IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA (CIVIL) APPEAL No. 16 of 2020
(FORMERLY CAUSE NO FSD 205 OF 2017 (NSJ))

BETWEEN:

(1) LEA LILLY PERRY
(2) TAMAR PERRY

APPELLANTS

-AND-

(1) LOPAG TRUST REG.
(2) PRIVATE EQUITY SERVICES (CURACAO) NV
(3) FIDUCIANA VERWALTUNGSANSTALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON
(7) RON GREENSPOON
(8) MIA GREENSPOON
(9) ADMINTRUST VERWALTUNGS ANSTALT

RESPONDENTS

BEFORE:

The Rt. Hon Sir John Goldring, President
The. Hon Sir Richard Field, JA
The Rt. Hon Sir Jack Beatson, JA

Appearances: **Mr David Brownbill QC instructed by Mr Nicholas Dunne of Walkers (Cayman) LLC on behalf of the Appellants at the hearing. In respect of the application dated 6 August 2021 to amend the grounds of appeal, Mr Paul Chaisty QC instructed by Conyers Dill & Pearman LLP on behalf of the Appellants**

Mr Justin Fenwick QC instructed by Campbells LLP on behalf of the Respondents

Heard: **26 - 27 April 2021**

Draft Circulated: **1 November 2021**

Judgment delivered: **11 November 2021**

Judgment with errata: **19 November 2021**

JUDGMENT

The Rt. Hon Sir Jack Beatson, JA

A. The Dispute and the parties

1 This appeal concerns the ownership of the single issued share in Britannia Holdings (2006) Ltd. ("BH06"), a company incorporated in the Cayman Islands. At issue is the validity of the purported transfer of the share in 2013 by the late Mr Israel Igo Perry to Lopag Trust Reg. ("Lopag"). Mr Perry, who died on 18 March 2015, was a wealthy businessman and a qualified Israeli lawyer. Lopag is a Trust Enterprise registered under the laws of the principality of Liechtenstein. The share in BH06 was to be held on the terms of a discretionary trust known as the Lake Cauma Trust established by Mr Perry on 1 May 2013 under Liechtenstein law. He also executed the transfer of the share on 1 May 2013 but, because of the need for regulatory approval by the Cayman Islands Monetary Authority ("CIMA"), the transfer was completed on 15 October 2013.

2 On 17 October 2017, Mr Perry's widow, Lea Lilly Perry ("Lilly"), and the couple's eldest daughter Tamar Perry ("Tamar") obtained a proprietary injunction (later amended and continued until trial) preventing Lopag and other defendants from dealing with the assets held by BH06 or derived from dividends or distributions by it. In these proceedings launched on 30 November 2017 they challenged the validity of the transfer of the share. Lilly Perry claims that the transfer was void and should be set aside. Her case is that the transaction violated her matrimonial property rights under Israeli law because it was made without her knowledge or consent and without complying with the formalities required by Israeli law. This ground has been referred to as the "*matrimonial property rights claim*". The second ground is that Lilly and Tamar Perry claim on behalf of Mr Perry's Cayman estate that the transfer of the share should be set aside because Mr Perry made the transfer as a result of his mistaken belief or tacit assumption that discretionary beneficiaries of Liechtenstein trusts have effective rights under Liechtenstein law to enforce the trustees' obligations and to apply to a Liechtenstein court to prevent action by the trustees in breach of trust, to remove trustees, and for other relief. This ground has been referred to as the "*equitable mistake claim*".

3 There was a ten-day trial in February and March 2019. As well as purely factual evidence, the judge heard expert evidence on Israeli law on the matrimonial property rights claim and on Liechtenstein law on the equitable mistake claim. There was also a two-day hearing in January 2020 to consider allegations made by Lopag in September 2019 that Tamar Perry *inter alia* had forged the share certificates of a Panamanian

company. In a judgment handed down on 27 May 2020 the judge dismissed Lilly and Tamar Perry's claims. They appeal against his order dated 27 July 2020.

4 On the matrimonial property claim, on behalf of Lilly Mr Brownbill QC submitted that the judge made four errors. The first was that Lilly Perry had consented to her husband dealing with the family's assets for tax or estate planning purposes and to him transferring such assets into trusts for this purpose, and that such consent can be inferred under Israeli law without knowledge of the specific transaction in question. The second was that the transfer did not require a formal property agreement confirmed by the court in accordance with Israel's Spouses (Property Relations) Law 1973. The third alleged error was that the judge found that the share in BH06 was a business asset so that Israeli law permitted Mr Perry to deal with it without Lilly's consent unless there had been a "*critical event*" or a *"critical date*" in the marriage. The fourth was that he found that the transfer of the share did not constitute a critical event. On the equitable mistake claim, on behalf of Lilly and Tamar, Mr Brownbill submitted that the judge erred in concluding that they had failed to prove that Mr Perry transferred the share believing or tacitly assuming beneficiaries of discretionary trusts have effective rights under Liechtenstein law. He submitted that the judge also erred in concluding that the expert evidence showed that Liechtenstein law provides remedies which satisfy the requirements of effectiveness so that, even if Mr Perry held such a belief or made such an assumption, he was not mistaken.

5 The grounds of appeal challenge some of the findings of primary fact made by the judge after hearing the evidence of the witnesses, and some of his findings on Israeli and Liechtenstein law made after hearing expert evidence on those legal systems. It has therefore been necessary to consider the role of an appellate court when such findings are challenged.

6 The approach to challenges to a judge's findings of primary fact is considered at [72] – [76] below and the approach to challenges to on the substance of foreign law is considered at [77] – [83] below. At this stage it suffices to observe that Mr Brownbill accepted that findings on the substance of foreign law are matters of fact which must be pleaded and proved, and that the task of an appellate court is to police errors by the trial judge, not to determine the question of foreign law *de novo.* But he submitted that the position is different where a judge contributes his own legal skill and reasoning to derive relevant principles of foreign law from judgments of a foreign court in order to resolve a conflict between the evidence of the experts on that legal system. Such findings, he submitted, *"can properly be reviewed by an appellate court just as an appellate court reviews findings on domestic issues of law*". In the present case, the appeal on questions of

foreign law is generally not against the findings as to the substance of the relevant foreign law but against the application of that law to the judge's findings of primary fact.

7 On behalf of the trustees, Mr Fenwick QC submitted that the Appellants have not come close to demonstrating that the judge's conclusions on the challenged findings were ones which no reasonable judge could have reached. That, he maintained, was required where an appellant seeks to overturn findings of fact (as the Appellants do in relation to the finding that Lilly Perry consented to family assets being settled on trust by her husband) or of foreign law (as the Appellants do in relation whether the share is to be categorised as a "*business asset*" and whether its transfer was a "*critical event*" in the marriage).

8 There are nine Respondents to the appeal. The first and ninth Respondents, Lopag and Admintrust Verwaltungs Anstalt, two of the three current trustees of the Lake Cauma Trust, are the main and active ones. The third trustee, Cato Trust, is not a party to these proceedings, but the first and ninth Respondents' skeleton argument states that its contents have been approved by Cato Trust.

9 The fifth Respondent, Yael Perry, is the younger daughter of the late Mr Perry and Lilly Perry, and the sister of the second Appellant, Tamar. Yael Perry played an active role at the trial. She gave evidence, was represented by leading counsel, and largely supported the submissions made on behalf of the trustees. She took no active role and was not represented in the appeal.

10 The fourth, sixth and eighth Respondents, Gal, Dan, Ron and Mia Greenspoon, are the children of Tamar Perry and Hagai Greenspoon, to whom she was married between 1990 and 2013. They have taken no active part in the proceedings.

11 The second and third Respondents, Private Equity Services (Curacao) NV and Fiduciana Verwaltungsanstalt also took no active part. The second Respondent was appointed as a trustee of the Lake Cauma Trust by the lineal descendants of the late Mr Perry and Lilly Perry. The validity of this appointment has been contested by the first, fifth and ninth Respondents but the agreed case summary and chronology states that the validity of the appointment is irrelevant to the appeal. The third Respondent was originally appointed as an additional trustee of the Lake Cauma Trust and other Liechtenstein trusts established by the late Mr Perry by the Liechtenstein Court of First Instance on 13 January 2017 on the application of the Swiss Protectors Association ("SPA"), which had become the Lake Cauma Trust's Protector on 24 August 2015. Fiduciana's involvement is summarised at J[110(d)] - [110(k)]. It was removed as trustee by the Liechtenstein Supreme Court on 2 March 2017 but reappointed by the SPA. Following other decisions of

the Liechtenstein courts, on 7 February 2018 it resigned as trustee of the trusts and was replaced by the ninth Respondent.

12 The remainder of this judgment is organized as follows. The background is in Part B. Part C summarizes the trial and the decision below. The approach of an appellate court to appeals against findings of fact and findings of foreign law is in Part D. Parts E and F deal with the appeals against the rejection of the matrimonial property claim and the equitable mistake claim. They consider the grounds of appeal and give the reasons for the conclusion that neither appeal is well founded. Part G is a brief overall conclusion. Part H is in substance a postscript to the judgment dealing with an application made by the Appellants on 6 August 2021, almost three months after the conclusion of the hearing, to include a new ground of appeal, for other relief, and to stay this judgment pending the determination of the application.

