the BMA 1994 Code imposes management obligations on the entity designated as the manager, which is to say the person appointed to manage the scheme. The Regulations purport to impose management obligations (again, if the construction contended for by the Funds is correct) on an entity other than the manager, namely the administrator. For this reason alone, it seems to me to be somewhat simplistic to say that the one is no more than a re-statement of the other.

231. When one comes to look at the Regulations, one sees that, at the outset, "manager" is defined to mean the person appointed in accordance with part A of the schedule, that is to say in relation to Bermuda Recognised schemes, while the "administrator" is defined to mean the person appointed in accordance with parts B and C of the schedule, that is to say in relation to Bermuda Standard schemes or Bermuda Institutional schemes. In relation to Bermuda Recognised schemes,

there is an extensive section dealing with the appointment, powers and duties of the manager, and reference also to the powers and duties of the directors or trustees and those of the custodian. When one comes to Bermuda Standard schemes or Bermuda Institutional schemes, there are references to the administrator, and a section dealing with, amongst other things, the administrator's functions, and a similar section dealing with the position in relation to the custodian. Indeed, this part of the Regulations goes on to consider the appointment of a registrar and an investment advisor, but there is no reference at all in the parts of the Regulations applicable to Bermuda Standard schemes or Bermuda Institutional schemes to the position of a manager. All of this begs the question as to what is meant by the various prospectuses issued on behalf of the Funds, when they referred to the Regulations, to the fact that the Fund had been classified as a Bermuda Standard scheme, and carried on to say that the Fund, the manager, the investment advisor, the administrator and the custodian conducted their activities on behalf of the Fund in accordance with the Regulations. Since the Regulations in relation to a Bermuda Standard scheme make no reference whatsoever to the manager, it would seem to be impossible for the manager to conduct his activities in accordance with the Regulations.

232. It is also instructive to consider the replacement to the Regulations, which as I have said were repealed by the 2006 Act and replaced by the 2008 Code, which was issued by the BMA in August 2008, pursuant to powers given to the BMA by the 2006 Act. The 2006 Act did consider the roles of both manager and administrator, defining an investment manager as a person acting on behalf of a fund who manages its investments under the terms of a management agreement, and an administrator or fund administrator as a person who provides any one or more of some six listed services to a fund. Those are:

a applying the subscription monies received by a fund in accordance with its constitution and its prospectus;

b processing the issue, conversion and redemption of units of a fund;

c applying the income of a fund in accordance with its constitution and its prospectus;

d calculating the net asset value of the units, and their issue, conversion and redemption price;

e maintaining the accounts of a fund;

f distributing to the participants of a fund all dividends or other distributions which may from time to time be declared and paid by it on units in a fund.

233. I have referred already to the fact that Mr. Sheldon cross-examined Mr. Ellis in relation to the effect of the 2008 Code. Mr. Ellis accepted that if the 2008 Code represented "a massive reduction in the functions and duties of a fund administrator" (the way it was put to him by Mr. Sheldon), that would be astonishing. However, he was not prepared to accept that an administrator's regulatory responsibilities had in fact been diminished by the repeal of the Regulations and their replacement with the 2008 Code, the consequence of adopting the position for which the Funds contend, which Mr. Ellis did adopt in his report.

234. Mr. Sheldon set out in both his opening and closing submissions for Citigroup the reasons why the meaning contended for by the Funds could not make any sense, never mind good commercial sense. In his submissions, Mr. Lyon was not even prepared to concede that there was an issue in relation to the nature of the duties owed by Citigroup and the Bank of Bermuda, and particularly whether they owed the statutory duties set out in regulations 11 (1) and 11 (2). His position was that it was simply not open to the Court as a matter of statutory construction to find that the words did not mean what they plainly said. He carried on to say that the Court could not find that the words defined in the statute (he meant the underlying

Regulations) mean anything different from what the statute defines it to mean. His case for the Funds was that the Regulations define an administrator to be the person appointed pursuant to part B. From that point forward, Mr. Lyon's position was that once one had established that the defendants were the people appointed as administrator, that was that.

235. With respect to Mr. Lyon, I find this to be an overly simplistic approach, and one which flies in the face of the principles of construction to which I was referred. I will start by referring to those principles, and will then move on to their application in relation to the construction of the Regulations.

236. I start by setting out the applicable law as submitted by Citigroup in its written submissions, in the following terms:-

> "57. In *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1993 [L2/32], Lord Hoffmann, delivering the judgment of the Board of the Privy Council, stated (at para 16):
>
> The court has no power to improve upon the instrument which it is being called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is only concerned to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument or document would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-3. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

58. The passage there referred to by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-3 [L2/28] is also important in this context of construing documents whether they be statute or contract:

The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this

exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd,* [1997] 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

'…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that

> flouts business common sense, it must be made to yield to business common sense.'
>
> If one applies these principles, it seems to me that the judge must be right and, as we are dealing with one badly drafted clause which is happily no longer in use, there is little advantage in my repeating his reasons at greater length. The only remark of his which I would respectfully question is when he said that he was 'doing violence' to the natural meaning of words. This is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs. Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listeners.

60. It is also instructive to consider the following passage in the judgment of Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd,* [1997] 2 WLR 945 at 967 [M1/4] (referred to in para (4) of the above citation from *Investors Compensation Scheme Ltd*):

> It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to

> enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. No one, for example, has any difficulty in understanding Mrs. Malaprop. When she says "She is as obstinate as an allegory on the banks of the Nile," we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute "alligator" by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like "allegory."
>
> Mrs. Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says "And how is Mary?" it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer "Very well, thank you" without drawing attention to his mistake. The message has been unambiguously received and understood."

237. On the basis of these extracts, Citigroup submits that when the process of construction described by Lord Hoffmann is carried out in relation to the Regulations, it is clear that they cannot have the meaning which the Funds ascribe to them. Citigroup submits that whatever confusion may have been caused by the terms used, it is obvious when the relevant background to the Regulations is taken into account that the term "administrator" when used in part B of the schedule means the person who has undertaken the functions and duties of a "manager"; Citigroup submits that the term "administrator" does not refer to a service

provider such as itself which has only undertaken certain administrative and clerical functions and duties.

238. Citigroup starts by looking at the BMA 1994 Code, noting that the Funds and Mr. Ellis appeared to have identified what they perceive to be an administrator's functions and duties under the Regulations, and then looked back to the BMA 1994 Code to support the conclusions that they reached. It may be helpful just to set out that part of Mr. Ellis's supplemental report detailing the relationship between the BMA 1994 Code and the Regulations. In my view, the passage which I set out below supports Citigroup's case rather than that of the Funds. The passage is as follows:

> "3.2 The BMA 1994 Code spells out in precise detail the functions of the "manager" of a scheme. While the code adopts the term "manager", the more common industry term for an entity that performs the functions it describes was and is "administrator." Accordingly, the CISC Regulations adopted the term "administrator" to describe the role which the BMA 1994 Code described as the "manager". However, the CISC Regulations assign the same functions to the "administrator" as the BMA Code assigns to the "manager." The Chancellor Manual states:
>
> *"The Bermuda CIS Regulations…in essence restate and make mandatory the voluntary Bermuda Code of Conduct… The Bermuda CIS Regulations replace the "manager" with an "administrator," bowing to normal usage, although service provider's functions and duties are virtually unchanged from the Bermuda Code of Conduct.*"

This is of course the passage to which I have already referred in paragraph 229 above.

239. Citigroup submits that the term "manager" used in the BMA 1994 Code clearly does not refer to an administrator such as Citigroup, but rather refers to the person who is managing the scheme. Citigroup then submits, having identified the

pertinent parts of the BMA 1994 Code, that if it were to be applied to the facts of this case, then clearly Phoenix Investment was the "manager", and Citigroup was a service provider and no more.

240. I have already referred to the fact that if one were to accept the construction of the Regulations contended for by the Funds, the change from the BMA 1994 Code to the Regulations would have done very considerably more than involve the Regulations re-stating the BMA 1994 Code: it would instead involve imposing management obligations on a service provider administrator. Accordingly, Citigroup submits that if indeed the duties of a service provider administrator were "virtually unchanged" by the Regulations, this supports Citigroup's contention that one needs to distinguish between a "manager administrator" and a "service provider administrator". These were the terms used by Citigroup to explain the confusion otherwise created by the Regulations; the term "manager administrator" is used to describe the person to whom the functions and duties of the "manager" under the BMA 1994 Code were ascribed, and who became described as the "administrator" in the Regulations; the person to whom the functions and duties of "administrator" are ascribed in the BMA 1994 Code is referred to as a "service provider administrator", on the basis that a service provider administrator does not have imposed upon him the management function identified in the Regulations.

241. In support of this contention, Citigroup also referred to the mutual funds laws of the Cayman Islands and the Bahamas. I will not detail the provisions of those laws, but recognise that they are consistent with the argument which Citigroup makes. Citigroup concludes that if indeed the duties of a service provider administrator were "virtually unchanged" in the Regulations, then it must be the case that the duties imposed on a service provider administrator are limited to those identified in regulation 6 (2) of the Regulations, which covers the position where a service provider becomes aware of certain matters, which then give rise to a reporting obligation.

242. Citigroup then conducts an exercise designed to demonstrate that the obligations imposed on the manager under the BMA 1994 Code are effectively identical to those imposed upon the administrator under the Regulations. Citigroup then refers to the interpretation section of the Regulations to which I have already referred, defining the "manager" as the person appointed in accordance with Part A, and the administrator as the person appointed in accordance with part B and C of the schedule. Citigroup also notes that there is no reference at all to "manager" in part B (as I have done), commenting that it would be a remarkable lacuna if no functions or duties at all were to be imposed on the "manager" of a Bermuda standard scheme, while pointing out that that would be the effect of accepting the interpretation contended for by the Funds. One bears in mind that the "manager" of a scheme is the person who has the principal role in the operation of the scheme's business, and the person to whom most prominence and detail is given in the prospectus, as identified by Citigroup. I accept that the point made by Citigroup here is a valid one.

243. Citigroup carries on to refer to regulation 11 (2), and contends that the duty of the administrator to "manage" a scheme is clearly inapt, because it clearly is not the duty or function of a service provider administrator such as Citigroup to "manage" the scheme. Citigroup points out that this linguistic problem is wholly overcome if "administrator" as referred to in the Regulations is a reference to a manager administrator as contended for by Citigroup.

244. Similarly, submits Citigroup, the provision for delegation contained in regulation 12 of part B makes no sense at all on the interpretation contended for by the Funds, but clearly falls into place on Citigroup's definition. I confess that the argument put forward by the Funds in its pleading in relation to delegation (referred to in paragraph 14 above) has never made any sense to me. There is no factual support for the contention that Citigroup delegated what the Funds contend were its management powers and duties under the Regulations to Phoenix Investment and/or Phoenix Advisors. With respect, the plea is a nonsense, and demonstrates neatly the contrived interpretation for which the Funds contend.

245. There are other matters on which Citigroup relies. It points out that if the interpretation contended for by the Funds is correct, it raises the question why the Funds' lawyers should draft a prospectus and underlying agreements which were prima facie not in conformity with the structure provided for in the Regulations, and why the BMA should approve the scheme when the prospectus and underlying agreements were prima facie not in conformity. Citigroup also points out that if the Funds' contention were to be correct, the 2006 Act would represent a considerable decrease in the extent of regulation, something which would be directly contrary to the general trend of increased regulation. And, lastly, Citigroup points out that the anomaly of an administrator reporting to itself under regulation 6(2) (the effect of the Funds' interpretation) would instead make perfect sense. The service provider administrator would report to the manager administrator.

246. To my mind, there can be no question but that the construction contended for by Citigroup must be right, and that contended for by the Funds must be wrong. It seems absolutely clear to me that the construction contended for by the Funds inevitably leads to a conclusion that flouts business common sense, and that this is one of those occasions when the wrong word was used in the Regulations. I accept that Lord Diplock's words in *The Antaios* were said in relation to a commercial contract, but it seems to me that they have equal application to the construction of the Regulations. I do, therefore, find that the word "administrator" in part B of the Regulations is a reference to a manager administrator and hence applicable to the appropriate manager, Phoenix Investment; it does not apply to Citigroup in its role as a service provider administrator. The functions of an administrator under regulation 11 are not therefore applicable to Citigroup or the Bank of Bermuda in relation to their appointments as administrators to the Funds. I would just add one thing, and that is to make it clear that there was no evidence that either of the administrators were ever actually aware that there had been any breaches of the investment restrictions. Had there been such evidence, then regulation 6(2) would have been

triggered and a report would need to have been made to the BMA and to shareholders at the time of the next report.

The Duties said by the Funds to be owed by Administrators

247. I have dealt with the issue of what obligations, if any, the Regulations imposed upon the successive administrators, first Citigroup and then the Bank of Bermuda, without yet considering whether the administrators did have a duty to comply with the Regulations, as opposed to perform the duties identified in the underlying administration agreements. I therefore turn next to the issue of whether the administrators undertook to discharge the duties in accordance with the Regulations, whatever those duties might be. The Funds contend that such obligations arise in any number of ways. First, it is said that the administrators were bound by the express terms of the administration agreements to perform the statutory duties owed to the Funds, whether as a matter of law, by necessary legal implication, as a matter of true construction of the contractual words used in the administration agreements, or, lastly, because the administrators are estopped from denying that they owed those statutory duties. Next, the Funds contend that the administrators were bound to perform their statutory duties by the terms of an unwritten collateral contract pursuant to accepting appointment as administrator for reward. Next, the Funds contend that by virtue of accepting appointment as administrators pursuant to part B of the Regulations, and assuming the responsibilities imposed by the Regulations, the administrators owed the Funds a duty of care in tort to perform the statutory duties. Finally, the Funds say that if all of the above is wrong, then the statutory duties must be interpreted as giving rise to a private right of action. As I have said, all of these alternative arguments are premised on the Regulations imposing the obligations upon the administrators for which the Funds contend. I will deal with them in turn.

Existence of a Contractual Duty to Perform the Statutory Duties

248. Before turning to the particular clause in the administration agreements upon which the Funds rely, I should give some detail of the content of those agreements, which I will do with reference to the Citigroup Phoenix Global

Administration Agreement. This document, dated 24 June 1999, is headed "FUND ACCOUNTING, ADMINISTRATION AND TRANSFER AGENCY AGREEMENT". The agreement recites that Phoenix Global is managed by Phoenix Investment, and appoints Forum to act as fund accountant, administrator and registrar and transfer agent for the Fund for the period of the agreement. In relation to the services to be provided by Forum under the agreement, these are divided into fund accounting, administration, and registrar and transfer agency. There are other clauses in the agreement to which I will refer at the appropriate time, but for present purposes, the clause upon which the Funds rely is clause 2 (a) (2) (xii), which is in the following terms:

> "subject to the routine obligations of the Funds' transfer agent(s) and fund accountant(s), generally perform all the duties usually performed by administrators of companies in Bermuda including the keeping and making of all statutory returns and records required to be kept under regulations in Bermuda for the time being in force."

249. The Funds rely upon the case of *Stone & Rolls –v- Moore Stephens* [2009] 3 WLR 455 for the principle that where service providers such as auditors, or in this case administrators, have statutory duties to the company imposed upon them for the benefit of the shareholders of the company as a class, then the court will construe the contract under which they provide their services to the company "in the light of the relevant statutory provisions and the relevant auditing standards".

250. But this last quotation, upon which the Funds rely, only has relevance if one is referring to the duties usually performed by administrators of companies in Bermuda in the context of those duties usually performed by persons appointed as administrators pursuant to the Regulations. I do not think that that is the context in which the word "administrators" is used in the clause set out above.

251. First, it is important to bear in mind that for the purposes of this agreement, the word "administration" is but one of the three types of service which Forum as

administrator agrees to provide to Phoenix Global under this agreement. Then one needs to look at the types of service referred to under the head "administration" in the agreement; those services are all in the nature of corporate administration and related services. One also has to consider the types of service which are identified in terms in the clause, namely "the keeping and making of all statutory returns and records required to be kept under regulations in Bermuda for the time being in force".

252. I am satisfied that this clause is concerned with corporate secretarial administrative matters relating to companies generally under the Companies Act 1981, and has nothing to do with the statutory duties which may be applicable to administrators of Bermuda Standard schemes under the Regulations. As well as saying that the construction for which they contend is mandated by law, the Funds seek to rely upon standard principles of construction, asking the familiar question "What would a reasonable person have understood the parties to mean by using the language of the document against all the background which would reasonably have been available to them at the time?", per Lord Hoffman in the *Investors Compensation Scheme* case. The Funds carry on to argue that there could be little doubt that the aim and purpose of the administration agreement was the appointment of Citigroup as administrator in accordance with part B of the Regulations. The problem that I have with this argument is that nowhere in the agreement is there any reference to the Regulations. One would have expected that if "administrator" did indeed mean an administrator appointed pursuant to the Regulations, the Regulations would be referred to somewhere in the agreement, and as I have said, they are not. The Funds also refer to the common assumption of the parties as set out in the prospectus, which refers at the outset to the various participants conducting their activities on behalf of the Funds in accordance with the Regulations. I have already referred to the fact that that statement made no sense at all in relation to the manager (Phoenix Investment), since the word "manager" is not mentioned in part B of the Regulations. There is another fundamental problem with this argument, and that is that the words in question appear in the prospectus of 1 June 2001, but do not appear in the prospectus

operable at the time that Citigroup entered into the Citigroup Phoenix Global Administration Agreement. Even if I were wrong in placing reliance upon that matter, there are no references in the body of the prospectus to the Regulations, or the fact that the administrator performs its services pursuant to the Regulations. It follows that I should, and I do, reject the contention that the parties were entering into their contract with the aim and purpose of appointment pursuant to the Regulations. There is nothing whatsoever to suggest that this was the case, and I therefore find that there was no contractual duty imposed on Forum/Citigroup to perform the statutory duties imposed by the Regulations.

253. I should at this point also deal with the position in relation to the Bank of Bermuda, where the wording of the corresponding clause was slightly different. In the Bank of Bermuda Phoenix Global Administration Agreement, the relevant clause was clause 4 (s), which clause was in the following terms:

> "generally perform all the duties usually performed by secretaries, registrars and administrators of companies including the keeping and making of all statutory returns and records required to be kept and made under regulations in Bermuda for the time being in force".

