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LatAm focus: litigating trusts disputes in the BVI

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The British Virgin Islands has long been hailed as a leading offshore jurisdiction for wealth management and asset protection amongst Latin American high net worth families and individuals. Over the next four years, Latin American HNWI's, family offices and fund managers are predicted to drive an increase in offshore business of approximately 24 per cent.

Much of the BVI's appeal to Latin American end-user clients derives from its economic and political stability, its commitment to business and the financial services industry and its independent legal system based primarily on English common law and equitable principles. The BVI also has modern legislation often based on the statutes of leading onshore jurisdictions. Disputants have access to a well-established court system including a specialist court modeled on the London Commercial Court, and an appellate framework within which a final appeal lies to the Judicial Committee of the Privy Council.

The provisions of the BVI Trustee Ordinance (Cap 303) (the **Ordinance**) facilitate the principal advantages of using an offshore trust which are to hold, preserve and transfer wealth while maintaining flexibility and confidentiality. The Ordinance contains comprehensive provisions regarding reserved powers, purpose trusts, conflict of laws and trustee powers, including the power to delegate investment strategy to agents.

Powers of investment and delegation are ordinarily prescribed by express provisions of the trust instrument, however paragraph 2 of the Second Schedule of the Ordinance, which is commonly applied to a BVI trust by express reference in the trust instrument pursuant to s.93 of the Ordinance, authorises a trustee to invest any portion of the trust fund and s.3 of the Ordinance protects a trustee in respect of investment activities provided he exercises the diligence and prudence that a reasonable person would be expected to exercise in making the investment as if it were his own money. Section 24 of the Ordinance permits a trustee to appoint agents to transact any business or do any act required to be done in the execution of the trust, and provided the appointment is made in good faith (ie honestly), the trustee is not responsible for the agent's defaults. Paragraph 4(q) of the Second Schedule to the Ordinance specifically empowers a trustee to engage the services of an investment adviser

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without incurring liability for any action taken in good faith in accordance with the advice of such adviser. Therefore at first blush, the delegation of a trustee's powers of investment to a professional manager (whether on an advisory or full discretionary basis) can be achieved with impunity provided the trustee acts honestly.

The case of *Appleby Corporate Services v Citco Trustees BVIHC [2014] 1 JBVIC 2001* concerned a BVI discretionary trust settled by a wealthy Argentine national. The trust fund was worth approximately US\$7 million and consisted of the entire issued share capital of a BVI registered company. Those shares were held by Citco as trustee. Pursuant to paragraph 4(q) of the Second Schedule to the Ordinance, Citco appointed investment managers on a full discretionary basis to manage the investment of the trust fund. The investment guidelines agreed between Citco and the investment managers precluded transactions involving commodities, derivatives, margin payments or nil or partly paid securities unless expressly authorised in writing by Citco. No such authorisation was given.

Monthly portfolio statements were sent to Citco which not only demonstrated a systematic and serious departure from the agreed investment guidelines but also a sustained decrease in the value of the trust fund. By the time Citco retired as trustee (around 11 years later), the value of the trust fund had dropped from around US\$7 million to US\$142,000. In the ensuing claim brought by the replacement trustee, it was alleged that Citco had a duty to supervise the investment manager and to ensure that the delegated powers and functions were not being abused. In upholding the claim, the BVI Commercial Court held that a trustee had a duty to inform itself at appropriate intervals that agreed investment guidelines are being observed and that the overall value of the trust fund is not being affected by abuse on the part of an investment manager to which a trustee's powers and functions had been delegated. Furthermore the 'good faith' exculpatory provisions of s.24 and paragraph 4(q) of the Second Schedule of the Ordinance did not apply to a breach of duty to supervise an investment manager. Accordingly, Citco was ordered to reconstitute the trust fund to the value which it would have had if Citco had conscientiously performed its duty of supervision. That value was assessed at US\$6.267 million.

The outcome in *Appleby Corporate Services v Citco* augments the credibility of the BVI as a jurisdiction for secure and sophisticated wealth management and asset protection. This case also highlights the strengths of the BVI-only 'VISTA' trust structure. Unlike standard discretionary trusts such as that used in *Appleby*, the VISTA trust prevents the trustee from any involvement in the management of the underlying BVI company (which itself will hold the operating companies) except in extreme circumstances. This means that the directors of the company, who may be the settlor of the trust, family members and other trusted individuals, can retain complete control, while still enjoying the benefits of a BVI trust. Please see our guide to [VISTA trusts](#), for further information.

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