B. The background

13 These proceedings are one element in complex, long running and bitterly contested litigation since Mr Perry's death as a result of disputes between Lilly and Tamar Perry and Lopag and within the Perry family. There has been litigation in a number of jurisdictions including Liechtenstein, England and Wales, and Delaware.[1] The factual background is set out at [52] – [110] of the judgment below.[2] The perspectives of the parties are contained in paragraphs 11 - 30 of the Appellants' skeleton argument, paragraphs 8 - 10 of the Respondents' skeleton argument (which complained that the Appellant's summary was not a fair one), and paragraph 4 of the Appellants' reply skeleton. For the purposes of this appeal, the background can be summarised as follows.

14 Mr and Mrs Perry married in Israel on 3 March 1964. It is common ground that the non-statutory Israeli community property rule dating from decisions in the mid-1960s applies to couples such as Mr and Mrs Perry who married in Israel before 1974 when a statutory resource balancing scheme was introduced by the Spouses (Property Relations) Law 1973 ("the PRL"). The community property rule and the factual findings of the judge in relation to the way it and the PRL apply in this case and the challenge to those findings are discussed at [44] – [62], [85] – [87][98] – [100], [109], [112] - [115 and [121] below. Israel's legal system is a mixed system. It incorporates elements of common law, civil law and religious law as changed by

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1 The Liechtenstein decisions are summarised at [36] – [40] below. The other decisions of most relevance to this appeal are those in England and Wales (*Perry v Neupert* [2018] EWHC 1788 (Ch), [2019] EWHC 52 (Ch) and [2019] EWHC 2275 (Ch)); and Delaware (*Perry v Neupert and Côte D'Azur Estate Corp. & the BGO Foundation* CA No. 2017-0290-JTL, 15 February 2019). At the hearing Mr Fenwick also referred to litigation in the BVI: Day 2, p 57 lines 12 ff, and pp 67 line 9 - 68 line 15.

2 Hereafter, references to his judgment are denoted J[xx].

Israeli legislation such as the Spouses (Property Relations) Law and the decisions of Israeli courts, in particular its Supreme Court. Israel's law is thus derived from British law, Ottoman law, itself influenced by European civil law, and the legal principles of its major religious communities. Its codification is basically a civil law codification influenced by civil law ideas but there is an Israeli common law, and the role of judges and judge-made law is a common law one: see Aharon Barak, *Some Reflections on the Israeli Legal System and its Judiciary,* (2001) 4 Ius Commune Lectures on European Private Law, METRO, Institute for Transnational Legal Research.

15 One of the issues at the trial concerned the happiness and stability of the Perry's marriage. Was it as Lilly and Tamar Perry maintained, generally a happy one but with difficult periods, especially in about July 1998 when Lilly discovered that her husband had had an extra-marital affair and said she wanted a divorce, or was it, as Yael Perry maintained, not a happy marriage, one where divorce had been discussed on several occasions from the time Yael was young? Yael's evidence was that in the late 1990s the couple decided to separate and split Mr Perry's property. Lilly's evidence was that there was no decision to separate their assets in 1998 or since then. The judge also had before him the translation of a recorded and transcribed conversation Mr Perry had shortly before his death with Mr Israel Wolnerman, an Israeli lawyer who had acted for him since 2008. The conversation is discussed further at [33] – [34] below. During it Mr Perry said that "*in the heels of an argument between us, we agreed on a divorce and asset division between us in which all assets in Israel will be granted to [Lilly Perry] plus 50 million Marks that will be [paid] to her after I collect them from the German Pension Program. An amount of one million Marks was [paid] to her in advance*".

16 The German Pension Program is a reference to the business of an entity called "The Organisation for the Implementation of the Social Security Treaty" ("The Organisation") which Mr Perry founded in 1983 and from which a significant part of his wealth resulted. Its business was to fund Israeli residents who were eligible to participate in the West German social security pension scheme and enable them to pay the costs of retrospectively buying into the scheme. Some 30,000 people, including many Holocaust survivors, signed up and were registered for this scheme. The loans to participants were secured by way of life insurance. Britannia Guarantee National Insurance Company ("BGNIC"), a Cayman regulated insurance company at one time owned by the late Mr Perry, played a central part in managing the scheme: J[63]. BGNIC is the immediate subsidiary of BH06. BH06 also owns various other companies, directly and indirectly. Those other companies in turn own shares, commercial properties, and cash deposits.

17 No value has been formally ascribed to the share in BH06, but it is clear that it is very substantial. The Appellants state that that BH06 and its underlying assets, which they describe as passive long-term investments in rental property and shares, have for many years been the main source of liquidity for the Perry family and were worth in excess of US$ 200 million when the share was transferred: see their skeleton argument paragraphs 4 and 122(1). The judge stated at J[105] – [107] that after Mr Perry's death some shares in Mobileye NV, an Israeli technology company, were sold. The Mobileye shares were held by Solid Holdings NV ("Solid"), a Curacao corporation indirectly entirely owned by the Lake Cauma Trust through BGNIC and BH06. BH06 then declared a dividend and paid Lopag. On 25 August 2015, Lopag adopted a resolution *inter alia* to allocate 263,158 Mobileye shares to Tamar Perry and paid US $40 million to the Ypresto Trust (on which see [35] below) for the benefit of Yael Perry. The trustees' skeleton argument claims (paragraph 9) that assets worth hundreds of millions of US$ were removed from Solid to an entity controlled by Tamar Perry. The decision of the Liechtenstein Court of First Instance on 23 April 2018 referred to at [38] below states (p 100) that the assets of the Lake Cauma Trust were reduced by approximately US$ 300 million. It appears from page 67 of that decision and from *Perry v Neupert* [2019] EWHC 52 (Ch) at [16] that the entity to which the assets removed from Solid were transferred is Solid Fund Private Foundation ("SFPF") which got 99% of the shares in Solid at a nominal value.

18 In 1999, the Israeli tax authorities commenced an investigation into the management of the Organisation. In 2000 they sought the assistance of the Swiss authorities who conducted a money laundering investigation and froze Mr Perry's Swiss bank accounts. During 2000, Mr and Mrs Perry moved to London: J[245(c)].

19 The Israeli tax authorities' monetary claim against Mr Perry was settled on 17 May 2001: J[70]. The agreement provided that Mr Perry would not be required to file tax returns in Israel if he was an overseas resident and had no taxable income in Israel but stated that a criminal investigation into the management of the Organisation's business would continue. Mr Perry completed and filed an "IR UK Arrival Form" on 18 June 2002. After input from Field Fisher Waterhouse ("FFW"), one of the firms of English solicitors which advised him, and a letter from FFW to the UK tax authorities in October 2002 he and Mrs Perry were recognised as non-domiciled residents: J[72] – [74].

20 By then, the Israeli prosecution authorities had charged Mr Perry and the Organisation with serious offences concerning the Organisation's business, including fraud and theft, insurance offences, and obstructing the course of justice. Mr Perry returned to Israel for his trial which started in 2002 and took several years. He was convicted on 24 October 2007. As to the size of the fraud, the trial judge, Justice Zacharia Caspi, found that Mr Perry and the Organisation stole grossed-up advance insurance premiums totalling approximately

DM 270 million, other premiums totalling approximately DM 50 million, and were guilty of aggravated fraudulent receipt of property of approximately DM 150,200. Soon after his conviction, CIMA required BGNIC to take steps to protect its assets and to prevent Mr Perry from having or exercising any management or control of it. As a result, management shares were created and issued to a trustee for the benefit of BH06.

21 On 19 February 2008 Mr Perry was sentenced to 12 years imprisonment and fined the equivalent of approximately £3 million. On 5 February 2009, his appeal against conviction was dismissed but his sentence was reduced to one of 10 years. He returned to Israel to serve his sentence but, after he was diagnosed with advanced colon cancer in March 2012, he was released from prison into house arrest on medical grounds. In January 2013 he was advised that the cancer was terminal, and he died on 18 March 2015.

22 Following Mr Perry's conviction, there were two developments. The UK's Serious Organised Crime Agency ("SOCA") instituted proceedings against him and many of those who had received loans to enable them to buy into the West German pension scheme brought a class action in Israel against him and the Organisation. The class action was settled after Mr Perry's death on the basis that payments were made to members of the class without any admission of liability.

23 There is a full summary of the SOCA proceedings in the judgment below at J [77] – [81]. Here it suffices to state that in October 2009 a worldwide freezing order was made against Mr and Mrs Perry, the Heritage Trust (on which see [25] – [26] below) and others, but not Lopag. The order was discharged in July 2012 following the judgment of the United Kingdom Supreme Court that there was no jurisdiction in the English court to grant freezing injunctions over assets that were not in its territorial jurisdiction: *Perry v Serious Organised Crime Agency* [2012] UKSC 35, [2013] 1 AC 182.[3] What is relevant for the present proceedings are the witness statements made by Mr and Mrs Perry in the SOCA proceedings about their assets, as to which see [25], [27], [54] and [55] below.