254. The difference is that instead of referring to the duties usually performed by "administrators of companies in Bermuda", the Bank of Bermuda agreement refers to the duties usually performed by "secretaries, registrars and administrators of companies". If anything, that seems to me to make the position even stronger than was the case in respect of the Forum agreement, and I find that the position in relation to the Bank of Bermuda is the same as that in relation to Forum.

255. And all of the above is quite separate and apart from the fact that the management obligation for which the Funds contend under the Regulations is completely inconsistent with the administration agreements, which impose no management obligations and make it clear that the Funds' manager is Phoenix Investment.

Terms are implied in contracts when they represent the intention of the parties or are necessary to give business efficacy. Neither is the case here.

Estoppel

256. I have referred to the manner in which this argument was contained in the pleadings, and quite apart from legal issues as to whether an estoppel is available to the Funds, the problem seems to me to be that the alleged estoppel is based on the common assumption that the administrator and the custodian conducted their activities on behalf of the Funds in accordance with the Regulations. I have already referred to the difficulties with this argument in relation to Citigroup, because of the terms of the governing prospectus. I should have mentioned that the Funds sought to overcome this difficulty by citing an answer given by Ms. Conyers in cross-examination, when she accepted that there was an assumption that the statement in the 2001 prospectus was true in 1999, when Forum had its first dealings with the Fund. The problem remains that Ms. Conyers did not have the same understanding as to the effect of the Regulations as the Funds now say that they had. I do not see that an estoppel can arise in circumstances where the parties on either side may have thought that the administrator's services were to be performed pursuant to the Regulations, but where they had a completely different view as to what obligations the Regulations imposed. It cannot be said in these circumstances that the two sides shared a common assumption.

257. Further, as Citigroup points out, there is a requirement for there to be communication between the parties if indeed an estoppel is to operate. As is stated in *Chitty on Contracts* (30th Edition, Volume 1, paragraph 3-109) an estoppel "requires communications to pass across the line between the parties. It is not enough that each of two parties acts on an assumption not communicated to the other". It does not seem to me that an estoppel can arise in the circumstances of this case, and I so find. For the avoidance of doubt, I find the position to be the same in relation to the Bank of Bermuda as I have found it to be in relation to Forum/Citigroup, since the Bank of Bermuda took the same view as did Citigroup

in relation to the effect of the Regulations on the services which it was to provide as administrator.

258. This is all apart from the argument that an estoppel cannot found a cause of action. Had it been necessary for me to rule on this point, I would have done so in accordance with the submissions of Citigroup and the Bank.

Implied Collateral Contract

259. This argument on the part of the Funds rests upon the appointment of Citigroup and the Bank of Bermuda as required under the terms of the Regulations. The argument goes that since the administrators were appointed for reward, they performed their statutory functions and undertook their statutory duties pursuant to an implied contract to do those things.

260. But the factual reality is that both administrators performed their duties as administrators (whatever those duties might have been) under the terms of comprehensive administration agreements. Just as there is no warrant for importing implied terms into the administration agreement executed between the parties, there is no warrant for implying a completely separate agreement. This is particularly the case when the implied terms (or contract as a whole) which are founded on the interpretation of the Regulations contended for by the Funds, are wholly inconsistent with the terms of the contracts actually entered into.

261. Finally, a further hurdle exists in relation to Citigroup, whether in relation to implied terms or an implied collateral contract, because of the existence of an entire agreement clause in the Citigroup Administration Agreements.

Duty of Care in Tort

262. The Funds' written submissions contend that it is well established that where a person who undertakes to provide services, particularly professional services, either under a contract, or without a contract in a situation "akin" to contract, he

owes his client a duty of care. It is conceded that the extent of that duty depends upon the terms of the contract, but also contended that the duties in contract and tort are not identical. Reliance is placed on the case of *Henderson –v- Merrett Syndicates* [1995] 2 AC 145.

263. But it is the case in Bermuda that following the decision of the Court of Appeal in *White –v- Conyers Dill & Pearman* (Civil Appeal No. 31 of 1993, Judgment dated 12 May 1994) the duty to exercise reasonable skill and care arises solely in contract, and not in tort. That decision being binding on me, I do not believe I can properly disregard it. But the point is, it seems to me, academic, because there is no doubt but that where there is a concurrent duty in tort, it can be no more extensive than the duty owed in contract. I have already given my view as to the parameters of the contractual duty, and there is nothing to be gained so far as the Funds are concerned by seeking to establish a separate duty of care in tort; if the statutory obligations for which the Funds contend are not imported into the contract, they cannot be owed under a duty of care in tort.

Breach of Statutory Duty

264. The Funds concede that the question whether there is or is not a private law cause of action arising from a breach of the Regulations is not expressly dealt with in the Regulations. However, the Funds then move on to consider the question whether there might be indications which point with more or less force to the one answer or the other, when it seems to me that the starting point is the general principle, which is set out in an extract from *Clerk & Lindsell on Torts* (19th edition, 2006 at paragraph 9-06), to which I was referred by Citigroup, and which is in the following terms:

> "a. The basic proposition is that, in the ordinary case, a breach of statutory duty does not, by itself, give rise to any private law cause of action. Such a cause of action can arise if it can be shown, as a matter of construction of the statute, that the "statutory duty was imposed for the protection of a limited class of the public and that

> Parliament intended to confer on members of that class a private right of action for breach of the duty" [X (*minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731]. There is no general rule by which one can determine the intention of Parliament, but there are a number of "indicators". Thus, if the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, this indicates that there may be a private action, since otherwise there would be no means of enforcing the protection that the legislation was intended to grant. Where the statute provides an alternative remedy to enforce the relevant duty that will normally indicate that the statutory right was designed to be enforceable by those means and not by private right of action ……statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large have not been held to give rise to a private law right of action for damages for breach of statutory duty:
>
> > "Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general."

265. Citigroup also cites another passage from *Clerk & Lindsell*, which I will set out slightly more fully than the citation contained in the Citigroup written submissions. This is from paragraph 9-41, and is in the following terms:

> "There is no rule against recovery of economic loss in an action for breach of statutory duty. Where the claimant can establish, as was the case in *Rickless v United Artists Corporation*, that the purpose of the statute was to safeguard his financial interests an action will lie. On the other hand, it

> would seem that following the trend in negligence the courts will be cautious about inferring such an intention. In particular where the essence of the complaint is that the defendant's violation of statute has made the claimant's business less profitable, compelling evidence will be required to prove that the statute was designed to protect the claimant's profitability."

266. Citigroup then referred to the source of the power to make regulations, contained in section 29 of the Bermuda Monetary Authority Act 1969 ("the BMA Act"), which provides that the power of the Minister of Finance to make regulations extended to "regulating collective investment schemes operating in or from within Bermuda". Prima facie, therefore, it would appear that the Regulations were not intended to create a private law cause of action. Further, section 29 (2) of the BMA Act does provide a remedy in the form of criminal sanction if an offence has been committed against the Regulations. This too is an indication that no private law remedy was intended to be conferred.

267. And finally, it is of note that in relation to Bermuda Recognised schemes, there is provision in part A of the schedule to the Regulations which expressly confers a right of action on investors or former investors for any loss incurred as a result of any material breach by the custodian or manager of any provisions of the Regulations. Mr. Lyon's argument throughout was that part B of the Regulations afforded investor protection. If this had been the intention of the Minister when making the Regulations, it would have been simple to provide a like protection for Bermuda Standard schemes as is given in the Regulations to investors or former investors of Bermuda Recognised schemes. And even then, it is one thing to talk of investor protection, but it does have to be borne in mind that the plaintiffs in this case are the Funds.

268. Taking into account the various indicators which I have identified, I am satisfied that the Regulations do not afford a private law right of action to the Funds in the event of their breach, and I so find.

269. In doing so, I do note that in the case of *Oceanic Bank & Trust Limited –v- MJ Select Global Limited* (Supreme Court of the Bahamas, unreported judgment dated 2 December 2005), Mr. Justice Lyons took a similar view of the equivalent Bahamian legislation, the Mutual Funds Act of 1995. Mr. Justice Lyons found this to be a regulatory act, which of itself did not create private rights. He referred in his judgment to the judgment of the House of Lords in *R –v- Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58 at 170. It does also seem to me that the conclusion which I have reached is consistent with the summary of the relevant law given in that case by Lord Jauncey of Tullichettle.

270. There is one further argument made by the Funds in relation to the Regulations to which I have not yet referred, and that is the effect of bye-law 106. That bye-law provides that the power given to the board of directors to manage the company is "subject to the provisions of the Companies Acts". "The Companies Acts" are defined in the bye-laws to mean "every Bermuda statute from time to time in force concerning companies insofar as the same applies to the Company." The Funds argue that the statutes in force included the BMA Act and the Regulations. The argument for the Funds is then that any administrator appointed by the board pursuant to bye-law 114 must be an administrator with the statutory duty of management set out in the Regulations.

271. I think this argument fails at the first hurdle. I agree with the argument put forward by the Bank that the reference to "every Bermuda statute from time to time in force concerning companies" is a reference to the Companies Act 1981, and not to the BMA Act or the Regulations made thereunder; all of the other references in the bye-laws to the Companies Acts are clearly references to company legislation. The following words "insofar as the same applies to the Company" do not seem to me to detract from that position, although the Funds placed reliance on those words and said that there were many other statutes at that time in force and which applied to the company. But the reality is, for instance,

that the Regulations apply to trusts as well as to companies. In short, I do not think that bye-law 106 has the application for which the Funds contend.

272. Against that finding as to the meaning and effect of the Regulations, I now turn to the particular claims of breach by the administrators.

The Research Fees Paid to Phoenix Advisors

273. As already indicated, Phoenix Advisors was the investment sub-advisor, appointed pursuant to agreements dated 24 June 1999 in the case of Phoenix Global, and 30 June 1999 in the case of Phoenix Capital. The sub-appointment of Phoenix Advisors was contemplated by the agreements between each of the Funds and Phoenix Investment, but in relation to the appointment of sub-advisors, the clause in the management agreement provided as follows:

> "**Appointment of Sub-Advisers.** The Manager may contract with or consult with such banks, other securities firms, brokers or other parties, without additional expense to the Fund, as it may deem appropriate regarding investment advice, research, statistical data, marketing or otherwise."

A corresponding provision in relation to expenses was contained in the sub-advisory agreement, to the effect that each of Phoenix Investment and Phoenix Advisors would bear all expenses incurred in connection with the latter's duties and activities under the agreement.

274. There were also provisions to the same effect in the various prospectuses, providing that Phoenix Investment would be responsible for any fees payable to Phoenix Advisors.

275. In the event, these payments for research fees were, if not from the outset, paid from a very early stage by the Funds. Because of the availability of a time bar defence, the claim in respect of those early payments as against Forum is

maintained from February 2000, and the amounts in fact paid are not now in dispute. Payment instructions were made on a somewhat confusing letterhead, which had the name of Phoenix Capital at the top, and that of Phoenix Advisors at the bottom. But what is quite clear is that the amounts, which were then in the sum of $20,000 per month were, by instructions to the custodian, being debited to the account of Pheonix Capital and credited to the account of Phoenix Advisors.

276. As appears from the witness statements of Mr. Hindess and Ms. Cashin, the matter became an issue in relation to the first full audit undertaken by Ernst & Young, which was for the year ended 30 September 2000. Brendon Muller of Forum sent a memorandum to Messrs. Liew, Risman and Blum on 12 February 2001, referring to the fact that supporting invoices had been provided for the previous year, and were needed to support the amounts paid for the twelve months ended 30 September 2000.

277. The individual dealing with the processing of these payments on behalf of Forum was Ms. Cashin and I have already referred to her evidence, to her communications with Ernst & Young, and also to the evidence of Mr. Hindess.

278. So the position was that while the underlying documentation did not permit these research payments to be charged to the Funds, in fact they were so charged, with the knowledge of everyone involved, that is to say the Funds, Phoenix Investment (because its mind and management were the same as those of the Funds), Phoenix Advisors, Forum and later the Bank of Bermuda, and Ernst & Young and subsequently the replacement auditors, Rothstein Kass & Co.

279. Against this background, the complaint made on behalf of the Funds is that the administrators, first Citigroup and then the Bank of Bermuda, took no steps at all to prevent the payments being made, or to require that they be reversed. The Funds say in their closing submissions that instructions should have been given to the custodian to the effect that it should not pay these fees unless and until the management agreements and prospectuses had been changed. I pause in passing

to note that this submission seems to imply that if the directors had been informed that the custodian would not process the payments, changes would have been made to the management agreements and prospectus so as to regularise the payments. There is a complaint that the matter was not put to the directors of the Funds, nor a report made to the BMA that the NAV of the Funds was not being correctly calculated. Neither, it is said, were the shareholders told.

280. The legal basis upon which the claims are made, both as against Citigroup and as against the Bank of Bermuda rests on the interpretation of the Regulations contended for by the Funds, and the consequent obligation to ensure that the Funds were managed in accordance with their constitutions. In response, both Citigroup and the Bank of Bermuda plead that they were entitled to rely upon the acts and decisions of Mr. Blum and the Funds' other directors, and that neither had the power or authority to prevent the payments being made. The Bank of Bermuda raises additional defences, relying on the manner in which the fees had been accounted for in the financial statements before it became administrator and contending, as Mr. Collins had said in his evidence, that if the issue had been raised with the directors of the Funds, they would simply have amended the relevant documents so as to permit the payments.

281. As I have said, the case for the Funds as against the administrators is entirely dependant upon their interpretation of the Regulations. In particular, the Funds contend that the administrators breached regulation 11 (2) (d), and cannot therefore place reliance upon the "proper authorisation" defence. Further, the Funds contend that the administrators had the power pursuant to regulations 11 (1) and 16 to give instructions to the custodian to prevent the payments being made. Given the conclusion which I have reached that the Regulations do not impose duties upon the administrators pursuant to regulation 11, this claim by the Funds must therefore fail. All of the payments in question were supported by proper authorisation, and the administrators were entitled to rely upon that authorisation.

282. I should just add something further in regard to this question of authorisation before turning to the alternative position, because the Funds contend that, in the case of Citigroup, Ms. Conyers understood the payments to be in breach of the prospectus and the management agreement, and accepted that it was Forum's responsibility to prevent the fees being paid. In fact, when Ms. Conyers was asked to accept that it was Forum's responsibility in the circumstances to prevent the fees being paid, she responded that she was not sure that she did and would have to think about it. However, it is true that she was unable to give any explanation as to why the payments had been processed by her staff.

283. One of the complaints that has been made throughout is that the documentation which has been produced on behalf of the Funds is incomplete, and this is something that was accepted by Mr. Moretti. His position was that he had asked Mr. Blum on a number of occasions for complete copies without success, and he had reached the conclusion that nothing more could be obtained from Mr. Blum.

284. It does appear to me that there must be documentation missing in relation to the manner in which the auditors were satisfied as to the propriety of the research fee payments. I have referred to Mr. Muller's memorandum, and had referred earlier to the fact that Ms. Cashin had sent an email to a member of the audit staff at Ernst & Young on 16 April 2002, in which she had said that the board would sign a resolution, indicated the directors' consent to the payment of the research fees – see paragraph 139 above. I have also referred to the evidence of Mr. Hindess to the effect that his firm would have wanted to see board approval for the payments. However, I had not referred to Mr. Hindess' oral evidence, in which he was asked whether the issue would need to have been resolved to Ernst & Young's satisfaction before the release of the audited financial statements. Mr. Hindess had confirmed that although he did not recall the manner in which the matter had been resolved, he was confident that that would have needed to be the case. There seems to me to be no doubt but that this aspect of matters must have been resolved by means of a resolution of the Funds' directors approving the payments, as Ms. Cashin had advised would be forthcoming, and I so find. I share Mr.

Hindess' confidence that his firm would not have released the audited financial statements unless that were the case.

285. I will be dealing later in this judgment with the reliance which the administrators are entitled to place upon such resolutions, but suffice to say at this point that in my view they were so entitled. I do therefore find that Citigroup was entitled to rely upon the authorisation of the directors.

286. I do, however, need to carry on consider the various other defences which have been raised both by Citigroup and by the Bank of Bermuda in relation to this head of claim, in case I am wrong on the view which I have taken as to the effect of the Regulations.

287. Citigroup starts by commenting that the Funds do not allege that the payments to Phoenix Advisors were in themselves improper; the complaint is that the Funds were charged with payments which should have been the responsibility of Phoenix Investment as manager. Citigroup notes that both Mr. Ellis and Mr. Bond gave evidence that fees of this type were not unusual, and Mr. Collins essentially concurred. Mr. Collins was also of the view that, irrespective of the terms of the prospectus or the agreements, the directors of the Funds were acting within their powers when authorising payments of the research fees, and that those payments were liabilities of the Funds which would need to be reflected in the books, records and accounts of the Funds. His view was that the auditors would not have passed the accounts if they been of the view that the payments exceeded the powers of the directors.

288. Mr. Collins also said that even if these fees were not part of the management fees, they were clearly disclosed and recorded as additional fees on top of the ordinary management fees.

289. I would at this stage refer to the additional defence raised by the Bank of Bermuda, and the contention that if the issue had been raised, the relevant

documents would have been amended so as to permit the payments. In my view, that is the very strong probability, certainly well beyond a mere balance of probabilities. In this regard, it is important to remember two things. First, when a difficulty arose in regard to the triggering of the Stop Loss Provision, by virtue of the NAV having decreased in a particular quarter by more than 25%, the response from the Funds was to seek to increase that 25% figure to 35%. Secondly, I bear in mind Mr. Blum's statement to Ms. McLennan that he was himself the manager of the underlying clients, accounting for 95% of the Funds invested in Phoenix Global. So that my next finding in relation to these payments is that if there were the duty under the Regulations for which the Funds contend, this claim would fail because the consequence of raising the matter with the Funds would have been the corrective action mentioned. And I should just refer at this point to the argument that reporting the matter to the BMA would have put an end to the payments. I deal with a similar argument in relation to the effect of reporting a breach of the Stop Loss Provision to the BMA, later in this judgment. Given the lack of action on the part of the BMA when informed of a variety of matters which might reasonably be viewed as more serious than this, I do not think that that course would have caused the payments to cease. And the argument here essentially duplicates the argument in relation to the "lost chance" claims which I deal with later in this judgment.