24 Since the "*equitable mistake claim*" by Lilly and Tamar Perry concerns the legal position of discretionary beneficiaries of Liechtenstein trusts, Mr Perry's use of trusts is a relevant part of the background to the transfer of the share in BH06 and was taken into account by the judge when making his findings. Lopag was founded in 1989 and the main people Mr Perry dealt with were Mr Louis Oehri, a founding member,

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[3] The law was changed retrospectively by section 48 of the Crime and Courts Act 2013 which inserted a new section 282A into the Proceeds of Crime Act 2002 giving jurisdiction for assets to be pursued outside the UK if they had some connection to the UK. SOCA commenced fresh proceedings against Mr Perry's assets but discontinued its claim and later settled a compensation claim brought against it.

and Mr Dominik Naeff, a member of its board and Mr Oehri's son-in-law. Mr Oehri first met Mr Perry in 1983, when he worked for Praesidial Anstalt, at that time the biggest trust company in Liechtenstein. His evidence was that, at that time, Mr Perry "*had a concrete idea about the role that Liechtenstein would play in the business that he was developing*". By the time of Mr Perry's death, he had established 11 Liechtenstein discretionary trusts subject to Liechtenstein law. It is therefore necessary to turn to the trusts, and to the steps Mr Perry took after he was advised that his cancer was terminal.

25 After moving to London in 2000, Mr and Mrs Perry initially lived in a property in South Audley Street. It was owned by a Turks and Caicos Islands registered company of which Mr Perry had held the shares before 2002. In 2000, using Mallet Ford Inc., a BVI company, they also acquired a house in South Street, Mayfair which they planned to renovate. Mr Perry made a loan to Mallet Ford to enable it to fund the purchase. The shares in Mallet Ford were transferred to Lopag to be held on a Liechtenstein discretionary trust created on 24 March 2000 and called the Heritage Trust. In §30 of his second witness statement in the SOCA proceedings Mr Perry stated that he used a Liechtenstein entity for "*legitimate tax planning*". There was also written evidence on this by Mr Oehri referred to by the judge at J [68] – [69]. Mr Oehri stated that FFW advised Mr Perry about the establishment of the Heritage trust. Mr Oehri did not recall the details but stated that that "*the focus was on how the trust would function*". He also stated that "*someone had noted that a Liechtenstein trust would apparently give the settlor more influence over the running of a trust than an English trust*" and that the main difference between the two trust law systems was the degree of influence that the settlor would have on the trust." It must be said that the judge in these proceedings had serious reservations (see J[257(d)(vii)]) about Mr Oehri's candour and reliability and, in the Israeli prosecution, Justice Caspi described him as "*mendacious*".

26 The key terms of the Heritage Trust are summarised by the judge at J[67(a)] – [67(i)]. During Mr Perry's life, the income from the trust was to be paid to him. After his death it was to be paid to Mrs Perry, and after her death Mr Perry's children were entitled to the income and capital in equal shares. The trustees had power to add or remove beneficiaries subject to obtaining the consent of Mr Perry or, after his death, if Mrs Perry survived him, her consent, and, after the death of both of them, the consent of the Protector, Mr Hagai Greenspoon. During his marriage to Tamar Perry, Mr Greenspoon worked with Mr Perry first for him in the Organisation and later as a legal adviser, and he was also the Protector of some of the trusts.

27 As to Lilly Perry's awareness of the trusts, her application to the UK Home Office dated 1 September 2006 for an extension of her visa stated that the leasehold interest of the house in which she lived was owned by an overseas trust of which she was the primary beneficiary. In her first statement in the SOCA proceedings

dated 24 December 2009, she stated that she was a discretionary beneficiary of the Heritage Trust but did not control it. She made numerous requests for payments from the trusts and received substantial sums. One of the requests she signed was to the Heritage Trust in August 2012 for a distribution of €80 million. Her evidence was that she would sign anything she was given by her husband without examination but there was other evidence that she discussed documents she was asked to sign concerning the SOCA proceedings, received advice on them from Asserson and considered them carefully: see the judge's findings at J[265] (accepting the evidence on which the trustees had relied, summarised at J[217] and J[219]), and J[269] – [270].

28 While he was in prison, Mr Perry created several other trusts. In March 2009 he created another Liechtenstein Trust called the Damerino Trust. Lopag was the trustee and initially Hagai Greenspoon was the Protector. The beneficiaries were Tamar Perry, Hagai Greenspoon, their children and Yael Perry: J[76]. The trust deed required the trustee to make the records it maintained available to the beneficiaries. In January 2012 Mr Perry created two BVI Trusts, each initially with property of US$10 million: J[82] – [85]. Lopag was not involved. The primary beneficiaries of the Catolac Family Trust were Lilly, Tamar and Yael Perry, and Tamar and Yael's children. The prime beneficiary of the Roseland Family Trust was Tamar Perry and, after her death, her children and Yael Perry.

29 In March 2013, about two months after Mr Perry was told that his cancer was terminal, he met Mr Oehri and Mr Naeff at the family home in Tel Aviv. The topics discussed included succession planning and the need for any changes in the existing arrangements concerning the family's wealth to be made in a tax efficient way. On succession planning, Mr Naeff's note of the meeting (partly set out at J[88]) recorded Mr Perry as stating that he wanted "*a solution where the assets are as far as possible divided between TP [Tamar Perry], her children, and YP [Yael Perry] and that the individual vessels should be strictly separated because there are certain tensions between TP and YP*".

30 Following further meetings at which the terms of the trust deed were discussed and settled, on 1 May 2013 Mr Perry created the Lake Cauma Trust, with Lopag as its trustee: see J[89] – [90]. The Lake Cauma Trust Deed differed from Damerino Trust deed in that it provided that only the protector was entitled to see the records kept by the trustee. Originally the beneficiaries of the Lake Cauma Trust were "all the descendants of Mr Igo Israel Perry", that is not including Lilly Perry or Mr Perry. As stated, Mr Perry also executed the transfer of the share in BH06 to the Lake Cauma Trust on 1 May 2013, although the transfer was not completed until 15 October 2013 because of the need for approval by CIMA. There was no evidence that Mr Perry sought Liechtenstein law advice on discretionary trusts in 2013.

31 In June 2013, the month after the creation of the Lake Cauma Trust, it was announced that the Israeli law governing the taxation of trusts would be amended. From 1 January 2014, Israel would tax trusts anywhere in the world which had an Israeli resident beneficiary. As a result, following instructions by Mr Perry contained in a "*letter of wishes*" he signed dated 28 November 2013, a deed executed on 2 December 2013 amended the definition of the beneficiaries of the Lake Cauma Trust: see J[93] – [97]. Thereafter they were to include all the descendants of Mr Perry's grandparents and their relatives, and four specified charities, but to exclude persons who were tax residents in Israel, the USA, and the UK, except those with UK non-domiciled status. The trustees and the Protector, their employees, spouses and children and any entity in which excluded persons had a direct or indirect interest were also excluded. Lilly Perry was included because the beneficiaries included the relatives of the descendants of Mr Perry's grandparents.

32 In January 2015, Mr Perry had further meetings with representatives of Lopag to discuss his wish to restructure the arrangements by creating a separate discretionary trust for each beneficiary. By February 2015 a further 7 Liechtenstein discretionary trusts had been established by Mr Perry but he had not given detailed instructions as to the allocation of assets to each trust: see J[98] – [99].

33 By early March 2015 Mr Perry's deteriorating health required him to have major surgery. On 5 March, before the surgery and two weeks before he died, he met Mr Israel Wolnerman. In the conversation referred to at [15] above, Mr Perry told Mr Wolnerman of his concern that his wife and daughters would not get on after he died. He also told him that his wife's approach was to control the children and grandchildren by the power of money, and that he objected to this, and wanted a separate trust for each beneficiary with Lopag as trustee and Neil Duggan and Dieter Neupert as the joint protectors. He said that he wanted to instruct Mr Wolnerman and give him a power of attorney in case he would not be capable of instructing the trustees himself.

34 Their conversation was recorded, and the recording was later transcribed and translated into English. Mr Wolnerman also made a note of it. The transcription and the note are referred to as Mr Perry's Letter of Wishes. The judge set out a long extract from the translation of the transcript at J[100]. For the purposes of the appeal, the following suffices:

> *"… I'm making these inheritance arrangements. I call this inheritance but a big part of it is trust arrangements that have already been done and only need adjusting and so to make it possible for each one to have their own property or the property that was given in trust to*

him as a beneficiary, so each one can use it or enjoy it (as, the case may be) without needing permission from the other family members.

Lilly - in advance, I'd like to clarify a few things, there are some differences of opinion between Lilly and me regarding the question on if there are marital properties between us.

Personally, I have never been a partner in assets Lilly received from her parents and I don't recall that we ever had a joint bank account.

In the late 90's or towards the late 90's, in the heels of an argument between us, we agreed on a divorce and asset division between us in which all assets in Israel will be granted to her plus 50 million Marks that will be [paid] to her after I collect them from the German Pension Program. An amount of one million Marks was [paid] to her in advance.

In my understanding, if the German Pension Program had less succeeded, meaning that what was promised to Lilly at the time was bigger than half of the properties today, Lilly would have insisted that the previous agreement will be complied.

...

I've heard from Lilly that she has no intention of giving the girls anything and she specifically mentioned not ever giving them any part of her special jewellery collection — unless they change [their] treatment towards her, when I calculate the value of half of the inheritance, I bring into calculation all estates that have already been given to Lilly such as real estate assets in Israel, a very significant jewellery collection, polished diamonds - not embedded, that were bought as an investment and which Lilly took from the safe in London, and so on.

That's why I instruct as following:

All real estate assets in Israel, whether are written in Lilly's name or whether are written in both our names, will become Lilly's property directly.

The jewellery, the diamonds and the collection of fans will become Lilly's property directly and not by the trust.

The house or houses in London and France including the big apartment in Trump International in Columbus Park will be granted to Lilly's trust.

To avoid misunderstandings I'm speaking about Villa La Treille in [Villefranche], France and 39-41 South Street.

...

Perry: all estates in [Villefranche], London and New York are given to [Lilly], with terms and conditions that I'll detail later. In addition, there will be a deposit of 50 million dollars to Lilly's trust that will be invested and managed in the same manner as all trusts will be [managed].

...

Perry: we're done with Lilly, I'll come back later to... for instance, I'd like for the children to use the house in London, the house in.... As needed, so she wouldn't be able to ... fight with them or say "don't come/ do come"

Paragraph 16 of the translation refers to Britannia requesting to be deregulated with a view to it being dissolved and its assets transferred to the Lake Cauma Trust.

35 After Mr Perry's death, there were disputes between Lilly Perry and Tamar Perry and Lopag and between them and Yael Perry about *inter alia* the manner in which the value of the shares in Mobileye NV should be distributed, and were distributed, and about accounting for the proceeds of a property transaction in Herzliya in Israel: J[104] – [109]. In September 2016 Lilly and Tamar Perry and other members of the family commenced proceedings in Liechtenstein seeking the removal of Lopag as trustee of all the trusts except the Ypresto Trust, of which Yael Perry was a discretionary beneficiary. They also sought the appointment of a new trustee, First Advisory Trust, which they had chosen. One aspect of the Liechtenstein litigation is referred to at [11] above. The judge summarised it at J[110(a)] to [110(m)]. At this stage, a briefer summary of the three Liechtenstein decisions referred to by the judge suffices. I consider his findings

about them in the light of the expert evidence and the Appellants' and Respondents' submissions about those findings in Part C of this judgment.

36 The three decisions considered Articles 923, 927/2 and 929/3 of the Liechtenstein *Persons and Companies Act 1926* (***PGR***) also referred to as the law on trust enterprises, *Treuunternehmensgesetz* ("***TrUG***") which respectively concerned the duties of trustees, the position of beneficiaries, and supervision and other measures concerning trusts. The first decision was that of the Liechtenstein Supreme Court on 3 March 2017 in *Perry v Lopag Trust* 07 HG.2016.212 -ON 34. The Supreme Court affirmed a decision of the Court of Appeal that the application by Lilly and Tamar Perry and the other members of the family be struck out because they had not established that they had standing as discretionary beneficiaries to obtain the relief they sought.

37 The second decision, also by the Liechtenstein Supreme Court, was on 6 April 2018. Save in relation to the Heritage and Damerino trusts, the Supreme Court affirmed decisions of the Princely Court and the Court of Appeal granting an application by Lopag and Fiduciana for an order to remove the SPA as the protector of the trusts and appointing Dr Peter Schierscher as temporary protector of all the trusts. Dr Schierscher was, however, removed as temporary protector of the Heritage and Damerino trusts.

38 The third decision was that of the Princely Court, the Liechtenstein Court of First Instance, on 23 April 2018. In *Perry v Lopag Trust & others* 07 HG.2016.234 – ON 32, the Court refused Lilly and Tamar Perry's request that it exercise its supervisory jurisdiction over all the trusts in respect of their complaints about Lopag's conduct by removing it as trustee. The Court also decided that the SPA be removed as protector of all the trusts.

39 The Court's reasons (see pp. 103-105) were that it considered that the dynamic nature and complexity of the circumstances of the case, involving, as it did, a wide range of jurisdictions, meant that "*no satisfactory result can be achieved through one decision alone as to whether the trustee will or will not be removed*". It referred to removal introducing a hiatus into efforts by a trustee which is attempting (as the court decided that Lopag was) to secure and retrieve the trust assets. It also referred to the tension between that factor and the possibility that the trustee is overstepping the mark in those attempts or is guilty of other failings that would justify its removal, particularly where, as in the case before it, there was a history of disputes between the trustee and discretionary beneficiaries. It considered that:

> *"[T]rust governance that is appropriate to the situation can be achieved – in view of the tension between necessary steps to retrieve the trust assets and any failings on the part of the trustee – if a further trustee is appointed who was not involved in the original main dispute and if a protector is appointed that is connected neither with the trustee nor with any of the beneficiaries."*

The Court also stated:

> *"A second trustee provides a potent regulatory mechanism for ensuring that the efforts by the first trustee are motivated by the substantive interests of the trust and not by personal conflicts. A further regulatory mechanism is a neutral, independent protector, due to his powerful position. He can even remove a trustee without being tied to a specific justification, not least but also when the trustee fails to fulfil his obligations."*

40 As to the Protector, the court referred to what it characterised as the exposure of two members of the SPA to "substantial conflicts of interest". One was a director of BH06, a company owned by the Lake Cauma Trust; the other was a director of Solid Holdings NV. The court stated that through the appointment of a second trustee, Admintrust Verwaltungsanstalt and the neutral protector, Dr Peter Schierscher, who it appointed as protector of all the trusts on a permanent basis, "*good trust governance is thus ensured, with the result that Lopag need not be removed as trustee, specifically in view of its efforts to retrieve the trust assets*".

C. The trial and the decision below

41 At the trial, as well as the expert evidence on Israeli law and on Liechtenstein law referred to at [5] above, the judge heard seven witnesses of fact. Lilly and Tamar Perry, Mr Hagai Greenspoon and Mr Wolnerman gave evidence for the plaintiffs. Messrs Oehri, Naeff and Mr Florian Zechberger, the lawyer who acted for Lopag in the Liechtenstein proceedings, gave evidence for the defendants. I deal with the judge's factual findings which are challenged in the appeal later in this judgment.

42 The experts on Israeli law were Professor Ruth Halperin-Kaddari, called by Lilly and Tamar Perry, and Professor Pinhas Shifman, called by Lopag. The judge stated that he found them both impressive witnesses and convincing on different issues. It will be seen that, while he accepted Professor Halperin-Kaddari's views on a number of issues, he considered that on occasion she "*strained too far to fit the case law … to reflect her strongly held view that each element of the law must provide maximum and inflexible protection to wives*": see J[24]. On the issue of inferring consent from conduct, he accepted Professor Shifman's view.

The experts on Liechtenstein law were Dr Bernhard Lorenz, called by Lilly and Tamar Perry, and Mr Christoph Bruckschweiger, called by Lopag. The judge stated that on the critical issues in dispute he generally found Mr Bruckschweiger to be more persuasive and to give more cogent and well-grounded justifications for his opinions: see J[19] and J [178(p)]. The judge's findings on specific issues of foreign law which are challenged in the appeal are dealt with later in this judgment.

43 The judgment below covers 208 pages. It has 292 paragraphs, a great number of which run over many pages and are divided into numerous sub-paragraphs and sub-sub-paragraphs. The judge's summaries of the parties' submissions run to about 58 pages. There are very full summaries of every argument made on behalf of the parties and the positions of the experts on Israeli and Liechtenstein law, some of which were (understandably) repeated in the 88 pages in which he analysed those submissions and set out his conclusions. It has to be said that, notwithstanding the undoubted care taken and the learning in it, the length and complexity of the judgment have made it significantly more difficult to navigate than a shorter and more focussed judgment. Sometimes the judge's findings had to be inferred from his summaries of the submissions of the parties. There is at least one example of the submissions of leading counsel before us referring to the judge's summary of a submission rather than the judge's finding: See Day 2, page 166, lines 18-23.

The Matrimonial property claim:

44 The judge found that in the case of couples such as Mr Perry and Lilly Perry who married in Israel before 1974, subject to some of the statutory rules in the PRL 1973, the non-statutory Israeli community property rule applies: J[239] – [240]. This was because, by section 15 of the PRL, which applies to marriages entered into before 1974, property relations between spouses are governed by the law of the domicile at the time of the solemnisation of the marriage. I summarise his findings as to what the non-statutory regime as modified by the PRL requires at [45] – [50] below and his findings on the regime's application to the circumstances of this case at [52] – [59] below.