290. If I am wrong in that finding, I would accept the argument made for the Funds that these payments were not properly authorised under the terms of the agreements to which I have referred, and the prospectuses. Subject to consideration of the other defences which I have not yet reached, my view is that if the Funds are right in the interpretation of the Regulations and I am wrong on the "corrective action" and reporting to the BMA aspect of matters, then Citigroup and the Bank of Bermuda were in breach of those duties in allowing these payments to be made to Phoenix Advisors. I take that to be the case both in relation to the arguments which Citigroup makes in relation to the Funds' breaches and the administrator's breaches.

291. That still leaves other defences in relation to these payments in the form of causation, contributory negligence, exoneration from liability and indemnity, and statutory relief. These defences have application to a number of the claims made on behalf of the Funds, and I would therefore propose to deal with those defences in relation to the wider claims, in due course.

292. I have dealt with this head of claim with reference to Phoenix Capital, but the position is the same in relation to Phoenix Global. Further, in my view there is no difference between the position of Citigroup and the Bank of Bermuda in relation to these payments, when considered with reference to the Bank's position as administrator, but that does of course leave the claim which is made against the Bank in its position as custodian, which is in a greater amount since its period as custodian covers a longer period than that of administrator.

The Claim against the Custodian in respect of Research Fees

293. It is important to bear in mind when considering the claims made by the Funds against the Bank in its capacity as custodian that there is no question of the Regulations imposing any form of management obligation upon the Bank in that capacity. So the starting point is to consider the relevant terms of the Bank of Bermuda Custodian Agreements. For these purposes, I will refer first to the definition of "proper instructions" and then to the payments which the custodian is permitted to make out of the bank accounts opened and maintained on behalf of the Funds. It is convenient to do this in the terms and with the emphasis which the Bank of Bermuda placed on those provisions in its written submissions, as follows:

> *"*Clause 1(A): *"**Proper Instructions**" shall mean* ***signed written instructions*** *or ... facsimile ... instructions* ***in respect of any of the matters referred to in this Agreement purported to be signed … by one or more Directors of the Company or the Manager or any other person or persons duly authorised to sign by the Board of Directors of the Company … A certified copy of the resolution of the Board of Directors***

of the Company or the Manager shall be conclusive evidence of the authority of any such person to act *until the Custodian is in receipt of written notice to the contrary".*

Clause 5(A): *"The Custodian shall open and maintain a separate bank account or bank accounts in its books in the name of the Company …**The Custodian shall make or procure the making of payments out of such account or accounts on behalf of the Company only:-***

> *"(a)* ***upon the purchase of Investments for the account of the Company…; …***
>
> *(c)* ***for the payment*** *of interest and dividends by the Company* ***or the payment by the Company*** *of taxes,* ***management investment advisory,*** *custodian, secretarial and registrar and subscription and redemption agents* ***fees or other operating expenses (including, without limitation*** *thereto, fees for legal, accounting and auditing services, directors' remuneration, brokerage and commissions);…*
>
> *…and*
>
> *(j) for other proper corporate purposes.*

Before making any such payment the Custodian shall receive (and may rely upon), in the case of payment permitted under the terms of items (a) to (j) of this sub-clause Proper Instructions directing such payment*, naming the person or persons to whom such payment is to be made and specifying the amount of, and the time by which, such payment is to be made and such other information as may be appropriate to allow the Custodian to effect the relevant payment in proper form."*

294. There is no issue in relation to whether or not proper instructions were in fact given in respect of these payments. All were signed on behalf of the Funds by proper authorised signatories, so that aspect of matters does not fall to be determined.

295. Neither is there an issue as to whether or not the payments were fees. They clearly were. However, there is then an argument that the Bank was only authorised to make payment out of the Funds' accounts for their proper corporate purposes. In my view, there is nothing to this point. The entitlement granted to make payments "for other proper corporate purposes" is an entitlement in addition to the other listed purposes, included in which is the payment of fees. In any event, it seems to me that prima facie the payment of fees falls within the definition of "proper corporate purposes". To adopt the example used by Mr. Lyon in cross-examination, the use of corporate funds to settle a book-maker's account would properly put the custodian on enquiry; the payment of research fees by a fund company would not. Then there is an argument based on the effect of regulation 16 (1) (a) of part B of the Regulations, which governs custodians, and which obliges the custodian to provide for the safe-keeping of the assets of a scheme. But this cannot be an absolute duty, and it does not seem to me that this regulation has any application to a situation where proper instructions have been given to a custodian to make payment of fees or expenses.

296. In its closing written submissions, the Bank has gone into considerable detail to rebut these claims, but for my part I do not think that such detail is necessary. It seems to me that the payments were indeed payments which were properly made under the terms of the custodian agreement, and I so find. I would just refer to the fact that there is also a ratification defence raised, and since this has application to a number of other defences, I will deal with that point under a separate heading later in this judgment.

The Loans to SPVs

297. These claims are made against Citigroup, and relate to substantial loans made by Phoenix Capital between January 2000 and January 2001. The loans in respect of which claims are maintained are as follows:

24 January 2000	Fiducia	$8,250,000
18 July 2000	Astir	$4,000,000
30 August 2000	Mandarin	$11,000,000
24 January 2001	Fitben	$13,263,381

All the borrowers are said to have been in default on the loans.

298. Since the loans are said to be in breach of the Quality Restriction and the Illiquidity Restriction, as those terms are defined, which restrictions are set out in the various Phoenix Capital prospectuses, the starting point is to review the terms of the relevant clauses. In the case of the Quality Restriction, this appears under the heading "Quality Information" in the prospectus, and is in the following terms:

> "The Fund will limit its portfolio investments to those instruments that present minimal credit risks and are of "eligible quality" as determined by the Manager under the supervision of the Board of Directors. For this purpose, "eligible quality" means a security that is rated, or guaranteed by an institution the securities of which are rated (i) in one of the three highest rating categories by at least two nationally recognized statistical rating organizations in the United States assigning a rating to the security or issuer, or (ii) if only one rating organization assigned a rating, by that rating organization or (iii) if unrated, of comparable quality as determined by the Manager.

> These standards must be satisfied at the time an investment is made. In the event that an investment held by the Fund is assigned a lower rating or ceases to be rated, the Manager will promptly reassess whether such security continues to present a minimal credit risk and whether the Fund should continue to hold the security. If a portfolio security no longer presents minimal credit risk or is in default, the Fund will dispose of the security as soon as reasonably practicable unless the Manager determines that it is not in the best interests of the Fund to do so."

299. The first paragraph of the extract set out above was defined in the pleading to be the Quality Restriction, but in argument, the Funds also relied on that part of the prospectus setting out permissible investments, and I would therefore set out two further relevant clauses from the prospectus, which are as follows:

> "*Commercial Paper; Corporate Bonds.* The Fund may invest in high quality commercial paper and corporate bonds issued by U.S. corporations. Commercial paper (including variable amount master notes and funding agreements) refers to short-term promissory notes issued by corporations, partnerships, trusts or other entities to finance short-term credit needs. The Fund may also invest in high quality U.S. Dollar-denominated commercial paper and corporate bonds issued by non-U.S. corporations.
>
> *Mortgage-backed Securities and Asset-Backed Securities.* The Fund may invest in certain high quality U.S. Dollar-denominated mortgage-backed and asset-backed securities. Mortgage-backed securities are securities collateralized by loans backed by mortgages or pools of mortgages. Asset-backed securities are securities collateralized by shorter-term loans, such as automobile loans, home equity loans, computer leases, or credit card receivables. The payments from the collateral are passed through to the security holder. The collateral behind asset-backed securities tends to have a controlled or limited prepayment rate. In addition, the short-term

> nature of asset-backed loans reduces the impact of any change in prepayment level. Due to amortization, the average life for mortgage-backed or asset-backed securities is also the conventional proxy for maturity."

300. In relation to the Illiquidity Restriction, this is one of a number of restrictions set out under the heading "Investment Restrictions", and appeared in the first prospectus of 30 June 1999 in the following terms:

> "The Fund will also not maintain more than 20% of its net assets in illiquid securities, which include "restricted securities" subject to legal restrictions on resale arising from an issuer's reliance upon certain exemptions from registration under the U.S. Securities Act of 1933, as amended (the "Securities Act"), other than restricted securities determined by the Manager to be liquid, such as securities eligible for resale under Rule 144A under the Securities Act and commercial paper issued in reliance upon the exemption from registration in Section 4(2) of the Securities Act."

That figure of 20% was changed to 25% by an amendment of 20 August 1999 and to 35 % by the prospectus of 14 March 2001. Hence at the times that the Loans to SPVs were made the relevant figure was 25%.

301. Again, the case for the Funds against Citigroup depends upon the establishment of the duties for which the Funds contend under the Regulations. Even assuming that the duties owed under the Regulations were to be established, contrary to my finding, the Funds need to establish that there were indeed breaches of the Quality Restriction and the Illiquidity Restriction, so that the starting point is to consider whether the loans to SPVs were indeed in breach of those restrictions, such that the administrator should have acted in the various ways contended for by the Funds.

302. The argument for the Funds is put very briefly, although the subject was referred to extensively in cross-examination, where Mr. Lyon drew a distinction between an original lending, and an investment in commercial paper as defined, which involved investment in a debt instrument issued by some other entity.

303. The counter-argument on behalf of Citigroup is that commercial paper and corporate bonds are themselves originating promises to pay the holder of the paper/bonds. Citigroup emphasises the words "funding agreements" included as one type of commercial paper, and says that these words clearly show that investments in loans and promissory notes were permitted and/or contemplated. Citigroup also suggests that it is meaningless to draw a distinction between originating loans/promissory notes and an investment in a loan/promissory note by purchasing such.

304. The argument is a fine one, but the conclusion that I have reached is that the position argued for by the Funds is overly narrow. Moreover, it is contradicted by advice which Wakefield Quin as attorneys for the Funds gave to a prospective auditing firm by letter dated 23 October 2002, when in relation to shareholder loans they said "Each Company has the capacity and power to grant a loan to a shareholder of the Company." That seems to me to be sufficient to dispose of the issue, even though that letter was written well after the grant of the loans. It is reasonable to assume that if the issue had been raised at the time that the loans were granted, Wakefield Quin would have advised in the same terms, and Citigroup would have been entitled to rely upon such advice.

305. In relation to the Quality Restriction as defined with reference to "eligible quality" it does not appear that the Funds now pursue this issue, but in any event, it does seem to me that the argument would be bound to fail. The question of eligibility is dealt with in the clause on the basis that it is the manager's determination which governs. It is reasonable to assume that the Fund was investing on the basis of the manager's determination, and that ought to be the end

of the matter. Certainly, if Citigroup had asked the question whether the manager thought a particular loan (which would necessarily be unrated) was of comparable quality to a rated security, the strong probability is that the manager would have responded affirmatively.

306. In relation to the meaning of the Illiquidity Restriction, Citigroup notes that there is no definition of "illiquidity" in the prospectuses, and seeks to draw a distinction between the terms of the loans and the nature of the underlying investment, although understandably Citigroup acknowledges difficulties when it comes to the Painting owned by Mandarin, in relation to which Citigroup says that this was not an illiquid investment at the outset, on the basis that the investment in the Painting was not a direct one, but effected indirectly by means of a loan to Mandarin. It seems to me that the reality is that these loans, which were not payable for substantial periods, were in real terms illiquid, and I so find. It follows that if there was the investment monitoring obligation under the Regulations for which the Funds contend, then Citigroup was in breach of those obligations in relation to each of the Loans to SPVs, once the applicable threshold of 25% of the net assets of the Funds had been passed.

307. That is the position assuming that the argument for the Funds as to the effect of the Regulations is correct, when I have already found against the Funds on that issue. The position then is that to succeed without reliance on the Regulations, the Funds would need to establish that Citigroup as administrator owed a duty to monitor compliance with the investment restrictions contained in the prospectuses. Even the Funds' expert Mr. Ellis relied only upon the terms of the Regulations as the basis for such a duty. There is nothing in the Citigroup Administration Agreements to support the pleaded causes of action, and neither does the evidence as to the common and reasonable practice in Bermuda at the relevant time support the case for the Funds. It follows that without the benefit of there being a duty to monitor based on the Regulations, this claim by the Funds must fail, and I so find. However, even if the Funds are correct in their interpretation of the Regulations, and even if they can establish a duty to monitor

compliance with the investment restrictions by some other means, there are other defences raised by Citigroup which I need to consider, and I now refer to these.

308. Before doing so, I would just refer to that part of the plea which details the steps that Citigroup should have taken – reports to the BMA, taking matters up with the directions or manager, and so on. I deal with these matters later in the judgment when considering the "lost chance" arguments.

309. The first of these is the ratification defence, and again I will defer in regard to that for the present. I will do the same in respect of the general defences of causation, contributory negligence, exoneration from liability and indemnity, and statutory relief. I will, however, deal at this stage with the issue of losses arising from the Loans to SPVs.

310. As I have already indicated, the primary claim of the Funds is that they only have to give credit for recoveries made as at 15 July 2004, which figure they give at US $7,954,654. The alternative case for the Funds is that they should give credit of US $27,853,268, being the recoveries effected as at 1 September 2008. The reason for the assertion by the Funds that the lower, earlier figure is the appropriate one is their submission that their losses "crystallised" as at 15 July 2004, by virtue of the re-structuring.

311. I confess that I have always had a difficulty understanding how the Funds could maintain their primary case, insofar as it necessarily involves double recovery, both for those class A shareholders who had chosen to redeem in cash, and for those class A shareholders who had chosen to redeem in kind by accepting shares in Dynagest in substitution for their shares in Phoenix Capital. The first flows from the fact that the litigation is being pursued on behalf of all class A shareholders. The fact that those shareholders who redeemed for cash at the time of the re-structuring would indeed secure a double recovery in the event that the Funds were to be successful in these proceedings is demonstrated by the

following exchange in the cross-examination of Mr. Moretti, which took place on 16 September 2009:

> "Q. So those shareholders who went for the cash option have clearly been - received full value on the basis of the values that we've seen there, they made recovery on that basis?
>
> A. Yes.
>
> Q. You accept that. Now, does that not make it clear, Mr. Moretti, that if you are seeking damages based on valuations that are below the ones that appear at tab 97 in this litigation, that those shareholders are going to get double recovery?
>
> A. Which shareholders?
>
> Q. The shareholders who redeemed for cash.
>
> A. They redeemed for cash, so they're out of the picture, I guess.
>
> Q. No, Mr. Moretti we'll come on to this. Is it not the case that any recoveries in this litigation are going to be distributed to all class A shareholders who were registered before?
>
> A. That's correct.
>
> Q. Whether they went for option one or option two?
>
> A. Yes, you're absolutely right.
>
> Q. Yes. So if on the basis that you make any claim for a valuation of an asset below that in tab 97, they would get double recovery?
>
> A. Yeah, I think that is something we'll have to sort out -
>
> Q. You accept that?
>
> A. - when we get in money to distribute".

And Mr. Moretti carried on to comment that the problem could be solved if the proceeds of the litigation were made available only to those shareholders who had redeemed in kind.

312. But no doubt the more egregious example of double recovery is in relation to those class A shareholders who pursued option one and exchanged their shares in

Phoenix Capital for shares in Dynagest. As I have indicated, Dynagest now has only one unsold asset in the form of the Painting. The substantial recoveries which represent the alternative case for the Funds totalled more than US $23,000,000 (more than US $10,000,000 in respect of the Equity Trust promissory notes, and more than US $12,000,000 from the sale of Chesterfield House), and these sums have already been paid out to those class A shareholders in Pheonix Capital who exchanged their shares for shares in Dynagest. Mr. Lyon sought to rely on a distinction between the Fund and the underlying investors, and found nothing unjust in the notion that Phoenix Capital is seeking to effect recoveries for the benefit of investors who have already recovered. Mr. Lyon went so far as to say that the whole suggestion that such an arrangement was unjust was "absolutely outrageous". I disagree.

313. Be that as it may, the matter has to be looked at as one of law, and I agree with Mr. Sheldon that the starting point is to consider the true effect of the re-structuring.

314. As Mr. Sheldon submitted, the value of the assets of Phoenix Capital (and for that matter those of Phoenix Global) at the time of their transfer to Dynagest was critical. Mr. Moretti accepted as much. This is for the obvious reason that the value attributed to the assets at the time of the transfer formed the basis of the cash payment to those shareholders who chose that option as well as the number of shares in Dynagest received by those shareholders who opted to redeem in kind.

315. The value of the assets transferred in the case of Phoenix Capital was the value shown on the complete portfolio valuation undertaken by the Bank of Bermuda as at 15 June 2004. The total net asset value was given as US $41,975,682, which in large part represented valuations based on cost. As I have already indicated, the valuation is not an artificial figure. Both the cash paid out and the shares in Dynagest allotted were calculated on the basis of the NAV as at 15 June 2004. Incidentally, I agree with Mr. Sheldon that this is the relevant date, and although

there was a further assignment dated "as of 15 July 2004", nothing turns on the change in date. So that the position so far as the Funds are concerned is that the losses did indeed crystallise in June 2004, but on the basis of the values shown in the NAV for 15 June 2004. The shareholders of the Funds have received amounts attributable to their shareholding based on the value shown in the 15 June 2004 NAV.

316. Mr. Moretti sought to suggest that he had no alternative but to accept the 15 June 2004 NAV, but accept it he did, and he cannot now maintain that the values he took should not be accepted. If he had wanted, for instance, to use the values he now says should be used for calculating the loss to the Funds, he could very easily have done so. In any event, as Citigroup pointed out, Mr. Moretti accepted the accuracy of the valuation a relatively short time previously. On 19 January 2004, he wrote to the Financial Services Commission of the British Virgin Islands in connection with the proposed migration of the Funds to the BVI and said "our second task was to value all the investments. We came to the conclusion that the investments, although some not being fully liquid, were correctly valued". Mr. Moretti also wrote to the Bank of Bermuda on 17 December 2003, asking them to produce the December NAV "as it will be the one determining the transfer values of the assets". Finally, it is to be noted that on 7 May 2004, the Bank advised Mr. Moretti that a transfer audit should be carried out. In doing so, the Bank noted that this was particularly important in view of the liquidity issue. Mr. Moretti chose not to have an audit performed, although it is to be noted that he now regrets that decision.