45 Under the non-statutory community property rule, assets of a purely family character, such as the family residence, are treated differently to other assets, also referred to by the judge and at the hearing of the appeal as "*business assets*". The judge stated at J[273] that there were a number of controversial issues of Israeli law about the juridical nature of rights under the rule and their effect and operation, but found that "*the following points could be treated as settled and good law*":

(a) the underlying premise of the rule is that there is a joint ownership agreement between the couple which will be given effect to in accordance with the couple's presumed intention and the strong policy objectives governing it: J[273(a)].

(b) in the case of assets of a purely family character each spouse acquires an immediate and vested joint ownership right of a proprietary nature: J[273(c)].

(c) in the case of assets which are not of a purely family character, joint property rights crystallise on a "*critical date*" or "*critical event*" in the marriage, but, until that date "*the joint ownership rights 'hover' over all"* such assets and "*constitute a deferred joint ownership interest*": J[273(d)] and [273(e)]. The identification of a "*critical event*" involves a "*fact specific and sensitive inquiry having regard to the nature of the spouses' relationship, the nature of the asset and its reasonably anticipated use and the effect and reason for the incident alleged to give rise to the critical event*": J[273(g)]. Later in his judgment, at J[283], he stated that "*[a] critical event or date occurs when an event takes place that shows that the marriage faces a real danger to its continuation because of a serious crisis between the spouses*". Returning to his summary of points that he had said could be treated as settled, he stated that one of these was that, before the occurrence of such a critical event, subject to a duty of good faith to the other spouse, the spouse holding title has authority to deal with and potentially dispose of such assets: J[273(f)] and [273(g)].

(d) Sections 1 and 2 of the PRL apply to the non-statutory community property rule. Couples married before 1974 who wish to contract out of the non-statutory community property rule must enter into a "*property agreement*" as defined in section 1 and are to satisfy the formalities specified in those provisions: J[239] and J[242]. Those requirements are that the agreement be in writing and be approved by the court: J[241(a)]. Where a property agreement is required, if one complying with those formalities has not been made, the statutory resource balancing regime of the PRL applies: J[241(a)]. An agreement to remove particular assets from the PRL's resource balancing regime is subject to the different and weaker formalities rule in PRL section 5(a)(3), which requires only a written agreement and not the court's approval: J[241(b)] and J[242]. The judge rejected Professor Shifman's view that an unwritten "*property agreement*" remained enforceable despite the failure to satisfy the formality requirements of the PRL: J[251].

(e) The choice of law rule in section 15 of the PRL enables couples to vary the property relations established at the time of their marriage by an agreement "*in accordance with the law of their domicile at the time of making the agreement*": J[242].

46 As to the meaning of "*property agreement*" it was common ground between the experts (see J[247(a)]) that the leading authority is the decision of the Israeli Supreme Court in *Shai v Shai* CA 169/83 31(3) PD 776. The judge stated (at J[247(c)]) that in that case Vice-President Miriam Ben-Porat said that "*the key question was whether the purpose of the relevant agreement was to regulate the rights of the spouses in matrimonial property in the future upon death, divorce or separation*".

47 The judge set out the passage from her judgment relied on by Professor Shifman:

> *"The test of whether a specific agreement between partners is a 'matrimonial property agreement' or not, lies in its purpose. If this is with a view to balancing matrimonial assets in the case of death, divorce or separation, we have a matrimonial property agreement ... conversely, if the agreement deals with current relations or [relates] to a regular transaction... without any visible consideration of asset balancing on divorce or death — we have a regular agreement...."*

He accepted Professor Shifman's view, based on *Shai v Shai* and other authorities, particularly *Anonymous v Anonymous (BAM)* Family Court Appeal 5142/10 25 July 2010, that there is a distinction between a "matrimonial property agreement" which served primarily for the future distribution of property in the case of divorce or death, and a "regular" agreement dealing with current transactions or concrete dispositions which was not required to meet the formal requirements laid down by the PRL. He stated at J[247(g)] that Professor Shifman's approach was consistent with Professor Halperin-Kaddari's evidence.

48 The judge also set out a number of other passages from both cases, including this one from *Shai v Shai* :

> *"... it is not the comprehensiveness of the agreement or the fact that it relates (for example) to a single asset among many, that is the determining test, but rather the fact that it addresses the property relations between the spouses in the event of termination of the marriage or death of a spouse. I accept the provisions of the sections quoted by me. Essentially, it (i.e. a Property Relations Agreement) is a forward-looking agreement aimed at regulating the spouses' relationship; it is not simply forward-looking but is rather specifically designated for the event of death or divorce."*

See also the passages from *BAM* referred to by the judge at J[247(e)]. In that case, the court recognised that there is a strong presumption that a comprehensive agreement between spouses is a "*property agreement*" and within the PRL. Despite that, because the agreement in that case between separated spouses was part of an arrangement to restore stability in the marriage and did not look forward to separation or termination, it was held not to be a "*property agreement*". The judge concluded at J[247(f)- (i)] that what was required is consideration of the terms of the alleged agreement and "*a fact sensitive assessment of the purpose of the particular agreement being challenged*", "*a review of all the circumstances*" and to ask "*did it look forward to, contemplate or was designed to regulate rights of property on termination of the marriage*".

49 As to the determination of whether assets are of a purely family character or not and whether they are to be classified as business assets, the judge rejected what at J[277] he considered to be "*Professor Shifman's narrow view of what is meant by and can be treated as … an asset of a purely family characte*r". He did so in the light of what he described as President Emeritus Barak's nuanced approach in *Shalem* v *Twenco* [2006] 2 Is. LR 430 which Barak P had at [27] -- [32] termed "*an intermediate approach*". Barak P stated at [29] that this approach *"seeks to balance between protecting the rights of the spouses in family assets and protecting the autonomy, commercial efficiency and rights of third parties. It aspires to a property regime that strikes a balance between the concept of marriage as a life of sharing and preserving the separate identity of the individual within the marriage".* The judge stated at J[277] that the determination:

> "*requires a fact sensitive assessment, in the context of the particular marriage, of which assets: (a) are to be regarded as having "significant economic and emotional ramifications on the marriage and on each spouse";*[4] *(b) the spouses (reasonably) expected would be subject to joint management (so that both spouses' consent was required for all disposals and dealings);*[5] *or (c) needed to be subject to that regime in order to achieve a proper balance between the protection of both spouses (and in particular the wife's) rights and the need to preserve and protect spousal autonomy, commercial efficiency and third parties".*[6]

50 As to the identification of a critical event, the judge followed the approach of Barak P in *Shalem v Twenco* at [28]. He stated that a critical event or date occurs when an event takes place that shows that "*the marriage faces a real danger to its continuation because of a serious crisis between the spouses*" which "*significantly*

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4 *Shalem* v *Twenco* at [31] (reference added).
5 *Shalem* v *Twenco* at [29] (reference added).
6 *Shalem* v *Twenco* at [27] (reference added).

endangers the relationship between the spouses". or which is "*an unusual economic action in breach of the duty of good faith*". He also stated that "*the 'critical date' needs to be determined on a case by case basis, according to its circumstances*".

51 The judge's findings on the application of Israeli law to the present case are summarised in the next 8 paragraphs.

52 The judge found that there was insufficient evidence that Mr Perry and Lilly Perry had entered into an agreement to separate their property in or around 1998, the time of crisis in their marriage: J[258(a)] – [258(l)]. Although the Letter of Wishes was evidence that Mr Perry believed that there had been such an agreement, the letter also acknowledged that there was doubt and dispute as to whether Lilly Perry had actually agreed to his plan.

53 He also stated that neither the evidence given by Lilly and Tamar Perry nor Yael Perry's evidence sufficed to show that Lilly Perry was a party to a binding separation agreement. They all (see J[258(j)]) had a strong self interest in presenting the evidence about the existence or absence of an agreement in the way that they did. There was (see J[257(a)(iv)]) no documentary evidence recording an agreement and there were no contemporary documents referring to discussions about such an agreement. In the absence of contemporary documents corroborating their evidence, their accounts were (see J[258(j)]) to be given limited weight.

54 The judge's assessment of Tamar and Yael Perry' evidence is seen at J[257(b)] and J[257(c)(vii)].[7] For the purposes of the appeal, however, what is of prime importance is his assessment of Lilly Perry as a witness. He rejected key parts of her evidence. He described her as not an impressive witness, prepared to be evasive when confronted by a difficult question in a way which was damaging to her credibility: J[257](a)(v)] and see J[255(c)(vi). He also stated that in her evidence in these proceedings and in the SOCA proceedings she failed to take her responsibilities as a witness seriously "*and thereby failed to demonstrate that she could be treated as seeking to assist the Court by preparing herself properly and by providing honest, candid and complete evidence on all relevant issues*".

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[7] The judge referred at J[257(b) to Tamar as having a "*partisan attitude*" and frequently giving "*the impression that she was acting as an advocate in her mother's cause and determined to see the facts in a light that was favourable to her mother's cause*": J[257(b)(vii)]. He described the way Yael Perry gave her evidence as reinforcing an impression that she was concerned to follow a rigid and predetermined story and stated that it was clear that she remained hostile to her mother and to some extent saw these proceedings as an opportunity to thwart her mother and sister: J[257(c)(vii)].

55 He stated that Lilly Perry's denial of any knowledge of the trusts until Mr Perry's death and her statement that, had she known, she would have objected to the transfer of assets into trust was wholly inconsistent with her evidence that she believed in Mr Perry and would sign whatever he asked her to sign. She sought to disown her evidence in the SOCA proceedings, but the judge observed (J[255(c)(vi)]) that her answers in cross-examination were damaging to her credibility. If her attempt to disown that evidence is rejected, he stated that it was consistent with her having given up her rights under the non-statutory community property rule under an agreement: see J[258(c)]. But he also stated in that sub-paragraph that, even if her attempt to disown her SOCA evidence is not rejected, her evidence in these proceedings does not show that there was a separation agreement. It only showed that "she accepted that she did not have rights over Mr Perry's other assets", and "is consistent with her believing that she had no rights for other reasons": see J[258(c)].

56 As to the transfers of property and funds to Lilly Perry, the judge concluded that these did not suffice for an inference to be drawn that the couple had agreed to make a property separation agreement: see J[258(i)] and see also J[256] – [257]. Even if they had done so, it would not have been a binding agreement because, as it was not in writing, it did not comply with the requirements of the PRL. The judge accepted Professor Halperin-Kaddari's explanation of the decided cases which he had summarised at J[206(a)]- [206(d)] and found that it would not have been enforceable: J[249]-[251].

57 The judge found that there was no agreement by Mr Perry and Lilly Perry that after they moved to London in 1999-2000 their matrimonial property rights should be governed by English law and not by Israeli law: J[245(a)] –[245(j)]. He stated that, had he found that they had so agreed, because he preferred the evidence of Professor Shifman, Lopag's expert, he would have found that section 15 of the PRL does not require such an agreement to be in writing where the spouses are not domiciled in Israel: J[244](a)] – [244(h)].

58 As to consent, at J[259] the judge stated that he preferred the evidence of Professor Shifman as to the requirements of Israeli law. His reasons for doing so were largely based on the decision of the Be'er Sheva District Court on 27 March 2018 in *RC v AC,* case 269444-10-17 ("*RC v AC*") and the acceptance by Professor Halperin-Kaddari (Day 8, page 20, (J[264]) that "*consent can be implied, depending on the weight of the evidence*". But she had prefaced this by saying that this was so "*in theory*", suggesting a high threshold and also that "*consent must require knowledge. So to prove consent by conduct, one must obviously first cross the threshold of knowledge and awareness*".

59 The judge found that in the light of the evidence the threshold was met. Although Lilly Perry's evidence was that she did not trouble herself with details and did not understand the legal technicalities and business complexities in establishing and operating discretionary trusts, he found that she "*consented either to Mr Perry having the right and power to settle any assets including the Share into the family trusts he created or specifically to the transfer of the Share*" to Lopag: J[265] – [270]. His reasons were:

(a) Lilly Perry gave Mr Perry authority to deal with all the family's assets and their matrimonial property, with the possible exception of certain property "*which directly related to her domestic affairs (such as the properties in Israel which she intended to inhabit and personal items such as her collections of jewellery and fans*": J[265]

(b) She "*was aware that Mr Perry was actively and regularly engaged in tax planning and succession planning and that such activity involved the creation of foreign (including Liechtenstein) trusts and the transfer of family assets to (and sometimes from) such trusts*": J[268]. She assented to Mr Perry doing so "*and regarded him as authorised to do so*": J[269].

(c) The share in BH06 was one of those assets and was the type of asset that Lilly Perry was aware would be part of the tax and succession-planning arrangements conducted and controlled by Mr Perry. Her consent to his dealings for those purposes extended to the share: J[268].

(d) Lilly Perry knew of the existence and the purpose of a number of the trusts (including the Heritage Trust), had some contact with trustees, was a beneficiary of a number of the trusts, and was able to obtain and did from time to time receive funds from the trustees, to whom she had to apply to obtain them: J[268] – [269].

(e) In her evidence, Lilly Perry acknowledged that she would follow Mr Perry's directions. The judge stated that the clear inference to be drawn from her evidence is that she would approve whatever Mr Perry did and regarded him as having full control of and authority to deal with their financial affairs and relevant assets (for the purpose of tax and succession planning) and "*unfettered control of all decision making in relation to financial matters and arrangements relating to tax and succession planning*": J[268] - [269].

60 In the concluding paragraph of the section of his judgment on consent, the judge stated that he considered it likely that Lilly Perry relied on receiving, as a trust beneficiary and through the transfers to her of the assets that she regarded as important and of personal significance, her share of the matrimonial property. He also referred to the Letter of Wishes and to what he described as "*a continuing dialogue and debate (perhaps argument is a more accurate term) over how the trust assets would ultimately be distributed*" between Lilly, Tamar, and Yael Perry.

61 As to whether the share was a business asset, the judge rejected Professor Halperin-Kaddari's opinion that it could not be described as a business asset in the sense used by Barak P in *Shalem* v *Twenco* because the share was in a holding company and it was never traded: see J[281]. He stated at J[279] –[280] that the share should not be treated as an asset of a purely family character for three reasons:

(a) It was "*an asset closely connected to and part of Mr Perry's business which it was reasonable to expect he would need to transfer or otherwise deal with for purposes connected with his business*".

(b) In this marriage "*both spouses understood that Mr Perry would need and was to have the sole power to manage and dispose of investment assets for the purpose of tax and succession planning*".

(c) The share represented Mr Perry's "*investment in a number of companies with substantial operations and holding valuable assets for investment purposes. For example, BGNIC operated a substantial regulated insurance business. Solid Holdings held the Mobileye shares and their proceeds for investment….*" The share "*was not simply a passive family investment*".

62 The judge also held that the transfer of the share was not a "*critical event*" which crystallised Lilly Perry's interest. He had earlier (at J[273(g), [283] and [284]) referred to or quoted from *Shalem* v *Twenco,* and reached the conclusion, following the passage of Barak P's judgment in that case set out at [49] above that the transfer of assets including the share into family trusts was not such an event because of the understanding and expectation in the Perry's marriage, to which he returned at J [285]. He stated that "*it was understood and expected that Mr Perry would need and be able to have sole power to deal with assets which were part of or connected to his business activities and was to be able and authorised to deal with such assets not only for the purpose of carrying on the relevant businesses but also for tax planning and succession planning purposes*". He concluded that:

> *"to treat the transfer of the Share into the Lake Cauma Trust as a critical event and to allow [Lilly Perry] to assert her rights against [Lopag] (and the beneficiaries of the trust) would … fly in the face of the reality of the relationship between Mr Perry and [Lilly Perry] and their mutual understanding as to how the matrimonial assets were to be managed and dealt with":* J[285].

63 These findings made it unnecessary for the judge to decide whether defences of estoppel and waiver had been established by Lopag. The judge, however, stated (see [286] – [292]) that in his view neither defence had been established. This was the subject of a Respondents' Notice by the trustees.

The equitable mistake claim:

64 The judge reviewed the documentary and oral evidence concerning the mistake claim at J [139] to [166]. He stated that the evidence on which Lilly and Tamar Perry relied was limited and made the following findings:

(a) *The discussions between Mr Perry, FFW, and Lopag in 2000 when the Heritage Trust was established*:

i. Mr Perry's primary concerns concerned the tax consequences of creating the Heritage Trust and making distributions from it, and operational aspects of the functioning of the trust: J [157].The focus of discussion of the differences between Liechtenstein and English trust law with FFW, his English legal advisers, was about how the trust would function in practice and related mainly to the degree of influence the settlor would have on the trust rather than the rights and remedies of the beneficiaries: J [156].

ii. There was no evidence that Mr Perry sought or received advice from Liechtenstein lawyers at that time about the legal nature of a Liechtenstein discretionary trust and the rights and obligations created by such a trust: J [146]. The only advice Mr Perry took from Liechtenstein lawyers related to tax matters: see J [155] and see also J [145].

(b) *The circumstances surrounding the establishment of the Lake Cauma trust in 2013 and the transfer of the share in BH06 to the trust:* Mr Perry had decided to establish a Liechtenstein discretionary trust before his discussions with Lopag's representatives in 2013. There was no evidence that he sought or obtained any Liechtenstein law advice in 2013: J [147]. The creation and structuring of the Lake Cauma Trust and the decision to use Liechtenstein was driven by tax planning considerations: J [157]. The operational aspects of the trust were important to Mr Perry. This was because he considered that what was material was his ability as settlor to influence and limit the discretion that could be exercised by the trustees, and the ability of the protector, whom he trusted to carry out his wishes and act in his interests and those of his family, to oversee and where necessary control their activities and decision making.