317. So the position is that one then has to move on and consider the losses in respect of each of the SPVs. Starting with Fiducia and Fitben, these were valued in full in 15 June 2004 NAV, so that there is no recoverable loss in respect of these loans. In relation to Mandarin, the owner of the Painting (for which various values have been given, declining over the years) this was valued for the 15 June 2004 NAV at US $12,000,000, so that there is a balance of US $1,269,504, which is the maximum amount recoverable by the Funds. Lastly, there is Astir which was

valued in the 15 June 2004 NAV at US $1,960,000. The amount shown to be outstanding at that time was US $2,800,000. This would give a maximum recoverable amount of US $840,000, but Mr. Moretti also accepted that there should be deducted from this figure the cash balance shown in Astir's account as at 31 July 2003 of US $110,982. Accordingly, the maximum amount recoverable by Phoenix Capital in relation to Astir is US $739,018.

318. All of the above represents my finding on the primary case for damages made by the Funds, but accepting the argument advanced by Citigroup that the crystallisation in value at the time of the re-structuring does not work as contended for by the Funds. However, if I am wrong in accepting these submissions of Citigroup in relation to the re-structuring, it is obviously necessary that I should go on to consider the primary case advanced on behalf of the Funds. The difficulty that I have with that case is in relation to the values which Mr. Moretti placed on the assets which Phoenix Capital had at June/July 2004. For instance, in relation to Fiducia and Fitben the pleading reads:

> "As at 15 July 2004, the following values were placed on these assets by the directors of Phoenix Capital:
>
> Equity Trust promissory notes – no market value.
>
> Chesterae shares – US$1,092,000"

319. The problem does not arise from the 15 June 2004 NAV, which is the point that I have already considered. Neither is it because it strains credulity to believe that the Equity Trust promissory notes really had no value in July 2004, when a recovery of $10,641,600 was made in respect of those same notes approximately 18 months later. I have already referred to the fact that my finding in relation to Mr. Moretti's credibility would inevitably impact upon the view that I would take as to his assessment of the losses sustained by the Funds. For what it is worth, what Mr. Moretti said in relation to the value of Chesterfield House and the Equity Trust promissory notes in his witness statement was this:

> "The net value of the building as at the date of the Fund's liquidation was therefore £600,000 (US $1,092,000 at that date) being £6,100,000 less the mortgage of £5,500,000. At the date of the Fund's liquidation, I could not value the Equity Trust notes as they were absolutely untradeable and I was unable to say if Equity Trust would repay them one day."

320. Citigroup submits that the plea and the evidence in support of it are "palpably false", and relies upon a resolution of the directors of Dynagest dated 20 August 2004, to which was attached a spreadsheet which only became available on the first day of the trial, after Citigroup had made complaint in regard to its non-production. To put matters in context, the board of Dynagest recognised that certain of the assets to be transferred to it from Phoenix Capital were illiquid and consequently lacked a readily assessable market value. For this reason, the board of Dynagest asked its investment manager, Dynagest Asset Management Ltd (a company owned by Mr. Moretti) to provide its valuation of these assets to the board. I should point out that these are not the same figures as appear in the 15 June 2004 NAV prepared by the Bank of Bermuda. In relation to the Equity Trust promissory notes, these were given a value of $15,422,400 and the shares of Chesterae were given a value of $11,793,600. The notion that the Funds can take one very substantial set of figures as to the value of these assets for one purpose, and then at much the same time adopt a relatively nominal set of values for another purpose (and one that redounds significantly to the benefit of the Funds) seems to me to be thoroughly dishonest.

321. So I accept that the figures put forward by the Funds representing its primary case as to loss are indeed false figures, and I reject them. There is one other matter to which I should refer at this point, and this is that I am quite sure that the true value of these assets at the material time was well known to Mr. Ramseyer, who had had extensive business dealings with Mr. Halabi, the businessman who was involved in both of these matters. Indeed, the settlement with Equity Trust covered not only the promissory notes in favour of Phoenix Capital, but a note which had been issued in relation to Mr. Ramseyer's company, Roberlon. When

settlement was effected for a figure lower than the face value of the promissory notes, Roberlon was paid in full, and the loss was absorbed entirely by Phoenix Capital. It is a matter for the Funds whom they call to give evidence, but given all the circumstances, the Funds cannot seriously expect this Court to accept the valuations put forward in support of its primary case. Mr. Moretti could very easily have ascertained the true position from Mr. Ramseyer, and that would no doubt have been close to the eventual settlement figure. As I have said, I reject those figures, and in the circumstances it seems to me sensible to work from the figures representing the actual recovery finally achieved, in relation both to the Equity Trust promissory notes, and the Chesterae shares. I therefore find that those recoveries represent the value of the relevant assets as at the date of the re-structuring.

322. In regard to the latter, I do appreciate that wildly different valuations were put forward at different times. Particularly, the Funds rely upon a valuation prepared by Savills in April 2005, which gave a valuation at that point of £6,000,000, which compared with the valuation which they had given of £6,100,000 in February 2004. That earlier valuation led to a net figure of £600,000, because of the mortgage of £5,500,000.

323. But the fact remains that Chesterfield House was sold, according to the pleading, for a net sum of £5,811,544 in January 2007. If nothing more, that seems to me to demonstrate that the Savills valuation was a woeful under-value. Assuming that the mortgage remained comparable (and I have no evidence to suggest that it was reduced) that would mean that the gross value of the property has gone up from a figure of £6,000,000 to something over £11,300,000 in a space of less than two years. That simply does not make sense, and in the light of the ultimate sale figure, I am not prepared to accept that the Savills valuation represents a true assessment of the value of Chesterfield House at an earlier stage. Again, no doubt Mr. Ramseyer would know a great deal more about the true value of Chesterfield House, but given the paucity of evidence which I have in relation to the issue, I

prefer to work on the basis that the ultimate recoveries provide more accurate guidance than does the Savills valuation.

324. Next is Mandarin which it is pleaded had a value of US $5,300,000 at June/July 2004 and US $4,000,000 as at 1 September 2008. However, the figure given in the Bank of Bermuda NAV for 15 June 2004 for market value was US $12,000,000 and the same figure appeared in Mr. Moretti's August 2004 document. Somewhat earlier, in 2001, the Painting had been insured for US $11,000,000, and in November 2001, that figure was raised to US $15,000,000. But there was no evidence as to why that had occurred, and I do not believe it represents the Painting's true value, even at that time. And while I did have evidence from Mr. Moretti that attempts to sell the Painting had been unsuccessful, there was no attempt by the Funds to produce evidence in regard to the Painting's present value. The figure of US $5,300,000 in Mr. Moretti's evidence was a figure which came from a conversation which he said that he had with someone at Sotheby's after the failed sale in 2007. But even this figure seems to me somewhat suspect. The Painting was consigned to Sotheby's for sale pursuant to an agreement made in August 2007. The consignment agreement indicates that Mr. Moretti was told by Sotheby's that the Painting could sell for approximately US $9,000,000 to US $12,000,000. The reserve price was US $9,000,000, and Mr. Moretti's evidence was that this was lowered to US $8,000,000 the day before the auction. I do not know what, if any, steps have been taken to try to effect a sale of the Painting since then. Citigroup suggests that Mr. Moretti has had regard to subsequent events to derive a value as at the summer of 2004, and maintain that this is inconsistent with the Funds' primary case not to have regard to subsequent events and subsequent recoveries.

325. I find the evidence as to the value of the Painting to be confusing and unhelpful. But I do accept the reality that the Painting remains unsold, and I am sure that this would not be the case if it were indeed possible to sell it, even for a figure significantly below its purchase price. It does seem to me that the figure of US $12,000,000 is an unrealistically high figure, and that the figure of US $5,300,000

is unrealistically low. I would put the value of the Painting as at the summer of 2004 at US $8,000,000. When it comes to looking at the position subsequently, my difficulty is that I have no evidence whatsoever to enable me to find that the market for works of art such as the Painting has diminished between mid 2004 and the date of trial. In the circumstances, and bearing in mind that it is a matter for the Funds to prove their loss, I would take that same figure of US $8,000,000 as the value of the Painting at the time of trial.

326. Finally, in relation to Astir, Mr. Moretti's evidence was that the value of the remaining part of the bond which was unsold at the time of the re-structuring was US $226,576. This figure was based upon the recovery of that part of the bond which had been sold. Yet on 13 November 2004 the remaining part of the bond was sold for US $426,528. This is the value that I would ascribe to the unsold portion of the bond, as at June/July 2004.

327. However, both sets of alternative valuations which I have given above are the figures as at the time of re-structuring, on the basis of the Funds' argument that their losses crystallised at this point. I have dealt with that argument later in this judgment, in relation to the claim made against the Bank of Bermuda arising from the Phoenix Global Investment and the Chesterfield Investment, because of the arguments to which I was referred by the Bank. However, those arguments are equally applicable to the claim made against Citigroup in respect of the Loans to SPVs. I find the notion that the Funds' losses crystallised in June/July 2004 to be specious, and I reject it. In the event that the Funds are entitled to recover damages for their alleged losses, those losses are not "crystallised", or set in stone, in the summer of 2004, by the artificial act of re-structuring. Full credit must be given in respect of recoveries.

328. I will now turn to the claims made against the Bank of Bermuda by the Funds, although I am conscious that I have not yet dealt with the general defences raised by Citigroup. This is because some of them do have application to the claims

made against the Bank of Bermuda, and for that reason I will consider them at a later stage.

The Phoenix Global and Chesterfield Investments

329. I consider the position first in relation to the Bank as custodian. Phoenix Capital purchased some 12,800 shares in Phoenix Global on 26 November 2002. That investment was made directly, rather than through the Bank of Bermuda as custodian. However, the payment for the investment was effected by the Bank, in consequence of a payment instruction sent by Ms. Chicas. That instruction involved a payment into Phoenix Global's account, and the reference was "Subscription from Capital".

330. Looking at matters first in relation to the claim against the Bank of Bermuda as custodian, the claim fails on the basis of the "proper instructions" defence, on which I have already ruled, the instruction having been signed by Ms. Chicas, an authorised signatory. Similarly, in relation to the "proper corporate purposes" argument, an investment of this sort would clearly fall into this category. Next is the effect of regulation 16 (1) (a) of the Regulations, and the claim fails here on the basis that a breach of the Regulations gives no private law cause of action, and in any event does not impose an absolute duty upon the custodian.

331. Next I turn to the Chesterfield Investment, and before considering the position as against the Bank in its capacity as custodian, I should just refer to one aspect of this investment which I found puzzling, and which in the event counsel were not able to clarify for me. This arises from the fact that the Chesterfield Investment was made in May 2003. In February 2002 the Fiducia and Fitben promissory notes had been exchanged for a share in Queensmere and a new promissory note issued by Ironzar. By settlement of 22 June 2004, those investments were exchanged for shares in Chesterae and the two Equity Trust promissory notes. The payment for the Chesterfield Investment was made in two tranches, the first being £150,000 made on 13 May 2003, and the second being £850,000 made for value on 19 May 2003, but the subject of instruction sent to Ms. Smith by Ms.

Chicas on 16 May 2003. That communication gave as the reference for the transfer of funds "balance of the purchase price of the shares of Chesterae Investments", which of course suggests that some part of Chesterae had already been acquired, despite the fact that there is no evidence of such acquisition, and the acquisition of shares in Chesterae pursuant to the June 2004 settlement clearly came later. When I raised this issue, Mr. Lyon agreed that it was puzzling, and said that he did not understand it, while Mr. Sheldon said that the answer would remain a mystery and that nobody understood it.

332. In any event, the claim essentially fails on the grounds which I have already referred to in relation to the Phoenix Global Investment, on the basis of the "proper instructions" defence, that it was within the Fund's proper corporate purposes, and taking the position which I have already taken as to the effect of regulation 16 of part B of the Regulations.

333. Turning to the position as against the Bank of Bermuda in its capacity as administrator, one starts with my finding in relation to the effect of the Regulations, followed by my alternative findings that if I were wrong on that first finding, there are no duties to comply with the Regulations either in contract or in tort, and no cause of action for breach of statutory duty. One therefore, comes next to the alleged breaches of the Quality Restriction and the Illiquidity Restriction, which I consider on the basis that my previous findings were all wrong.

334. The position here seems to be that the Funds no longer pursue this aspect of the case on the basis of a breach of the Quality Restriction; their closing submissions rely only on the alleged breach on the Illiquidity Restriction. In any event, I would take the same position in relation to any alleged breach of the Quality Restriction as I did in relation to the claim against Citigroup arising from the Loans to SPVs. In relation to the Illiquidity Restriction, I would not regard the investment in Phoenix Global, a monthly dealing fund, by Phoenix Capital, a daily dealing fund, as being a liquid investment. As the Funds pointed out, the

Phoenix Global Investment could be redeemed for cash only after 60 days, representing a 30 day notice period, and payment some 30 days after the end of the notice period. Phoenix Global in its prospectus described the class A shares as an illiquid investment, pointing out that there was no secondary market for such shares. In relation to the period to operate as the appropriate test of illiquidity, the Funds seem to have moved from the pleaded position that an investment was illiquid if it could not in the ordinary course of business be reduced to cash within a period of 48 hours, to a position where the period is seven days. Ms. Forrest referred to "a few days" as her test for liquidity, and regarded an asset as illiquid where there was a 30 day period between trade and settlement. I agree that an investment which would be reduced to cash only after 60 days should be classified as illiquid. Accordingly, taking the position in relation to the effect of the Regulations for which the Funds contend, and accepting that in those circumstances, the Bank should have known that the percentage of illiquid investments was over 50%, then the Funds would succeed in relation to this head of claim. I would take the same position in relation to the Chesterfield Investment, which represented an indirect investment in real estate.

335. However, that does leave the question of the extent of the Phoenix Capital's losses. Dealing firstly with the Phoenix Global Investment, the Funds take as their primary position that the recovery on the Phoenix Global Investment should be calculated as at the time of the re-structuring, and the transfer of the assets to Dynagest. That would involve a credit of US $395,264. In the alternative, the Funds argue that the figure for credit should be one of US $562,304, being the amount for which the shares could have been redeemed at the December 2003 NAV. This date is given on the basis that Mr. Moretti could not reasonably have considered redeeming the Phoenix Global shares at least until he knew what the NAV was at the end of October 2003. If, knowing that figure, Mr. Moretti had then decided to redeem the Phoenix Global shares, this could have only been done in the ordinary course of business on 30 days' notice, so that redemption would have taken place in December 2003. That would have resulted in a recovery of US $562,304. And the Funds' final alternative position is that there should be a

credit in the sum of US $314,983, representing the sum for which the shares were sold on 1 March 2006.

336. The position taken by the Bank is that Phoenix Capital received valuable assets in consideration for the payment of US $2,000,000, pointing out that after the investment had been made, its value went up for a period of time, before it started to go down. The Bank says that subsequent fluctuations in an asset's value are not within the scope of the Bank's responsibility as administrator or custodian, in the same way that falls in the value of the property market are not within the scope of a valuer's liability. Furthermore, the Bank maintains that Phoenix Capital is not entitled to make an investment, ratify and approve it, subsequently deal with it, and then wait to see whether or not it is profitable before complaining about it. The Bank says that its position in this regard is supported by the judgment of Morrison J in *ANZ Banking Group Ltd –v- Cattan*, unreported, 2 August 2001, at paragraph 38, which is in the following terms (with the Bank's emphasis):

> "*Mr. Cattan wanted the trades done; he showed no desire to come out of his positions in October; he continued to hold the investments until after they had gone sour. If he was to be put into the position he would otherwise have been in but for the breach, then he would have suffered no loss. The breach by ANZ of their IMRO obligations is greatly to be regretted. But these breaches were, at worst, technical and I agree with ANZ's expert that IMRO would probably have accepted ANZ's explanation for them.* ***But importantly I cannot see any loss. What Mr. Cattan cannot do is sit on the investments to see whether they work out or not; and if they do treat the contract as affirmed, and, if they do not, then seek to reject them.*** *I was shown no law to suggest any other conclusion than that the breach of the IMRO rules occasioned no loss…"*

337. The Bank points out that Phoenix Capital could have sought to redeem this investment at any time between its purchase in November 2002 and 30 April

2003, prior to the suspension of Phoenix Global's NAV, and then at any time between September 2003 and June 2004.

338. It does seem to me that the increase in the value of the investment after its acquisition in November 2002 demonstrates that it was the Funds' own decision making which led to the loss. Had they chosen to redeem in March 2003, the investment would have shown a substantial profit. Had they chosen to redeem in October 2003, there would have been a significant loss, but substantially less than the loss calculated on the basis of the re-structuring transfer in June 2004.

339. The Funds did not provide any authority for the various alternative scenarios which they submitted. The Bank, on the other hand, did refer me to a section in *McGregor on Damages* (17th edition, paragraph 29 – 068), where an analogous situation was considered, in the context of a stockbroker who has in his hands shares belonging to his principal and proceeds to sell them without instructions. *McGregor* indicates that there will frequently be conversion as well as breach of contract in such cases, but that the measure of damages may well be the same in both. *McGregor* then deals with the difficulties where the market value of the shares fluctuates between the time of the broker's wrongful sale, the time the news of it comes to the principal's ears, and the time that action is brought by the principal and judgment entered for damages.

340. *McGregor* then refers to the fact that commonly a fair interval of time will elapse before the principal comes to hear of the broker's default and therefore before he can bring an action. Where the market has fallen in the interval, the principal is still entitled in conversion to the market value at the time of conversion, and *McGregor* submits that there is no reason why in an action for breach of contract, he should not equally be entitled to the market value at the time of breach. *McGregor* indicates that this award may represent more than the claimant has lost, as he had clearly not intended to sell the shares during the interval, but notes that any other rule would allow the broker to profit from his default. On the other hand, where the market has risen during the interval between default and

knowledge, *McGregor* indicates that since the claimant's loss would be less than satisfied by an award of the market value at the time of default, the correct measure of damages is achieved by an award to the claimant based on the market value to which the shares have risen at the time of judgment, provided that the action is brought with all reasonable speed upon learning of the sale. Finally, *McGregor* indicates that where the market value has fluctuated both up and down between breach, knowledge and judgment, there is little clear authority. However, *McGregor* indicates that whether to give the highest intermediate value between knowledge and judgment should be dependant upon whether the claimant can show that he himself would have sold at the height of the market.