(c) *Legal advice:* The judge stated (at J [154]) that in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 and the other cases relied on by the Appellants the existence of legal advice (in those cases that tax would not be payable) "*was an important fact that allowed the inference to be drawn*" that the person in question had made an assumption which was

then falsified. But in the last sentence of J [155] he accepted that the basis for inferring a mistaken belief or assumption could be found elsewhere.

(d) *Evidence about Mr Perry's conduct concerning the role of the trustees and the beneficiaries as a basis for inferring that he had a conscious belief or tacitly assumed that the beneficiaries of the Lake Cauma Trust would have effective remedies against the trustees in the Liechtenstein courts:*

i. The fact that the focus of the discussion in 2000 was not on the rights and remedies of discretionary beneficiaries but on the influence of the settlor supported an inference that Mr Perry's main interest was his own position and rights as settlor and the relationship he would have with the trustees in day-to-day management of trust property and business: J [160].

ii. In the absence of any evidence about his views as to the rights and remedies of beneficiaries, it did not follow from his belief that Lopag should not exercise independent discretion on investment and important trust decisions that he also believed or assumed that the beneficiaries could enforce the trustees' duties in the way that discretionary beneficiaries of an English trust could: J [164]. His belief was consistent with his focus on his own control rather than their legal entitlements.

iii. Mr Perry's concern in a general sense to make provision after his death for his family was in his mind at the time of the creation of the Lake Cauma Trust and the transfer of the share: J [162]. It was clear that he had in mind succession planning and the need to structure the arrangements so that the disputes between family members would not interfere with the administration of their trust property: J [162]. But it was also important that the arrangements satisfied the requirements of efficient tax planning. Again, in the absence of any evidence about Mr Perry's views as to the rights and remedies of discretionary beneficiaries, it did not follow from this concern that he held a view or made assumptions about the particular remedies available to beneficiaries in the Liechtenstein courts: J [163].

iv. The role and the position of the protector was set out in the trust deeds including the Lake Cauma Trust Deed which Mr Perry had read: J [164]. The evidence suggested (or it is at least consistent with the evidence) that Mr

Perry's concern was probably satisfied because he considered that after his death the protector, being a family member or a trusted adviser whom he could trust completely, would have critical decision-making powers that would direct and control the activities of the trustees: J [164].

v. Later in his judgment the judge stated that he considered that the comparison between the terms of the Damerino trust and the Lake Cauma Trust relating to the information rights of beneficiaries referred to at [30] – [31] above strongly suggested that Mr Perry was not concerned to give his family direct information rights in the Lake Cauma trust and was content to rely on the rights given to the protector to ensure that his family was protected: J [178(s)].

65 The judge concluded at J[167] that:

> *"[T]he conscious belief or tacit assumption alleged by [Lilly and Tamar Perry] … cannot be inferred. The evidence does not entitle the Court to infer that Mr Perry held any beliefs or made any assumptions about how the rights of and obligations owed to the discretionary beneficiaries would be enforced in the Liechtenstein courts or that he separately considered the position and litigation remedies of the discretionary beneficiaries. The evidence and primary facts surrounding Mr Perry's use of Liechtenstein discretionary trusts in general and the transfer of the Share to [Lopag] in particular do not support the inference that in deciding to create Liechtenstein discretionary trusts and effect the transfer Mr Perry had a belief or made an assumption as to the extent to and manner in which these rights and obligations could be enforced in Liechtenstein."*

He had referred at J [149] and [152] to Lord Walker's statement in *Pitt v Holt* at [108] that the line between mere causative ignorance and a mistaken tacit assumption may be difficult to draw, and that the court ''*should not shrink from drawing the inference of an [incorrect] conscious belief or tacit assumption when there is evidence to support such an inference*". At [168] he stated that in reaching his conclusions he had taken that into account and set out Lord Walker's words again.

66 In view of the judge's finding that there was no mistaken belief or assumption, it was unnecessary for him to consider whether, if Mr Perry had a belief or an assumption about the remedies available to discretionary beneficiaries under Liechtenstein law, he was mistaken. It was clear that if that belief or assumption was that they were in the same position as such a beneficiary under an English trust, he would (see J [171]) have

been mistaken. But what was the position if Mr Perry's belief or assumption was not that they were in exactly the same position but that that Liechtenstein law provided such beneficiaries with "*effective litigation remedies*"?

67 The judge considered that effectiveness required an ability to bring complaints and claims before the Liechtenstein court in a manner that, if the complaints and claims were well founded, could result in an adequate remedy, that is one which prevented the continuation of the breach of duty, provided compensation for it, or adjusted the administration of the trust so it was properly administered. He concluded at J[176] that "*the expert evidence show[ed] that Liechtenstein law, both substantive and procedural, provide[d] remedies which satisfy the requirement of effectiveness as so understood*" so that, even if Mr Perry held such a belief or made such an assumption, he was not mistaken.

68 The expert evidence and the differences between the experts are summarised at J [178(c) – (t)]. The judge found that there were significant differences between the position of the discretionary beneficiaries of a trust under English and Liechtenstein law, in particular the latter cannot make an application and automatically be a party to proceedings for relief under Articles 927/2 and 923 of the PGR. But they have access to judicial supervisory proceedings through the *ex officio* jurisdiction of the Liechtenstein court under Article 929 which enables the court to replace the trustee or appoint a co-trustee. At J [178(p)] the judge stated that, where the experts disagreed, he preferred the evidence of Mr Bruckschweiger which he found to be clear and cogent, and generally persuasive. He rejected the opinion of Dr Lorenz on which Lilly and Tamar Perry relied that a discretionary beneficiary was entirely reliant on the court to initiate and properly conduct supervisory proceedings under Article 929 and had very limited or no rights to intervene or influence the proceedings. He stated that Mr Bruckschweiger's opinion was soundly based on specific and clear statements by the Liechtenstein Supreme Court that in a case where the issue is whether the trustee should be admonished by reason of an alleged breach of duty the court "*will or at least is likely to treat a discretionary beneficiary as directly affected and join them as a party*". He had earlier set out the passage from § 9.15.7 of the 3 March 2017 judgment of the Supreme Court on which Mr Bruckschweiger relied.

69 In J[178(t)], the twentieth and last sub-paragraph of the judge's conclusions on Liechtenstein law, he referred to the Cayman Islands' STAR trust regime which was introduced by the Special Trusts (Alternative Regime) Act 1997. He observed that the STAR regime supports the conclusion that arrangements which make provision for discretionary beneficiaries to have limited rights but for protectors to have strong rights can be regarded as acceptable by settlors and to provide rights and remedies which are effective.

70 The judge dealt briefly with the question whether, if Mr Perry had a mistaken belief or assumption, it was sufficiently grave to make it unconscionable for the trustee to retain the property transferred. He stated at J [179] – [180] that the evidence demonstrated that Mr Perry was prepared to take the risk flowing from the loss of control of assets to a trustee holding the trust property under a foreign discretionary trust, but not that he accepted that his family as discretionary beneficiaries would be without remedies in the Liechtenstein courts.

D. The Approach to Appeals against findings of fact and of foreign law

71 The parties have placed a wealth of authority on the approach to be used in appeals against findings of fact and of foreign law before the court. The principles are well known. They are summarised in the next two sections. Their application to the findings of the judge in this case is considered at appropriate points when dealing with the appeals against his rejection of the matrimonial property and equitable mistake claims.

Appeals against findings of fact

72 Because a trial judge has heard the evidence and is in a better position to assess it and the witnesses, policy and principle require appellate courts not to interfere with findings of fact, the evaluation of those facts, and inferences drawn from them by trial judges unless compelled to do so: see the oft-cited classic judgments of Lord Hoffmann in *Biogen Inc v Madeva Plc* [1997] RPC 1 at [45], Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance* [2003] 1 WLR 577 at [16], and Lewison LJ in *Fage UK Ltd v Chobani UK Ltd.* [2014] EWCA Civ. 5, CTLC 49 at [114]. The position in this jurisdiction is the same: see *Vista del Mar. Dev. Ltd. v Seales & Co Ltd, Cayman Covenant Ltd. and Seales* CICA 3 December 1992, [1992] CILR Note 4 and *Primeo Fund v. Bank of Bermuda (Cayman) Ltd.*, CICA 13 June 2019, 2019 (2) CILR 1 at [127] – [130]. For a very recent example of the use of this approach, see *Pleshokov v Sky* [2021] UKPC 15 in which the Privy Council allowed an appeal from a decision of the East Caribbean Court of Appeal which had overturned findings of fact and inferences drawn from facts by a first instance judge.