341. These passages do, of course, only provide guidance, but I do find that guidance useful. In this case, there is no interval of time between default and knowledge, so far as the Funds are concerned. The Funds had knowledge of the breach at the same time as did the Bank. It seems to me that it must be logical that the Funds' entitlement to recovery would only arise if there were to have been a drop in the value in the investment before the Funds could take action to recover damages. In this regard, I do not see that Mr. Moretti's stewardship on behalf of the Funds is a relevant factor, but even it if were, it seems to me that Mr. Moretti would need to establish that he had made a decision on behalf of the Funds to sue at the first possible opportunity. Not only did this not happen, but the Funds did not even consider suing the Bank in respect of this claim until years after the events said to give rise to the cause of action. In these circumstances it seems to me that the argument for the Bank that the Funds received value at the time of the investment is one that I should accept, and it follows that there is no loss arising from the alleged breach.

342. I next turn to the issue of quantum in relation to the Chesterfield Investment. For the Funds, the claim rests upon the Savills valuation. It is then submitted that the Chesterfield Investment was exchanged along with the Queensmere share and Ironzar promissory note for the shares in Chesterae and the two Equity Trust promissory notes. It seems that the author of this part of the Funds' submissions

was not Mr. Lyon, because it was not his understanding that the Chesterfield Investment had been part of the settlement of 22 June 2004. In any event, the written submissions submit that there should then be a pro rata recovery, and the calculation is put at US $76,747.

343. The countervailing argument for the Bank is that Phoenix Capital did not suffer any loss as a result of its investment in the Chesterfield Investment. The Bank submits that Phoenix Capital received a valuable asset in consideration for the payment made, being the shares in Chesterae, which in turn owned the building known as Chesterfield House. The Bank submits that there is no reason for doubting that the asset was not worth what was paid for it at the time of purchase, and says that the Funds have adduced no evidence to the contrary. The Bank continues that since the asset was subsequently sold for more than was paid for it, there was no loss and there is no evidence of loss. The Bank adds that it would be wholly artificial and arbitrary to take the transfer date as between Phoenix Capital and Dynagest as the date that any alleged loss crystallised, and refers to the fact that there is no reliable valuation as at that date other than Mr. Moretti's assertion.

344. I agree with the position taken by the Bank. I do not see how it can properly be said that the Funds suffered loss in respect of this investment, and I entirely agree that the notion that the date of the re-structuring should have somehow crystallised the loss is indeed both artificial and arbitrary. At one point during argument, Mr. Lyon suggested that the Funds had no alternative but to move to another jurisdiction because of the impossibility of finding another service provider following the Bank's resignation, as if this somehow justified the "crystallisation of loss" argument. But it was the acts of Phoenix Global's management that led to the Bank's resignation. And given that Phoenix Capital had the same management, it naturally followed that the Bank should resign that office as well. The Bank cannot be blamed for having done so.

345. Hence if there does come a point at which it is necessary to undertake a calculation of the loss in respect of both the Phoenix Global Investment and the

Chesterfield Investment, my finding is that no loss was suffered, and no award of damages follows. There remains the "lost chance" claim, which I will deal with later, but there is also a causation point with reference to what steps the Bank should have taken in its capacity as administrator. The pleading included the by now standard plea that the Bank should have drawn the breaches of the investment instructions to the attention of the Funds' directors or manager. But they had the ability to change the investment restrictions this time, and I regard it as naïve to think that they would not have done so had the issue been raised. I am sure they would have.

The Stop Loss Provision

346. This claim turns on that part of the prospectus which is set out at paragraph 59 above, which requires the board of Phoenix Global to instruct the manager to convert all of Phoenix Global's assets into cash and cash equivalents for the remainder of the quarter, in the event that the NAV has decreased by 25% in such quarter. The Funds' primary case is based on the effect of the Regulations for which they contend, and their case is that pursuant to regulation 11 of part B of the Regulations, the Bank of Bermuda as administrator had a statutory duty to monitor the Funds' compliance with the investment restrictions contained in both the prospectus and the bye-laws, and to provide or procure that the assets of the scheme were applied with reference both to the bye-laws and the investment restrictions contained therein, and in accordance with the investment objectives set out in the prospectus.

347. On the basis of my finding as to the effect of the Regulations, the duty to monitor compliance with the investment restrictions does not pertain, so that this claim fails unless the Funds are able to establish that such a duty arose separate and apart from the Regulations. I will therefore now address that issue. Before doing so I should say that if the Funds are right in their submission as to the effect of the Regulations, the management responsibility imposed would require the Bank to ensure the Stop Loss Provision was implemented.

348. The starting point is to consider what was the Bank's obligation in regard to the calculation of the NAV, and in that regard it seems to me that the first exercise is to review the terms of the Bank of Bermuda Phoenix Global Administration Agreement. There is also a passage in the prospectus on which the Funds rely, which I will come to shortly.

349. The obligation in relation to calculation of the NAV is contained in clause 4 (q) of the agreement, which is in the following terms:

> "subject to clause 9 of this agreement, determine in the name and on behalf of the Company on each valuation day the Share Prices in accordance with the Bye-laws and based upon the information supplied to it by the Manager, the Company, and Custodian;"

Clause 9 deals with the exoneration and indemnity provisions of the agreement.

350. Unfortunately, the agreement does not itself define the words "on each valuation day" which appear in clause 4 (q). The Bank submits that those words are a reference to the last business day of each month, and relies upon the terms of Phoenix Global's bye-laws and prospectus, as well as on section 2 (a) (ii) of the Indicative Fee Proposal which was attached to the administration agreement. Dealing with the wording of that clause first, that covered valuation services, and provided in terms that the fund accounting and valuation services to be provided by the Bank would involve "the preparation of monthly portfolio valuations". This is consistent with the definition of "valuation date" in both the bye-laws and the prospectus, each of which defines "valuation date" to be "the date on which the class A net asset value is calculated, being the close of business on the last Business Day in each month or such other date as the Board shall determine from time to time in its sole discretion". So the position on the basis of those documents seems quite clear.

351. However, the pleaded case for the Funds is that the Bank was or should have been aware of the NAV of Phoenix Global on a daily basis. The Funds seem to have taken a less rigid position in their closing written submissions, saying that if the Bank was under the duty to monitor the Stop Loss Provision, it could easily have done so by asking the directors or managers what the daily NAV of Phoenix Global was on any given day. The statement in the Funds' amended statement of claim relies upon that part of the 2002 prospectus which provides as follows:

> "The Net Asset Value will be determined at the close of business on the last Business Day of each month. A pro-forma Net Asset Value will be prepared at the close of business on each Business Day."

Obviously, in relation to the preparation of a pro forma NAV, the prospectus does not indicate to whom this responsibility falls. The Bank also relies upon an estoppel argument, to which I will come, which is made with reference to the pre-contractual negotiations, which of course cannot be used to assist in the construction of the agreement.

352. I do not think that there can be any doubt but that there was no obligation upon the Bank to prepare a pro forma NAV calculation on a daily basis. To find otherwise would be contrary to the provisions of the agreement itself, as well as contrary to the bye-laws and the prospectus. I will now refer to the terms of the pre-contractual negotiations, which come from email correspondence between William Chong of the Bank and Ms. DeArteaga, which took place on 17, 18 and 27 September 2002. That exchange made it quite clear that the Funds were not looking to the Bank to carry out a pro forma daily NAV calculation. Mr. Chong had asked what was meant by "daily update of pro forma NAV", and the response from Ms. DeArteaga was that it simply meant a daily estimate of the NAV of the Fund. The implication from that response is that the estimate would involve something significantly less than the same calculation as was undertaken at month end, contrary to the Funds' argument. Ms. DeArteaga carried on to say that the Funds used to publish the NAV of Phoenix Global on a daily basis, but were now

posting it monthly, and she said that the particular provision on which the Funds now rely would be changed in the revised prospectus. In those circumstances, it seems to me quite unconscionable that the Funds should seek to rely upon the provision in question as imposing any duty upon the Bank, and if it were necessary for me to deal with that aspect of matters by finding that the Funds were estopped from so doing, then I would so find.

353. Before turning to the factual position in relation to the decline in the NAV of Phoenix Global between April and June 2003, I should deal with the suggestion that if the Bank did not have an obligation itself to calculate the NAV on a daily basis, then it had an obligation to make enquiry from the directors or the manager, so as to be able to monitor the Stop Loss Provision. Mr. Collins had said in his evidence that he would expect the manager to monitor the NAV of the Fund on a daily basis. Looking at matters in the context of the factual matrix, one needs to bear in mind that the calculation of the NAV was to be undertaken at month end, this being a monthly dealing fund, and the month end NAV being the basis for subscription and redemptions. I do not understand how it can sensibly be argued, against this background, that there was any form of obligation on the Bank to monitor the Stop Loss Provision during the course of the month. Mr. Lyon sought to argue at one stage that in the absence of some obligation existing on a daily basis, the Stop Loss Provision was ineffective if the NAV were to decrease beyond the 25% threshold during the third month of the quarter. I do not find that to be at all a surprising result. At the end of the quarter, the Fund would be able to resume trading, so that it may well be regarded as sensible not to have to convert to cash or cash equivalents during the last month of the quarter for what would be a relatively (and perhaps a very) short period. Mr. Lyon also sought to rely upon an entry made by the portfolio accountant who first undertook the calculation of the NAV (as to which see the comments made by Mr. Moustopoulos in paragraph 161 above). This person was Vallicia Lowe, in relation to the calculation as at 31 May 2003. The Bank had an internal document which was used for the NAV calculation, and this involved a compliance review procedure in which the following statement appeared:

> "In the event the Net Asset Value of the Fund decreased by 25% in any given calendar quarter, the Board will instruct the Manager to invest 100% of the Fund's total assets in case and cash equivalent for the remainder of such quarter."

This way followed by a question as to compliance, with a space for a Yes or No answer.

354. In response to the question asked in the review, there was the letter N to indicate non-compliance, although there was also an asterisk with the words "NAV has been suspended as of May 31, 2003" presumably added by the reviewer. Mr. Lyon placed reliance upon this answer, suggesting that it necessarily meant that the Bank understood that the Stop Loss Provision was to operate during the course of the month, as opposed to at month end.

355. I agree that that is the literal meaning of the combination of question and answer, but I would not accept that the answer represents the Bank's considered view. Ms. Lowe did not give evidence and neither did the reviewer, Dennis Gorman, whose comment in any event seems to represent a different position than that taken by Ms. Lowe. But I agree with the Bank's submissions that the position is far from clear, and that it is inappropriate to place any great weight on this question and answer exchange, given the reality of the Bank's obligation as I have found it to be.

356. Let me next turn to the factual position. When the NAV for 30 April 2003 was calculated, this showed a decrease in the NAV of just under 23%. There was, therefore, always a danger that the 25% threshold would be broken during the course of the next month, and this was something that the Bank was clearly alive to, as one can see from the internal emails. But there is no suggestion in any of these emails that the Bank considered that it had a daily monitoring obligation; on the contrary, Bank employees were clearly looking towards the position as at the

end of May 2003, and even before the NAV calculation had been undertaken, there was email communication both between the Bank and Phoenix Global, and between the Bank and Mr. Ross of Wakefield Quin, in relation to a decision which was first communicated to the Bank on 4 June 2003, to the effect that the directors of Phoenix Global were proposing to suspend the determination of the NAV of Phoenix Global. At that point Ms. Lowe was still waiting to receive further documentation from Phoenix Global to enable her to proceed with the calculation of the month end NAV. It was on that date that Ms. DeArteaga sent an email to Mr. Moustopoulos saying:

> "Regarding the NAV for May, the reason why Kelly has not sent Vallicia the information, is because our lawyers are in the process of preparing the Board of Directors Resolution whereby the NAV for Phoenix Global Fund will be suspended for the months of May and June 2003."

Ms. DeArteaga then said that as soon as they received the resolution from Mr. Ross, this would be forwarded to the Bank, for distribution to the shareholders.

357. Ms. McLennan of the Bank immediately took the position that the directors could not suspend retroactively, on the basis that the Bank had received cash and had executed but not finalised trades for both May and June. There were also the difficulties identified by reason of Phoenix Capital's structure and its investment in Phoenix Global. Mr. Ross had drafted resolutions on the basis that the suspension would take effect as of 1 May 2003, but eventually changed his position as to the effective date of the suspension, which became 31 May 2003.

358. While there was considerable communication going on in relation to the suspension, the necessary documentation to produce the NAV calculation as at the end of May was eventually produced, and Ms. Lowe completed her calculation on 9 June 2003. Her work was then reviewed by Mr. Gorman, and he did not complete that review until 19 June 2003. The reason for his having taken 10 days

to complete his review are not known, and it is not a matter for me to draw adverse inferences from that delay. However, the calculation when completed did show that the NAV per share had dropped from US $158.97 to US $108.76, a percentage decrease of 31.58%, which obviously took the decrease well past the 25% threshold for the quarter.

359. I have mentioned in paragraph 185 above Ms. Forrest's conclusion that Phoenix Global's NAV fell permanently below the 25% level on or about the close of trading on 9 May 2003, and in consequence of this the Funds have taken 12 May 2003 as the date from which the Funds' loss should be calculated, representing the day on which the Funds say that the Bank should have ensured that the directors and/or manager of Phoenix Global should have implemented the Stop Loss Provision.

360. It is important to bear in mind that there is no evidence whatsoever to suggest that the Bank in fact knew what the position was on 12 May 2003; the case for the Funds is put on the basis that the Bank should have made enquiry on that particular day, and are to be fixed with the knowledge whether they did or did not in fact know the true position. In its pleaded case, the Funds simply say that the Bank "knew or should have known immediately, in early May 2003, when the decrease in the NAV during the second calendar quarter of 2003 amounted to 25%."

361. I do not think there is any basis for reaching such a conclusion, bearing in mind my finding that the Bank was under no obligation to undertake a daily NAV calculation. Neither do I see any basis for the suggestion that the Bank as administrator had an obligation to make regular enquiry from the directors and/or manager. And I am quite clear that the effect of the suspension of the determination of the NAV as at 31 May 2003 meant that there was no NAV at this date, and consequently the Stop Loss Provision was not triggered. This is confirmed in the evidence of the Funds' own expert, Mr. Ellis. He was asked whether he agreed that if the NAV was effectively suspended, the Stop Loss could

not be triggered, and agreed that that would be the "implication", which I take to mean that he accepted the proposition put to him. Mr. Collins put the position rather more clearly, and I would just set out that part of his evidence, taken from the transcript, in the following terms:

> "Q. What would the effect of such a suspension be on the official NAV?
>
> A. Well, it wouldn't exist, would be my understanding.
>
> Q. JUSTICE BELL: The NAV wouldn't exist?
>
> A. The NAV wouldn't exist because it's been suspended. I'll keep my answer short. It wouldn't exist.
>
> Q. And what would be the effect of such a suspension on the trigger on the stop-loss?
>
> A. Well, my interpretation would be it wasn't triggered. It's as simple as that. It didn't exist, it couldn't be triggered."

362. As the Bank pointed out, the true interpretation of the Stop Loss Provision is a matter for the Court, but my decision in regard to this question is supported by the evidence of Mr. Ellis and Mr. Collins. In relation to the effect of the Stop Loss Provision, I find, first, that the Stop Loss Provision was not triggered by reason of the suspension of the determination of Phoenix Global's NAV effective 31 May 2003. By reason of this finding, the claim based upon the Stop Loss Provision fails. If I am wrong in that regard, and the suspension of the NAV does not have the effect which I have found it to have, then the Stop Loss Provision would be triggered only on 19 June 2003. Since the obligation to convert into cash only lasted until the end of June 2003, the end of the second quarter, Phoenix Global sustained no loss by virtue of the failure to implement the Stop Loss Provision, by reason of Ms. Forrest's evidence that between 19 June and 30 June 2003 the assets of Phoenix Global increased in value by approximately US $910,000. I have ignored, for the purpose of this part of the exercise, the fact that the Bank's obligation, even on the Funds' case, was to draw the breach of the Stop Loss Provision to the attention of the directors or manager of Phoenix Global, and to

report the matter to the BMA. It seems to me highly unlikely that a report to the BMA could have achieved anything before month end. As the Bank pointed out in its submissions, the BMA did not at any time between June 2003 and September 2003 instruct Phoenix Global's directors and manager to lift the NAV suspension, or to implement the Stop Loss Provision, or to cease trading, despite the fact that during this period the BMA was obviously aware of the extent of Phoenix Global's losses and the existence of the Stop Loss Provision, and the fact that Phoenix Global's directors and investment manager had continued to trade, and had not implemented the Stop Loss Provision. On this basis, I find that a report to the BMA would not have achieved anything in the short term, and that I take to be not just the end of the second quarter, but also the end of third quarter. I also find that even if the Bank of Bermuda had brought the breach of the Stop Loss Provision to the attention of the directors and manager, it is highly unlikely that this would have had any effect. Given Mr. Blum's subsequent trading (never mind Mr. Moretti's), the true position must be that a report to the manager would achieve nothing, and I so find. In this regard I refer to the points I made when considering the effect of a report to management in relation to the payments to Phoenix Advisors – see paragraph 289 above. In relation to the Stop Loss Provision, the directors had the power to change this investment restriction. If the Bank had brought real pressure to bear on Phoenix Global, I am sure that would have happened – see my comments in relation to the Phoenix Global and Chesterfield Investments at paragraph 345 above.

363. At this point I should also address the case for the Funds that their loss should be measured with reference to the NAV as at 31 October 2003, when the calculation was resumed, and at which time the NAV stood at US $55.15 per share, a further very substantial reduction from the figure of US $108.76 as at 31 May 2003, no doubt because Mr. Blum had continued to trade unsuccessfully.

364. It is hard to see what more the Bank could have done, bearing in mind that they had an assurance from Mr. Blum that he would not trade, and that when they found out that he was in breach of that assurance, they immediately resigned,

when previously they had remained as a service provider at the request of the BMA. I have already found that on a balance of probabilities a report to the BMA would have achieved nothing, and I wish to be clear that in making that finding, I intend no criticism of the BMA. It is simply a recognition that the reality is that it was Mr. Blum who controlled Phoenix Global, and he had the ability to continue trading, and to continue losing money, without there being anything that the Bank as administrator could do to prevent him. In any event, for the avoidance of doubt, I find that the failure of Phoenix Global to implement the Stop Loss Provision does not give rise to a claim in damages beyond 30 June 2003, in circumstances where the NAV was not being calculated during the third quarter, and accordingly the Stop Loss Provision could not be and was not triggered.

365. The amount claimed by Phoenix Global as its loss starts with the calculation as to the NAV after it had fallen 25% from its 31 March 2003 value, and this is given by the Funds as US $54,404,352. The actual value as at 31 October 2003 is then given as US $18,563,507, so that the difference of US $35,840,845 is the amount of Phoenix Global's claim. Alternatively, Phoenix Global puts its case as such part thereof as the Court thinks is the true measure of Phoenix Global's loss under this head.

366. If my various findings in which I have rejected the claim based on the Stop Loss Provision and the period over which damages should be calculated are wrong, then I would rely upon the figures given by Ms. Forrest. She of course had access to the NAV figure for 12 May 2003, which she gave in her report as US $49,199,122. She then gave the NAV as at 31 October 2003 as US $18,675,687, to produce a figure representing the loss for the period of US $30,523,435. However, that last figure was adjusted by Ms. Forrest in her oral evidence, on the basis that she had overlooked that US $1,300,000 in redemptions had already been included in the ending NAV figure of US $18,675,687. Ms. Forrest emphasised that the figure for the ending NAV was correct, but that to get an accurate figure for the net trading losses over the period, the amount of US $1,300,000 had to be deducted, so that the correct figure was US $29,223,435.

Were it to be necessary for a finding to be made as to losses over the period from 12 May 2003 to 31 October 2003, I would find that figure of Ms. Forrest's to be the amount of the true loss, rather than the pleaded figure put forward by Phoenix Global.

367. I am conscious that I have not dealt with the argument made by the Bank that it would have been extremely difficult, as well as extremely expensive, for the Bank to calculate to the Phoenix Global NAV on a daily basis. In terms of the expense, I do not see that this can properly be a factor if indeed the Bank had undertaken the requisite obligation. And even when it comes to the extent of the difficulty which the Bank would no doubt have encountered in undertaking the valuation on a daily basis (and here I bear in mind the evidence of Ms. Forrest as to the late production of the underlying information), again it seems to me that this is of little relevance. If the Bank had undertaken that obligation as a matter of contract, then it would have had to do the best it could to undertake the calculation on the basis of the material available to it. If the late delivery of the underlying information meant that the calculation could not be effected on a daily basis, then no doubt the Bank would have had the obligation to make enquiry of the manager which the Funds claim it to have had.

Interest

368. The Funds obviously claim interest, which would flow from any award of damages I made, and prima facie in the absence of any award of damages, the issue of interest does not arise. In their closing submissions, the Funds did set out calculations as to damage, dealing both with their primary and alternative cases, and undertaking the requisite interest calculation under the different scenarios. That no doubt could have been a helpful exercise, but the alternative scenarios under which the damages and interest have been calculated are limited. For instance, the Funds deal with the damages claimed over and above the payments to Phoenix Advisors by taking the sum of US $36,813,381. They then take the two alternative positions in relation to recovery, and calculate interest again with alternative dates in terms of the re-structuring and the issue of proceedings. The

problem with that exercise is that it starts from the premise that the values given by Mr. Moretti are accepted by the Court, and of course they have not been, so that there are then any number of alternative scenarios which come into play, which require separate calculations of damage, and alternative calculations of interest in respect of each head of damage.

369. I would not propose to undertake the necessary mathematical calculations, given my primary findings, pursuant to which no damages are payable and the issue of interest does not arise. In the event that this matter were to go further, and this judgment were to be set aside in whole or in part, the number of alternative calculations would be much limited, and it would be a matter for the appellate Court either to undertake the necessary calculation itself, or to give a direction that the calculation be undertaken by this Court.

Causation

370. Both of the defendants argue that the Funds' loss, if indeed they have suffered such, was not causally connected to the various breaches of duty on the part of the administrators alleged by the Funds.

371. The Bank referred me first to the case of *Kuwait Airways Corporation –v- Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883. I would refer to the following passages from the judgment of Lord Nicholls of Birkenhead, with the emphasis given by the Bank:

> *"71.* ***In most cases, how far the responsibility of the defendant ought fairly to extend evokes an immediate intuitive response. This is informed common sense by another name. Usually, there is no difficulty in selecting, from the sequence of events leading to the plaintiff's loss, the happening which should be regarded as the cause of the loss for the purpose of allocating responsibility. In other cases, when the outcome of the second inquiry is not obvious, it is of crucial importance to identify the purpose of the relevant cause of action and the nature and***

> ***scope of the defendant's obligation in the particular circumstances. What was the ambit of the defendant's duty?*** *In respect of what risks or damage does the law seek to afford protection by means of the particular tort? Recent decisions of this House have highlighted the point. When evaluating the extent of the losses for which a negligent valuer should be responsible the scope of the valuer's duty must first be identified: see Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191. In Reeves v Comr of Police of the Metropolis [2000] 1 AC 360 the free, deliberate and informed act of a human being, there committing suicide, did not negative responsibility to his dependants when the defendant's duty was to guard against that very act.*
>
> 72. ***The need to have in mind the purpose of the relevant cause of action is not confined to the second, evaluative stage for the twofold inquiry. It may also arise at the earlier stage of the "but for" test, to which I now return. This guideline principle is concerned to identify and exclude losses lacking a causal connection with the wrongful conduct. Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without ("but for") the defendant's wrongdoing. If he would not, the wrongful conduct was a cause of the loss. If the loss would have arisen even without the defendant's wrongdoing, normally it does not give rise to legal liability."***

372. One might have thought that the answer to the common sense question as to what led to the Funds' losses would be the Funds' own acts, whether in terms of the payments to Phoenix Advisors, the Loans to SPVs, the investments in the Phoenix Global Investment and the Chesterfield Investment, and the failure to implement the Stop Loss Provision. However, it is clear from the cases that there are situations where, to quote from the finding in the case of *Reeves –v- Commissioner of Police* [2000] 1 AC 360, "a deliberate and informed act intended to exploit a situation created by a defendant did not negative causation where the

defendant was in breach of a specific duty imposed by law to guard against that very act".

373. *Reeves* was a case where a prisoner in police custody had committed suicide by taking advantage of the police officers' inadvertence in leaving the flap of the cell door open, enabling the prisoner to hang himself. There are a number of passages in the judgments which explain the relationship between the act of the suicide and the breach of duty on the part of the police officers. Lord Jauncey of Tullichettle, having referred to a passage in *Clerk & Lindsell* said (page 374):

> "It goes on to state that the novus actus interveniens "must constitute an event of such impact that it rightly obliterates the wrongdoing of the defendant." The reference to an independent act superseding the effect of the tortious conduct must, in my view, relate to an act which was outwith the contemplated scope of events to which the duty of care was directed. Where such a duty is specifically directed at the prevention of the occurrence of a certain event I cannot see how it can be said that the occurrence of that event amounts to an independent act breaking the chain of causation from the breach of duty, even although it may be unusual for one person to come under a duty to prevent another person deliberately inflicting harm on himself. It is the very thing at which the duty was directed."

374. Lord Hope of Craighead referred to the unusual circumstances which would allow the duty of care to extend to preventing people injuring themselves deliberately, and then said this (page 380):

> "That is the situation which may arise where a person who is of sound mind is deprived of his liberty and put in prison or detained in custody by the police. The duty of those who are entrusted with his custody is to take reasonable care for his safety while he remains in their hands. If it is known that he may engage in self-mutilation or suicide while he is in their

> custody, their duty is to take reasonable care to prevent him from engaging in these acts so that he remain free from harm until he is set at liberty. This duty is owed to the prisoner if there is that risk, irrespective of whether he is mentally disordered or of sound mind. It arises simply from the fact that he is being detained by them in custody and is known to be at risk of engaging in self-mutilation or of committing suicide. If the prisoner, while of sound mind, destroys himself despite all reasonable precautions to prevent him doing so, there is no liability: see *Pallister v Waikato Hospital Board* [1975] 2 N.Z.L.R. 725, where the board was held not to have been negligent; *Pretty on Top v City of Hardin* (1979) 597 P.,2d 58, where there was no evidence that the cause of the prisoner's suicide was anything other than his own intentional act; *Sudderth v White*, 621 S.W.2d 33. But it is hard to see why liability should not follow if the prisoner was a known suicide risk and precautions which could have been taken to prevent a deliberate act of suicide were not taken by the police."

375. The underlying facts in the *Kuwait Airways* case and that of *Reeves* are of course very different from the facts of the case before me, although Mr. Lyon for the Funds did argue that "the very thing" principle was applicable in this case. I found more assistance to be gained from the case of *Galoo Ltd –v- Bright Grahame Murray* [1994] 1 WLR 1360. That was an auditor negligence case relating to the acquisition by the third plaintiff of a controlling interest in the second plaintiff, which in turn owned all the shares in the first plaintiff. The agreement set out the method of calculation of the purchase consideration of the shares. Following the initial agreement, the third plaintiffs made loans to the first and second plaintiffs, and then some four years later purchased the bulk of the remaining shares. The action alleged that the audited accounts of the first and second plaintiffs for 1985 to 1989 and the draft audited accounts for 1990 contained substantial inaccuracies, and that the defendants had been negligent in failing to discover and report them. They further alleged that if the defendants had performed their duties with reasonable care and skill, the insolvency of the companies would have been shown and they would have ceased to trade

immediately and subsequent losses would not have occurred. On a strike out application, claims by the first and second plaintiff for damages for breach of contract or in tort were struck out. In respect of claims by the third plaintiff in tort, the judge held that the claim for loss resulting from the original purchase of shares by the third plaintiff disclosed a reasonable cause of action, but struck out further claims for loss resulting from the loans to the second plaintiff and for amounts paid under the supplemental purchase agreement and for payments made to a director of the first and second plaintiffs for loss of office. The Court of Appeal dismissed appeals from the judge's orders finding, inter alia, that a breach of contract would sound in damages only if it were the dominant or effective cause of the plaintiffs' loss and not if it had merely given the opportunity for the loss to be sustained. The court indicated that in determining whether a breach of duty (in contract or in tort in situations analogous to breach of contract) was the cause of a loss or merely the occasion of it the court would apply common sense to the facts of each case, and that applying that test, the defendants' alleged breach had provided an opportunity for the trading losses of the first and second plaintiffs to be incurred but had not caused them, and those claims had rightly been struck out.

376. Again, the facts are significantly different, but Glidewell LJ held that the authorities made it clear that if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an "effective" or "dominant" cause of his loss. The learned judge then asked the question "how does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?" and said that the answer to that question in the end is "by the application of the court's common sense." He carried on to find that the breach of duty by the defendants gave the first and second plaintiffs the opportunity to incur and to continue to incur trading losses, but did not cause those trading losses in the sense in which the word "cause" is used in law.

377. One of the submissions made on behalf of the Funds was that this is a case "in which the plaintiffs were badly let down by the service providers". That does seem to me to be an extraordinary submission, when one bears in mind that the plaintiffs are not the investors in the Funds, but the Funds themselves. How can the Funds claim to have been let down by the service providers when it was their own acts undertaken by the manager, sub-advisor, and/or directors of the Funds that caused the loss to the Funds? I agree with the submission made by the defendants that those acts were the effective or dominant cause of any loss to the Funds, and I so find. As the Bank submitted in relation to the payments to Phoenix Advisors, the true cause of those payments being made was the fact that the Funds themselves, by the directors, investment manager, voting shareholder and investment sub-advisor, had specifically decided and directed that they be made. The same is true of the Phoenix Global Investment and the Chesterfield Investment. And in relation to Phoenix Global's trading losses between 12 May 2003 and 31 October 2003, the true cause of those losses was the decision made by the Funds, through their directors, investment manager, voting shareholder and investment sub-advisor, to continue trading in a speculative fashion in the markets. The same may be said of the Loans to SPVs, although Citigroup advances a further argument in relation to the Fiducia and Fitben loans, to the effect that the chain of causation is clearly broken by the settlement agreement of 22 June 2004, between Equity Trust, Mr. Halabi and Phoenix Capital. I hope that I do not do a disservice to the lengthy submissions made by both defendants in relation to this issue if I simply say that it seems to me to be fundamental that the losses were caused by the Funds, and not their administrators or custodian, and I therefore find that the claims fail on this issue as well.

The "Lost Chance" Claims

378. Before turning to the other general defences put forward in this case, I should just deal with the "lost chance" claims.

379. Such a claim was first made in respect of the payments to Phoenix Advisors, with reference to the steps which the Funds said Citigroup should have taken, with a

view to providing or procuring that the Funds were managed in accordance with their constitutions. The claim is made as an alternative to the full damages sought, on the basis that had Citigroup taken the steps which the Funds say it should have, there was a chance that some of the losses would have been prevented, so that the Court is essentially invited to assess the time at which the steps in question would have succeeded in stopping the payments out.

380. Citigroup submits that the claims for damages for loss of a chance are only available where the issue turns on the hypothetical acts or omissions of a third party, and says that the claim is not available where the hypothetical acts or omissions are those of the claimant. I do not understand that to be the manner in which the claim is put on behalf of the Funds. In the case of the payments to Phoenix Advisors the hypothetical acts would be the acts of the BMA following a report to it, or the acts of the administrator in taking unspecified steps to ensure that the payments stopped. But I think the answer is in each case a short one. I have already found in a different context that I do not think that the BMA would have done anything in relation to the Stop Loss Provision in the short term. And in relation to the principal claim for these payments I have held that it is unlikely that the BMA would have taken action in the event that the payments had been drawn to its attention. I do bear in mind that the auditors were prepared to sign off on the financial statements, even though the payments were prima facie not permitted. And I also bear in mind what Ms. Conyers said about the approach of the BMA at the relevant time, being that that body did not make proactive enquiries of services providers, and expected self-regulation. Hence I do not think that an approach to the BMA would have changed the position. In relation to other steps which the administrators might have taken, I bear in mind the evidence that they were essentially powerless, as was demonstrated, again in another context, when Mr. Blum undertook to stop trading but breached that undertaking. When the Bank of Bermuda immediately gave notice of its resignation, Mr. Blum carried on trading. It was in fact Mr. Ramseyer and Mr. Moretti who secured Mr. Blum's removal, and even that did not prevent continued trading, undertaken this time by Mr. Moretti. In those circumstances, it is hardly sensible to think that

there were any steps which the administrators might have taken which would have stopped the payments being made, and if, for instance, instructions had been given to the custodian, I am sure that would have led to the underlying agreements and prospectuses being re-written so as to enable the payments to continue. I would refer again to the reaction of management in relation to the Stop Loss Provision, which was not just to suspend the calculation of the NAV, but also seek to amend the percentage threshold. Accordingly, I would not make an award of damages on the "lost chance" basis under this head.

381. The next "lost chance" claim relates to the Loans to SPVs, where it is said that if Citigroup had taken steps to prevent Phoenix Capital from making these investments, there was a chance that some or all of the purported investments would have been prevented. I do not think for one second that that was the case. The truth of it is that Mr. Blum and Mr. Ramseyer appear to have treated these Funds as their own private bank, and one without any credit controls. I have referred in paragraph 132 above to some of these loans, but there were any number of them. I do not believe that any steps that Citigroup might have taken would have had the effect of controlling the activities of Messrs. Blum and Ramseyer.

382. I find the position to be the same in relation to the "lost chance" claims as against the Bank of Bermuda, whether in respect of the payments to Phoenix Advisors, for the Phoenix Global Investment or for the Chesterfield Investment, where I have already expressed a view as to how the Funds' management would have responded to any pressure being brought to bear. Hence I would not have made any award of damages on a "lost chance" basis, had it become necessary for me to consider that issue.

Ex Turpi Causa

383. In their written submissions, the Bank puts matter on the basis that in relation to "the very thing" argument in causation, the problem arises because, in asserting "the very thing" argument, the Funds must necessarily rely on and seek to take

advantage of their own alleged wrongs, their own alleged breaches of contract, and/or their own alleged dishonesty or own illegality.

384. I think that the first point to be made is that the last part of this submission puts the test too high. The maxim goes no further than saying that a party cannot rely upon his own breach of duty or wrong.

385. In this case, the Funds' claims are inevitably predicated upon their own wrongful acts. Starting with the payments to Phoenix Advisors, the pleaded case for the Funds is that the payments were not made to discharge any bona fide debt owed to Phoenix Advisors by the Funds. Yet it was the Funds which made the payments. In relation to the alleged breaches of the Quality Restriction and the Illiquidity Restriction, the claim is put on the basis that Citigroup had an obligation to ensure that these restrictions were adhered to by Phoenix Capital. They were not so adhered to; it was Phoenix Capital that was in breach of the provisions governing its investments, and contained in its own prospectus. The position is no different when one considers the claims made against the Bank of Bermuda, in relation to the Global Investment and the Chesterfield Investment; Phoenix Capital made those investments. And in relation to the Stop Loss Provision, the primary duty under the prospectus was upon Phoenix Global to implement the Stop Loss Provision, imposing a duty on Phoenix Global's board of directors to instruct the manager to implement the Stop Loss Provision.

386. And when one looks at the Regulations, it is important to bear in mind that regulation 11, which requires the administrator to provide or procure various matters, the obligation is imposed on the administrator acting with the directors. In its submissions, Citigroup set out five fundamental hurdles which it submitted the Funds had to cross, the second of which was to establish the underlying breaches by the Funds of statements made in the prospectuses.

387. It must be remembered that the Funds are the plaintiffs to these proceedings, and not the investors. I have already referred the submission made by the Funds that

it was they themselves who were "badly let down by the service providers". I can see that it could be said that the investors were let down, but that would be first by the Funds, and then, arguably, by the service providers. However, the Funds can never succeed in such a submission. They chose to act in breach of the investment restrictions contained in the prospectuses, and they cannot now take advantage of their own wrongdoing in this regard. Accordingly, had it been necessary for me to do so, I would have found that the claims made by the Funds could not succeed because they are necessarily based on and seek to take advantage of their own wrongs.

Contributory Negligence

388. The principles are well known, and their application arises from the terms of section 3 (1) of the Law Reform (Liability in Tort) Act 1951, which provides (leaving out the proviso) that:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the amount of damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

389. The availability of the defence of contributory negligence to actions for breach of contract is referred to in *Clerk & Lindsell on Torts* at paragraph 3-48, where the authors indicate that the defence of contributory negligence is available to claims for breach of contract which are analogous to negligence claims. However, the Court of Appeal for Bermuda decided in the case of *Warwick Hotel Company Ltd –v- Bermuda Gas and Utility Co Ltd* (Civil Appeal No. 6 of 1986) that the statutory defence of contributory negligence was not available to a claim for breach of contract. Mr. Hargun for the Bank submits that the case may be distinguished, because in that case negligence had been abandoned so that the

claim was being advanced solely in contract, whereas in the case before me, the Funds allege negligence and breach of statutory duty, concurrently and in the alternative.

390. In the *Warwick Hotel Company* case, the claim was pursued in contract only, and I accept Mr. Hargun's argument that the distinction has relevance. Further, it is clear from more recent authority that in the circumstances of a case such as this contributory negligence is available as a defence – see *Barings Plc –v- Coopers & Lybrand* [2003] EWHC 1319. In that case Evans-Lombe J noted that in none of the Commonwealth cases involving auditors had there been a deduction for contributory negligence exceeding 50%. He referred to the contention that this reflected the principle that it was the auditors' duty to protect the company and its shareholders from the misdeed and follies of its own management. The learned judge referred also to the case of *Reeves*, where the deduction was 50%, although Morritt LJ in the Court of Appeal had favoured a deduction of 100%. The learned judge dealt with the appropriate extent of the reduction by reference to the conduct of the rogue trader and the knowledge of the others within Barings with reference to different periods, starting at 50% and increasing to 80%.

391. It seems to me that this issue has to be looked at bearing in mind the manner in which I dealt with the issue of causation, where I found the acts of the Funds to be the effective or dominant cause of the loss. And while I obviously have to consider the issue of contributory negligence on the basis that the effect of the Regulations is as contended for by the Funds, it seems to me that I must necessarily find that a greater proportion of blame lies with the Funds than it does with the administrators. Were it necessary for me to make a finding in respect of contributory negligence (that is to say if I am wrong on my various findings that there was no breach of duty on the part of the administrators), then I would put the reduction at 75%.

Failure to Mitigate

392. This defence is raised by the Bank in relation to the Phoenix Global stop loss claim, and the Phoenix Global Investment by Phoenix Capital. The Bank concedes that this defence overlaps with that of contributory negligence, as both do with the question of causation. And as the Funds submitted, a failure to mitigate only arises once there has been a loss, so that the defence needs to be looked at in this context.

393. In fact, I have dealt with the issue in relation to the Phoenix Global Investment when dealing with the extent of the losses alleged to have been suffered by Phoenix Capital from this investment, between paragraphs 335 and 341. Those paragraphs effectively cover the alleged failure to mitigate. This was not "continuing to trade" as the Bank set out in its closing submissions, but rather a failure to act at the first opportunity.

394. In relation to the failure in respect to the Stop Loss Provision, I did not deal in terms with the complaint that Phoenix Global continued to trade even after it was clear that the Stop Loss Provision should have been implemented, and even after Mr. Blum had given assurances to the Bank that he would not trade. I made it clear in paragraph 364 that it was hard to see what more the Bank could have done, and I am in no doubt that Bank should not be responsible for the continued losses occasioned by Mr. Blum's trading after the suspension of the calculation of the NAV as at 31 May 2003. If I were to be wrong in relation to my various findings in relation to the Stop Loss Provision, such that the Bank was responsible for Phoenix Global's losses because of the failure to implement the Stop Loss Provision, then I would hold that such obligation would not extend beyond 19 June 2003. That finding essentially duplicates my finding as to the position by reason of the suspension of the calculation of the NAV. That was to the effect that the Stop Loss Provision was not triggered. In relation to the failure to mitigate, there can be no loss beyond the position at 31 May 2003, because the Bank should not be responsible for the losses incurred by Mr. Blum's continued trading. So the position is the same either way. That still does leave the

possibility of losses in the event that the Funds are correct in their contention that the losses should be calculated from 12 May 2003. If the Funds are right and I am wrong in relation to that issue, then I would hold that the losses would only be those incurred between 12 May 2003 and 31 May 2003. Those figures can be taken from Ms. Forrest's report, because she calculated the NAV of Phoenix Global on a daily basis throughout May. The last trading day of May was Friday, 30 May 2003, at which point Phoenix Global's NAV stood at US $38,618,324. At 12 May 2003 it stood at US $49,138,359, so that the loss for that period would amount to US $10,520,035.

The Members' Resolutions and Ratification

395. I start by referring to the law in relation to this issue, and the first case to which I would refer is *Multinational Gas and Petrochemical Co –v- Multinational Gas and Petrochemical Services Ltd* [1983] 1 Ch. 258. That case was concerned with the activities of a joint venture company which had been formed by three oil company shareholders, who appointed the directors of the joint venture company. The issue before the court was one of leave to serve out the jurisdiction, and the submission was that proceedings had been taken against the defendant (a company within the jurisdiction) to assist in securing leave. Lawton LJ agreed with the first instance judge who had set aside the grant of leave, saying that the case against the defendant was bound to fail. In doing so, he said this:

> "When approving whatever their nominee directors had done, the oil companies were not, as the plaintiff submitted, relinquishing any causes of action which the plaintiff might have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there was no damage. What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's acts.

> It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its own acts."

396. Against that legal background, it is necessary to consider the resolutions passed. First, at the annual general meetings of both Funds held on 22 November 2000, resolutions were passed approving all actions taken by the directors and officers of the respective companies since the first AGM. Similar resolutions were passed at the AGMs for the following year on 29 November 2001, and at Phoenix Capital's meeting, disclosure was made as to the position of the auditors in relation to their inability to obtain sufficient evidential support as to the fair value of the promissory notes, which at that stage amounted to US $23,975,000. Mr. Blum as chairman advised that the directors had reviewed and considered the valuation of the promissory notes and believed that the prices as reflected in the financial statements represented fair value, and the shareholder accepted and approved the audited financial statements and auditors' report. And, most significantly, there were written resolutions of Phoenix Investment in its capacity as sole shareholder of each of the Funds, constituting the 2004 and 2005 AGMs, which in each case ratified and confirmed the actions of the directors up to the date of that resolution, which was 17 February 2005. Those resolutions have the same effect as a vote by shareholders in general meeting – see Buckley J in *In re Duomatic Ltd* [1969] 365 at 373, where he said:

> "In other words, I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

397. I would just pause before moving on to note that Mr. Lyon made much of the fact that the class A shareholders had no voting rights at meetings, and so could not change management. He described the share structure as unusual. I do not believe it to be at all unusual; on the contrary, it is in my experience absolutely

standard for funds of this sort. If a shareholder is unhappy with management, his remedy is to redeem his shares. And it is to be noted that in the case of the Funds there were relatively few redemptions even after the very poor results as at 31 October 2003 were made known, when calculation of the NAV resumed. No doubt this was because of the close relationship between many of the investors and Mr. Blum.

398. There were other resolutions to which I was referred, but suffice to say that the acts of the Funds in relation to the payments to Phoenix Advisors, and the acts of Phoenix Capital in relation to the Loans to SPVs, the Phoenix Global Investment and the Chesterfield Investment were all approved. It is simply not open to the Funds to make complaint of their own acts, provided those acts are intra vires and not fraudulent. The Funds cannot ignore the effect of the various resolutions of the members which ratified and confirmed all acts of the directors.

Exoneration and Indemnity

399. In the case of Citigroup, reliance is placed on the provision of the Citigroup Administration Agreements which are in the same terms in respect of both Phoenix Global and Phoenix Capital. The provisions are in the following terms:

> "(a) Standard of Care: Required Actions. Forum shall not be liable to the Company or any of the Company's shareholders for any action or inaction of Forum relating to any event whatsoever in the absence of (i) bad faith, willful misfeasance or negligence in the performance of Forum's duties or obligations under this Agreement or (ii) the reckless disregard by Forum of its duties and obligations under this Agreement. Forum shall be under no duty to take any action except as specifically set forth herein or as may be specifically agreed to by Forum in writing. Forum shall use its best judgment and efforts in rendering the services described in this Agreement.

(b) Indemnification. The Company agrees to indemnify and hold harmless Forum, its employees, agent, directors, officers and managers and any person who controls Forum ("Forum Indemnitees") against and from any and all claims, demands, actins, suits, judgments, liabilities, losses, damages, costs, charges, reasonable counsel fees and other expenses of every nature and character arising out of or in any way related to Forum's actions taken or failures to act with respect to the Company that are consistent with the standard of care set forth in Section 5(a) or based, if applicable, on good faith reliance upon an item described in Section 5(c) (a "Claim").

(c) Reliance. A Forum Indemnitee shall not be liable for any action taken or failure to act in good faith in reliance upon:

(i) the advice of the Company or of counsel, who may be counsel to the Company or counsel to Forum;

(ii) any written or oral instruction which it receives and which it reasonably believes in good faith was transmitted by an Authorized Person;

(iii) any written instruction or certified copy of any resolution of the Company, and Forum may rely upon the genuineness of any such document or copy thereof reasonably believed in good faith by Forum to have been validly executed; or

(iv) any signature, instruction, request, letter of transmittal, certificate, opinion of counsel, statement, instrument, report, notice, consent, order, or other document reasonably believed in good faith by Forum to be genuine and to have been signed or presented by any Authorized Person;

and no Forum Indemnitee shall be under any duty or obligation to inquire into the validity or invalidity or authority or lack thereof of any statement, oral or written instruction, resolution, signature, request, letter of transmittal, certificate, opinion of counsel,

instrument, report, notice, consent, order, or any other document or instrument which Forum reasonably believes in good faith to be genuine.

(d) Advice of Counsel. At any time Forum may apply to any officer of the Company for instructions, and may consult with legal counsel to the Company or to Forum with respect to any matter arising in connection with the services to be performed by Forum under this Agreement, and Forum and its agents or subcontractors shall not be liable to the Company for any action taken or omitted by them in reasonable reliance upon such instructions or upon the advice of such counsel.

(e) Third Party Services. Forum shall not be liable for the errors of persons that provide services to the Company or Forum or of other persons, including, without limitation, errors of any pricing service or the failure by any such person to provide information to Forum when they have a duty to do so (irrespective of whether that duty is owed specifically to Forum or a third party); provided, however, that Forum shall be required to pursue all reasonable claims against any such person based upon any agreements entered into by Forum with such person.

(f) Notification of Claims. In order that the indemnification provisions contained in this Section shall apply, upon the assertion of a Claim for which the Company may be required to indemnify a Forum Indemnitee the Forum Indemnitee must notify the Company of such assertion, and shall keep the Company advised with respect to all developments concerning such Claim. The Company shall have the option to participate with the Forum Indemnitee in the defense of such Claim or to defend against said Claim in its own name or in the name of the other party. The Forum Indemnitee

shall in no case confess any Claim or make any compromise in any case in which the Company may be required to indemnify it except with the Company's prior written consent."

400. Citigroup relies upon clause 5 for:

a exoneration from liability from reliance in good faith upon the information provided by an instruction authorised by the authorised persons (a term which I have already referred to), and

b an indemnity from the Funds in respect of any claim made against it arising out of such reliance.

401. The Funds contend that read as a whole, section 5 has no application where Citigroup is itself guilty of negligence, and that section 5 (c) covers a different situation than pertained in this case, where they say Citigroup failed to check the relevant provisions of the agreements, the prospectuses, or the Regulations.

402. In my view, the provisions of section 5 (a) and 5 (c) should be looked at separately, and I do not accept the argument for the Funds that the "reliance" provisions of section 5 (c) are applicable only in the absence of negligence. Provided that Citigroup acts in good faith and believes the various instructions given to it to be genuine, then it is relieved from liability. In the circumstances of this case, I take the view that Citigroup is entitled to be relieved from liability in consequence of its reliance upon the various instructions given to it by the Funds. Accordingly, were it necessary for me to reach a conclusion in relation to these provisions, I would hold that Citigroup is entitled to exoneration under section 5(c) of the administration agreement, and consequently to indemnification under section 5 (b).

403. In relation to the Bank of Bermuda the issues of indemnity, limitation of liability and relief from liability are pursued both in relation to its acts as custodian and

administrator. I will deal with the former first, and in relation to this matter, the Bank relies upon clauses 15(E) and (I), which are in the following terms:

"(E) The Custodian shall not, in the absence of gross negligence or wilful default on the part of the Custodian or any agent, sub-custodian or delegate appointed by it, be liable to the Company or to any shareholder of the Company for any act or omission in the course of or in connection with the services rendered by it hereunder or for any loss or damage which the Company may sustain or suffer as a result or in the course of the discharge by the Custodian of its duties hereunder or pursuant hereto. In particular, but not without limiting the generality of the foregoing the Custodian shall be under no liability in respect of:-

(i) any loss or damage caused by unauthorised use or forging of any authorised signature provided that in any such case the Custodian shall have properly investigated such signature in accordance with approved banking practice and by reference to any certified specimen signatures previously delivered to the Custodian by or on behalf of the Company pursuant to Clause 3 or shall have made such other investigations as may have been agreed from time to time in writing between the Manager on behalf of the Company and the Custodian.

(ii) any loss which a shareholder of the Company may suffer by reason of any depletion in the value of net assets of the Company which may result from any borrowing or overdraft facilities made hereunder, or

(iii) any loss or damage which the Company or any shareholder of the Company may suffer as a result of Investments or other property of the Company being delivered to and held by a lender pursuant to any borrowing facility arranged by the Company or the Manager.

The Company agrees to indemnify the Custodian from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever (other than those resulting from gross negligence or wilful default on the part of the Custodian or any agent, delegate or sub-custodian appointed by it and for which it would be liable as provided in sub-clause (B) of this Clause) which may imposed on, incurred by or asserted against the Custodian in performing its obligations or duties hereunder." and

"(I) The Custodian shall be under no duty to supervise compliance with restrictions on the investment powers of the Company or to take any action other than as specified in this Agreement with respect to any Investments or case of the Company held by the Custodian hereunder. The Custodian shall be entitled to receive and act upon any advice of counsel and shall be without liability for any action taken or thing done in good faith in reliance upon such advice."

404. The Funds submit that reliance is only placed on these provisions in relation to the Phoenix Global Investment and the Chesterfield Investment, but as I understood the pleading, the Bank as custodian also relies on the relevant provisions in relation to the payments to Phoenix Advisors.

405. There is a dispute between the parties as to where the burden of proof lies in establishing gross negligence, each saying that the burden lies on the other. It would appear from the reference in *Chitty on Contracts* quoted by the Bank that "if there is an exception to the exemption, for example, in the event of wilful neglect or default, then the burden rest upon the claimant to prove that his case falls within the exception". I proceed on that basis.

406. It is now well accepted that gross negligence involves something more fundamental than failure to exercise proper skill and/or care constituting negligence - see *The "Ardent"* 2 Lloyd's Rep. 547 at 586. And where the words

"gross negligence" are linked with the words "wilful default" as they are in the clause under consideration, then I adopt the following from the judgment of the Court of Appeal in *GSWR Co Ltd. –v- British Railways Board* (CA unreported 10 February 200):

> "the words "gross negligence" take their colour from the contrast with "wilful neglect" and refer to an act or omission not done deliberately, but which in the circumstances would be regarded by those familiar with the circumstances as a serious error. The likely consequences of the error are clearly a significant factor. Thus, whether negligence is gross is a function of the nature of the error and the seriousness of the risk which results from it."

407. I would next refer to the judgment of Rix LJ in the case of *Architects of Wine Limited (in liquidation) –v- Barclays Bank plc* [2007] EWCA Civ 239. Rix LJ referred to the fact that the enquiry is fact sensitive, and in the context of banking practice which that case was concerned with, he said that current banking practice is highly relevant to the issue of negligence, saying in terms that a bank's evidence about its practice is, especially if unchallenged, relevant evidence of the current practice of bankers. In this case, the evidence of Mr. Perry as to the practice was not controverted. Looking at the matter as a whole, I take the view that even on the case for the Funds, gross negligence has not been made out against the Bank in its capacity as custodian, so that if I am indeed wrong in my findings on liability, I would hold that the exoneration clause would operate so as to relieve the Bank from liability, in relation to its acts as custodian.

408. I then turn to the position in relation to the Bank's acts as administrator, where the standard is very similar to that in the Citigroup Administration Agreements, and provides for exoneration in the absence of fraud, negligence or wilful default. However, there is no clause in the Bank of Bermuda Administration Agreements comparable to clause 5 (c) of the Citigroup Administration Agreements, so that relief is not afforded to the Bank on the basis of reliance upon an instruction from

an authorised person. The position has to be considered on the basis of whether there was or was not negligence. In relation to this exoneration provision, I would hold that if I am wrong in my various findings on liability, then this clause does not operate so as to relieve the Bank from liability, on the basis that the breach of duty complained of would necessarily involve negligence on the Bank's part.

409. That leaves the bye-law provisions on which the Bank relies, which would grant indemnity in the absence of dishonesty, but provided that the Bank as administrator was appointed as an officer of the Fund company. The same requirement operates in relation to the Bank's defences under sections 98B and 281 of the Companies Act 1981.

410. Mr. Hargun relied upon two authorities for the proposition that an administrator could, if appointed to office, be an officer of a company. The first was *Re Western Counties Steam Bakeries and Milling Company* [1987] 1 Ch 617, CA. In that case, Lindley LJ referred to bankers or solicitors, who were, like auditors, prima facie not officers. But he carried on to say "But if appointed to an office under the company, and if they act in that office as officers of the company, they will be officers within s. 10…But to be an officer there must be an office, and an office imports a recognised position with rights and duties annexed to it…"

411. In *Mutual Reinsurance Company Limited –v- Peat Marwick Mitchell* [1996] EWCA Civ 704, Hobhouse LJ noted that "over the years the courts have held that the expression can include, depending on the circumstances, an auditor, a solicitor, an investment manager and a liquidator."

412. There seems to me to be no question but that the Bank was appointed to the office of administrator, and accordingly became an officer of the Fund companies. If one looks at the terms of the administration agreements, there is in clause 2 a formal appointment, and it seems to me that that is sufficient to bring the Bank within the definition of "officer" for the purpose of the bye-laws. It follows that in the absence of dishonesty, the Bank is entitled to the benefit of the indemnity

contained in the bye-laws, and assuming, contrary to my findings, that liability is established against the Bank, then I would find that the bye-law indemnity contained in the bye-laws should operate.

The Effect of Section 98B of the Companies Act 1981

413. As Mr. Hargun submitted, the relief afforded by section 98B overlaps considerably with the contributory negligence defence. Mr. Hargun submits that the Bank's proportionate share of the total alleged loss suffered by the plaintiff is de minimis, if anything at all. I think it is important to bear in mind that if this issue arises, it does so in the context of the interpretation of the Regulations for which the Funds contend. In those circumstances, it would seem to me to be inappropriate to hold that the percentage of responsibility on the part of the Bank should be nominal. Were it necessary for me to make a finding in regard to the appropriate percentage of responsibility of the parties, I would apply the figure of 75% used in relation to my finding on contributory negligence.

Section 281 of the Companies Act 1981

414. This again is an important section, which seems to me to be in significantly different terms than section 98B, because section 281 gives the court power to grant relief from liability where otherwise there would be such on the basis of negligence or breach of duty, where the court finds that the officer in question has acted honestly and reasonably, and that having regard to all the circumstances of the case, he ought fairly to be excused from liability.

415. In *Barings Plc –v- Coopers & Lybrand,* Evans-Lombe J reviewed the comparable English section and concluded that he had a wide discretion as to whether the party found to have been negligent or in breach of duty ought to be excused, and I set out the passages in which he considered how that discretion should be exercised, as follows:

> "1134. If these threshold tests are met, I have a wide discretion as to whether D&T ought fairly to be excused. In exercising that

discretion, I am required to look at all the circumstances. However I clearly should not apply the section so as to negate the basic principles of liability in this sort of case. Having found that D&T were negligent, I should not use the section to relieve them from liability merely because the negligence was not particularly gross (to use Hoffmann LJ's term). Likewise fault by BFS, and the comparison between its fault and D&T's is taken account of adequately in admitting a defence of contributory negligence.

1135. Something more is required to justify relief. In *D'Jan* it was the nature of the company and the defendant's shareholding. In a recent Australian case, *Circle Petroleum v Greenslade* [1998] QSC 172, which I discuss below, the court was willing to take into account the apparent fairness to the defendant of the relief being sought against him which was otherwise enforceable."

416. I note particularly the learned judge's comment that something more is required to justify relief, and it does seem to me that in the case before me, the factor which has the greatest possible significance is that administrators in Bermuda operating at the relevant time clearly did not have an understanding of the effect of the Regulations, and of course I am looking at matters on the basis that liability is established, which means that the interpretation contended for by the Funds applies. None of the Bank of Bermuda employees understood that they had a management function which involved monitoring compliance with the Funds' investments. Neither did Ms. Conyers for Citigroup, and neither did either of the experts who had worked in Bermuda at the material time, Mr. Bond or Mr. Collins. Indeed, Mr. Bond did not even know of the existence of the BMA 1994 Code, and when the Regulations came into effect, he did not review these either. He was aware in broad terms of what he referred to "best practice", but that clearly did not provide for the matters set out in the Regulations.

417. That does seem to me to be of the greatest significance. And even if I am wrong in accepting the distinction which Mr. Sheldon drew between a manager administrator and a service provider administrator, one can very well understand how a service provider would not appreciate that the change from the use of the word "manager" in the BMA 1994 Code to that of "administrator" in the Regulations would have the very significant consequences that follow from accepting the case for the Funds as to the meaning of the Regulations. In these circumstances, it does seem to me that I ought to exercise my discretion so as to relieve the administrators (and there is no reason why the relief should apply to one and not the other) from the liability which would otherwise be imposed upon them. I do that because it does seem to me fundamentally unfair that the Funds should be able to behave as they did in terms of their investments, and blame the administrators for failing to stop them. If that is indeed the correct legal position at the end of the day, then it seems to me to achieve an unjust result, and I would respond to that unjust result by relieving the administrators from liability, were it necessary for me to do so.

418. In reaching that conclusion, I have borne in mind that these proceedings are taken by the Funds, not by their investors. And when one considers the acts of the Funds, it matters not whether at the material time the Funds were controlled and directed by Mr. Blum, Mr. Moretti, or George Soros. Their acts were the acts of the two Fund companies, not the individuals behind them. That is what makes these proceedings, in my view, unjustifiable, and would make any award of damages in favour of the Funds quite inappropriate. And that is why I would relieve these defendants from liability if my various other findings were to be held to be wrong.

Summary of Findings

419. I start with the Regulations, and my first finding was that the term "administrator" contained in part B of the Regulations does not apply to Citigroup or the Bank of Bermuda, whose duties as administrator are contained in the Citigroup Administration Agreements and the Bank of Bermuda Administration

Agreements. Put another way, the "management" obligations contained in part B of the Regulations, in particular those contained in regulation 11 apply to Phoenix Investment as the manager of the Funds, and not to Citigroup or the Bank as administrator of the Funds.

420. Next are my findings in relation to the different ways in which the Funds sought to have imposed upon Citigroup and the Bank of Bermuda the duties contained in part B of the Regulations. In turn, I rejected that the Regulations could be imported into the administration agreements as an implied term, or that they could be imposed by virtue a collateral contract, or that the administrators had taken on a duty of care in tort to comply with the Regulations, or that there was a statutory duty imposed upon the administrators to comply with the Regulations giving rise to a private law cause of action in the event of breach.

421. Next, in relation to the research fees paid to Phoenix Advisors, I found that the payments were supported by proper authorisation, and the administrators were entitled to rely upon that authorisation. I found in terms that there must have been resolutions of the directors approving the payments to enable Ernst & Young to release the audited financial statements. Finally, I found that if the issue had been raised with the Funds, they would have acted so as to amend the management agreements and/or the prospectuses so as regularise the payments.

422. Next, in relation to the Banks position as custodian, I found that the custodian acted on proper instructions, and was entitled to make payment out of the Funds' accounts in relation to the research fees.

423. In relation to the loans to Fiducia, Astir, Mandarin and Fitben, the claim turns firstly on the effect of the Regulations. I then found that the investments by way of Loans to SPVs did not breach the Quality Restriction, but did breach the Illiquidity Restriction, once the requisite percentage threshold had been passed.

424. In relation to the losses claimed by the Funds under this head, I rejected the primary case for the Funds in relation to the value of the various promissory notes at the time of the re-structuring, and set out the values properly attributable, with reference to the NAV figures produces by the Bank of Bermuda as at 15 June 2004, which gave the total net asset value as US $41,975,682. Turning to the various investments, that meant that there was no recoverable loss in respect of the Fiducia and Fitben loans, the loss in respect of Mandarin was limited to US $1,269,504, and the maximum recoverable amount in relation to Astir was US $739,018.

425. I then turned to the true value of the promissory notes at the time of re-structuring without reference to the Bank of Bermuda NAV. In relation to the loans to Fiducia and Fitben, where the original assets had been exchanged for the Equity Trust promissory notes and the shares in Chesterae, I accepted Citigroup's submission that the pleaded values of those assets (zero for the Equity Trust promissory notes and US $1,092,000 for the shares in Chesterae) were false. I held that the best guide to their value at the time of transfer came from the eventual recoveries effected on the settlement with Ironzar and the sale of Chesterfield House. In relation to Mandarin, where the pleading gave the Painting a value of US $5,300,000 at June/July 2004 and US $4,000,000 as at 1 September 2008, I held the value on both dates to be US $8,000,000. Finally, in relation to Astir, where the pleading gave a figure of US $226,576, I took the value as the recovery effected in November 2004 of US $426,528.

426. In both sets of alternative valuations, I first dealt with matters as at the date of re-structuring, on the basis of the Funds' claim that the losses were crystallised at that point. However, I rejected that argument, and held that the correct position was that credit had to be given for the full recoveries effected by the Funds.

427. I dealt next with the Phoenix Global and Chesterfield Investments, and began by repeating my finding in relation to the claim against the Bank in its capacity as custodian, where I held that the claim failed on the basis of the "proper

instructions" defence, that the payments were for "proper corporate purposes", and I also found that the claim based on regulation 16 (1) (a) of the Regulations failed because the Regulations give no private law cause of action, and in any event did not impose an absolute duty upon the custodian.

428. In relation to the claim against the Bank in its capacity as administrator, this failed firstly because of my finding in relation to the Regulations. But on the basis that finding was wrong, I then held that the investments were not in breach of the Quality Restriction, but were in breach of the Illiquidity Restriction.

429. I then considered the question of loss, and held in relation to the Phoenix Global Investment that the Funds were not entitled to claim loss in circumstances where they had retained the asset for a substantial period, and had not made any claim against the Bank. In relation to the Chesterfield Investment, I also found that no loss had been suffered, based on the extent of the actual recovery.

430. I then dealt with the claim against the Bank in respect of the Stop Loss Provision. I found that there was no obligation on the Bank either itself to undertake a pro forma daily NAV calculation or to make enquiry from the managers as to Phoenix Global's daily NAV. In relation to the pleaded case that the Bank was obliged itself to calculate the pro forma NAV on a daily basis, I held that had it been necessary for me to do so I would have found that the Funds were estopped from making that argument.

431. In relation to the "trigger" to implement the Stop Loss Provision, I found that this had not been activated on 19 June 2003, when the calculation of the NAV as at 31 May 2003 had been undertaken because of the suspension of the calculation of the NAV effective that date. However, if I was wrong on that finding, I held that there was no loss because the Fund had been profitable for the rest of the month.

432. I then considered the position if I was wrong on the loss being calculable only until the end of June, and considered the position as contended for by the Funds

by looking at losses through until the end of October. In relation to that loss, this was put by the Funds at US $35, 840,845. I found that if it had been necessary for me to reach a figure, the appropriate figure would be that of US $29,223,435 as calculated by Ms. Forrest.

433. In relation to interest I deferred any calculation in view of the number of alternative calculations which would need to be made, and given my primary findings.

434. I then dealt with the general defences, starting with causation. I found that the acts of the administrators had not been the effective or dominant cause of the losses sustained by the Funds, so that if all of my previous findings had been wrong, I would have found that the claims would fail on the basis of a lack of causation. I then dealt with the "lost chance" claims, and held that had it been necessary for me to make a finding under this head I would have declined to do so on the basis that neither action by the BMA nor by the administrator at the relevant time would have prevented the losses from having being incurred.

435. I then dealt with the defence of ex turpi causa, and held that had it been necessary, I would have found that the claims made by the Funds could not succeed because they were based on and sought to take advantage of the Funds' own wrongs.

436. I then dealt with contributory negligence, and held that if that were to have been an issue for me, I would have put the reduction in damages at 75%. In relation to the alleged failure to mitigate, raised by the Bank in relation to the Phoenix Capital Investment and Phoenix Global, and the Phoenix Global stop loss claim, I dealt with the former when I considered the appropriate measure of damages; in relation to the latter, I held that the losses could only be those incurred between 12 May and 31 May 2003, accepting for these purposes that the Funds were right in their argument that the Stop Loss Provision should have been triggered on 12 May, and on the basis of Ms. Forrest's figures put the loss for that period at US $10,520,035.

437. I then dealt with the issue of ratification, and the acts of the members and directors, and concluded that it was not open to the Funds to complain of their own acts.

438. I then dealt with issues of exoneration and indemnity. I held that Citigroup was entitled to exoneration and indemnity on the basis of reliance upon instructions pursuant to clause 5 (c) of the administration agreement. In relation to the Bank's position as custodian, I held that the Bank was entitled to the benefit of the exoneration provision on the basis that gross negligence had not been made out. In relation to the position of the Bank as administrator, the governing agreement did not contain the same exoneration provisions as the Citigroup administration agreements, and I held that the Bank would not be entitled to exoneration on the basis that the breach of duty complained of would, if established, necessarily involve negligence on the Bank's part. That did, however, leave the provision of bye-law 149, and in this regard I held that the Bank as administrator had been appointed an officer of each of the Fund companies, and in the absence of dishonesty would be entitled to indemnity.

439. I then dealt with the effect of section 98B of the Companies Act 1981, and held that the relief pursuant to that section should be the 75% figure used in relation to my finding on contributory negligence. I dealt finally with the position under section 281 of the Companies Act 1981, where the Court has power to grant relief from liability if the officer in question has acted honestly and reasonably, and having regard to all the circumstances of the case ought fairly to be excused from liability. I held that both administrators had so acted, and that if it were necessary for me to do so, I would relieve the administrators from any liability that might otherwise attach.

Conduct of the Litigation

440. The defendants have complained throughout this litigation as to the completeness of discovery, the role of Mr. Ramseyer, and that they have been targeted as "deep

pocket" defendants against whom proceedings were brought with a view to achieving settlement rather than success in terms of a judgment. In relation to the discovery issue, the complaints started well before trial, on various interlocutory applications. In short, the defendants maintained that these proceedings and the manner in which they have been conducted are abusive.

441. There is no question but that the discovery given by the Funds has been highly unsatisfactory. One example arises in relation to Mr. Moretti's second witness statement. I allowed this in on 4 September 2009, but on the basis that discovery of the further documents referred to would be given by close of business on Tuesday, 8 September 2009. The full documents were not made available until the first day of trial. Then there were documents produced during the course of trial, which I refer to as the Wildenstein documents and the Jones Day documents. The subject of the Wildenstein documents came up in Mr. Moretti's cross-examination on 15 September 2009, when he referred to the proceedings which had been taken in New York against Wildenstein & Co. by Mandarin. Those proceedings had been struck out, and Mr. Moretti said that the documents were valueless, because the case had been lost. When Mr. Sheldon said that he would like to see what had been said in those proceedings, and asked why they had not been disclosed, Mr. Moretti's response was that they were overlooked on his part, and that he didn't think they were relevant. He then agreed that they should be disclosed. That exchange led to David Hughes, a partner of Berwin Leighton Paisner, traveling to New York to review the documents. He did this on Friday, 18 September 2009. Mr. Moretti's evidence concluded on the early afternoon of Monday, 21 September 2009, and he was released. The documents which Mr. Hughes had secured from New York were then made available to the defendants at about 4:00 p.m. that same afternoon, and this understandably prompted a complaint from Mr. Sheldon as to why the documents had not been produced earlier, so that Mr. Moretti could be cross-examined on them. In the event, Mr. Moretti did return to Bermuda, and was cross-examined in relation to those documents.

442. So far as the Jones Day documents were concerned, these were the subject of cross-examination on 16 September 2009, when it emerged that the London office of Jones Day had advised in connection with the settlement with Ironzar. Those documents where brought to Bermuda on Sunday, 20 September 2009 by a solicitor from Berwin Leighton Paisner, but not given to the Bermuda attorneys for the Funds until the following day. Although Mr. Hughes' affidavit sworn in relation to the late production of documents indicates that the documents had been given to the defendants on Wednesday, 24 September 2009, it appears that they were produced late in the afternoon of the previous day. I do regard the lack of timeliness in the production of these documents as quite inappropriate given that they were being produced during the trial. Every effort should have been made to review these documents promptly, and to get copies to the defendants without the period of delay which occurred in this case. And I should point out that the Bank's attorneys had specifically asked for discovery to be given of the Jones Day documents (inter alia) in March 2008, but the response was that full discovery had been given.

443. Mr. Moretti was cross-examined in relation to these documents on 1 October 2009, and suffice it to say that the documents showed that Mr. Ramseyer was deeply involved in both matters. I will now turn to Mr. Ramseyer.

444. Citigroup submitted that Mr. Ramseyer was very much behind this litigation, which they described as being "deeply disturbing" given his involvement in the original transactions now complained of. The Bank of Bermuda essentially echoed this complaint, contending that Mr. Ramseyer should have been called as a witness, since he was clearly available during the trial and was in fact receiving the transcript live, demonstrating a serious interest in the outcome of the proceedings. Surprisingly, Mr. Moretti was unaware that this was the case, which suggested that those acting for him took the view that there was no need to advise him that Mr. Ramseyer had (presumably) asked for and was being sent the transcript.

445. The response from the Funds was to say that the time devoted to the activities of Phoenix Advisors SA and Mr. Ramseyer during the trial had been disproportionate and a waste of costs and time. Their written submissions identified those parts of the case for the Funds with which Mr. Ramseyer had no connection, and in relation to matters where he did have a connection – for example in relation to the loans made to various companies on which Mr. Ramseyer had signing authority, said that that was "neither here nor there". Similarly, they said that where Mr. Ramseyer had assisted, for example in relation to the Wildenstein litigation, that also was completely irrelevant.

446. That approach is all well and good, until one comes to a transaction such as the Chesterfield Investment, where the pleaded case for the Funds (see paragraph 54 above) was that Phoenix Capital did not know the nature of the purported investment. Mr. Moretti did not hesitate to make enquiry from Mr. Ramseyer in relation to any number of matters, so one necessarily wonders why enquiry was not made from Mr. Ramseyer in relation to this transaction.

447. And finally, I would refer to the "deep pocket" complaint. The response for the Funds was to say that there was nothing unfair or inherently ironic about the claims being advanced, that they were substantial claims, and that Mr. Moretti had a duty to put them forward. I would simply refer to one matter which caused me concern, and that is in relation to the alternative case for the Funds on recoveries, which was pleaded by amendment on 20 October 2008. It was only at that time that the nature, and particularly the size of the potential claim changed appreciably, and what is surprising to me is that the amendment had not been made earlier, given that the recovery in respect of the Equity Trust promissory notes had been effected in January 2006, and the sale of Chesterfield House occurred in January 2007.

448. None of these matters can affect the merits of the action. If the Funds have good causes of action, they are entitled to succeed. But if, as I have found, their causes

of action fail, then the manner in which they have conducted this litigation will necessarily have an impact on the issue of costs.

Acknowledgment

449. I am acutely conscious that there have been a very considerable number of issues to be dealt with, and various points and alternative scenarios arising in relation to many such issues. I have no doubt that I will not have dealt with all of these issues fully, and in some cases in relation to smaller issues, perhaps not at all. Generally, where I have not referred to a particular point that will be because I have taken the view that it does not change the conclusion which I have reached on the issue in question. But there are points which I have not addressed because it is impossible for me to make a definitive finding at this stage. An example is the credit which Phoenix Capital has agreed to give in the event that Phoenix Global's claims in these proceedings are successful. The proceeds of those claims will go to its shareholders, and hence to Phoenix Capital as a shareholder at the time of the re-structuring. If such a situation were to arise, there would need to be further submissions to enable the appropriate calculation to be made.

Costs

450. The position in relation to costs does of course have to be looked at in the context of my primary findings, and the reality is that the Funds have lost this action comprehensively, not just on the basis of my primary findings, but frequently on the basis of my alternative findings. In these circumstances, it seems to me that an order for costs against the Funds is inevitable, but I do recognise that there might be submissions as to the appropriate type of costs order, so that at this stage I will simply note that I will hear counsel as to costs.

Dated this day of December 2009

Hon. Geoffrey R. Bell
Puisne Judge