73 The circumspection required means that there will be no interference unless the decision is "*plainly wrong*", by which is meant that there is either no evidence to support the challenged finding or that it was one which no reasonable judge could have reached: see the summary of the effect of recent UK Supreme Court decisions by Lord Briggs in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 at [52]. The Note of the *Vista del Mar. Dev. c*ase states that this court decided that even where there is no evidence that the trial judge misdirected himself, it should not interfere "*unless it is satisfied that the trial judge had not taken proper advantage of having seen and heard the witnesses and had, in consequence, arrived at an inexplicable or unjustifiable conclusion".*

74 The test, is the decision "*plainly wrong*", remains the same. But, as May LJ stated in *ST Dupont v EI du Pont de Nemours & Co* [2003] EWCA Civ. 1368, [2004] FSR 15 at [94], there is:

> "*a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.*"

A finding made purely on documentary evidence, such as the photograph in *Manning v Stylianou* [2006] EWCA Civ. 1655 on which the Appellants relied, for the submission that an appellate court is in just as good a position as the trial judge to evaluate that evidence, would be at or near the other end of the spectrum.

75 Where, however, a finding is based on both documentary and oral evidence, having regard only to the documentary evidence would be an example of what Lewison LJ in *Fage's* case described as "*island hopping*", and would fall foul of Lord Hoffmann's warning in *Biogen v Medeva* that specific findings of fact are inherently an incomplete statement of the impression which was made on the judge by the primary evidence.

76 As to evidence, the mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it: see Lewison LJ in *ACLBDD Holdings Ltd v Staechelin* [2019] EWCA Civ. 817, [2019] 3 All ER 429 at [31]. In *Henderson v Foxworth Investments Ltd.* [2014] UKSC 41, [2014] 1 WLR 2600 at [48] Lord Reed stated that "*an appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration*". At [57], he stated that the weight given to evidence is pre-eminently a matter for the trial judge and that an appellate court could set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration "*only if the judge's conclusion was rationally insupportable.*"

Appeals against findings of foreign law

77 A question of foreign law is treated as a question of fact to be proved in English law and in Cayman law by the evidence of suitably qualified experts in the relevant foreign law. It is common ground that in the absence of any Cayman authority on the approach to an appeal against a finding as to foreign law by the trial judge this court should adopt the approach in the English authorities.

78 There are a number of statements suggesting that a challenge on appeal to a finding of foreign law should not be treated as on all fours with one to ordinary findings of fact. Sir Jocelyn Simon P described a finding as to foreign law as a question of fact "*of a peculiar kind*", and Lord Neuberger that the notion that the resolution of a dispute as to foreign law involves a factual finding rather than a legal conclusion is somewhat artificial: see *Parkasho v Singh* [1968] P 233 at 250 and *Actavis UK Limited v Eli Lilly* [2017] UKSC 48, [2018] 1 All ER 171 at [93]. In *Dexia Crediop SpA v Comune di Prato* 2017] EWCA Civ. 428, [2017] 1 CLC 969 at [36] a strong Court of Appeal stated that, while the approach in *Fage v Chobani* is the starting point, "*it has … been recognised that [it] does not always apply without qualification to factual findings of foreign law*".

79 A useful summary of the approach of an appellate court to a trial judge's finding as to foreign law after hearing expert evidence can be found in the judgment of the English Court of Appeal in *MCC Proceeds Inc v Bishopsgate Investment Trust Plc* [1998] EWCA Civ 1680, [1999] CLC 417. At [12] – [13] the court stated that the approach varies according to the nature of the issue which arises in the particular case and the kind of decision which the trial judge and the Court of Appeal are called upon to make. It stated:

> "*Sometimes the foreign law, apart from being in a foreign language, may involve principles and concepts which are unfamiliar to an English lawyer. The English judge's training and experience in English law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given. The same applies, in our judgment, in the Court of Appeal. When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the Court is as well placed as the trial judge to form its own independent view.*"

80 It does not, however, follow, as the Appellants submitted (skeleton argument § 40, reply skeleton §21) that where the trial judge contributes his own legal skill and reasoning to derive relevant principles of foreign law from judgments of a foreign court to resolve a conflict of evidence between foreign law experts, "*such*

findings can properly be reviewed by an appellate court just as an appellate court reviews findings on domestic law".

81 *Parkasho v Singh* states that it is the appeal court's duty to examine the evidence of foreign law to decide for itself whether that evidence justifies the conclusion of the trial judge. But it is well recognised that, although it is less likely in the case of an expert witness that questions of credibility will arise, the demeanour of such a witness and his or her response to questioning may be important factors in deciding whether the evidence is reliable or not: *MCC Proceeds Inc v Bishopsgate Investment Trust Plc*. at [11]. In *Joyce v Yeomans* [1981] 1 WLR 549 at 556 Brandon LJ stated:

> "*… even when dealing with expert witnesses, a trial judge has an advantage over an appellate court in assessing the value, the reliability and the impressiveness of the evidence of the experts called on either side. There are various aspects of such evidence in respect of which the trial judge can get the 'feeling' of a case in a way in which an appellate court, reading the transcript, cannot. Sometimes expert witnesses display signs of partisanship in a witness box or lack of objectivity. This may or may not be obvious from the transcript, yet it may be quite plain to the trial judge. Sometimes an expert witness may refuse to make what a more wise witness would make, namely, proper concessions to the viewpoint of the other side. Here again this may or may not be apparent from the transcript.*"

82 An appellate court will be reluctant to overrule the trial judge where there are differing views as to a foreign law which is not based in any respect on common law. This is shown by two cases where the foreign law was Italian law, *Morgan Grenfell & Co. Ltd v SACE Istituto per I Servizi Assicurativi del Commercio* [2001] EWCA Civ. 193 and *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ. 428, [2017] 1 CLC 969. In *Morgan Grenfell* it was stated at [50] that in such a case "*there was less room for the judge to apply his own legal training and experience to help determine the relevant question, namely how … the Italian courts … would have resolved it*". See also [57]. At [51] the Court stated that the correct approach was "*to consider the evidence of Italian Law substantially in the same way as the other evidence of fact and opinion"* but for the judge to have "*at least some regard to his own training and experience in so far as it was relevant to the particular issues he was considering*".

83 An appellate court will be less constrained in two situations. The first is where, as in *Actavis UK Limited v Eli Lilly* [2017] UKSC 48, [2018] 1 All ER 171, the issue was the application of agreed principles of foreign law to the facts and the trial judge had not heard oral evidence from the experts. That may be the reason

that Lord Neuberger stated at [93] that the Supreme Court was "*in as good a position as [the trial judge] to analyse the effect of the evidence as to foreign law*". The second is where, as mentioned in the passage from *MCC Proceeds Inc v Bishopsgate Investment Trust Plc*. set out at [81] above, the foreign legal system has concepts which are similar to those of the jurisdiction in which the case is heard. In *MCC Proceeds* the English Court of Appeal considered this was so in relation to the construction of the Uniform Commercial Code. In *Ted Jacob Engineering Group Inc v Morrison* [2019] CSIB 22 the Inner House of the Court of Session stated at [17] that "*it is not difficult for a Scots lawyer to understand the legal concepts and rules of another civilian system*", in that case the UAE (Dubai), and at [26] that "*the rules of construction stated in the [Civil Code of the UAE] are not greatly different from those in use in Scotland*".

84 In *Dexia Crediop SpA v Comune di Prato* at [41], it was stated that as the editors of *Dicey, Morris & Collins on the Conflict of Laws* (15th ed., 2012) state at §9-010, subject to these exceptions:-

> "*... generally an appellate court, which will not have had the opportunity to put questions to the expert witness of foreign law, will be slow to substitute its opinion for that of the trial judge.*"

E. The Appeal against the rejection of the Matrimonial Property claim

The grounds and the submissions

85 The grounds of the appeal against the rejection of Lilly Perry's matrimonial property claim have been outlined at [4] above. They have several strands which to some extent overlap. The judge is said to have erred in finding that: (1) Lilly consented to Mr Perry dealing with family assets for tax or succession planning purposes by transferring them into trusts and that knowledge of the specific transaction transferring the share in BH06 was not required; (2) the transfer did not require a formal property agreement confirmed by the court in accordance with the PRL; (3) the share in BHO6 was a business asset so that he was permitted to deal with it without her consent unless there had been a "*critical event*" in their marriage; and (4) the transfer did not constitute a "*critical event*".

86 The first two strands involve the submissions that there was no consent in fact by Lilly Perry and that any consent by her did not satisfy the formalities required by Israeli law. The first and third strand involve considering the impact of the different approaches of Lilly Perry and her husband to passing money and assets to their children and grandchildren. The third and fourth strands, the appeals against the judge's finding that the share was a "*business asset*" and that its transfer was not "*a critical event"* do not arise if the appeal against his findings on consent are dismissed.

Consent in fact

87 Two factors lay at the core of Mr Brownbill's submission that the judge was not entitled to find that Lilly Perry had in fact consented to the transfer of the share. They were the different approach of the couple to gifts to children and grandchildren and the fact that initially Lilly Perry was not a beneficiary of the Lake Cauma Trust and until the amendment to the definition of the beneficiaries was excluded from it, so she was absolutely dispossessed. Mr Brownbill submitted that these factors meant that the finding that she consented to something that was contrary to her wishes was "*perverse, unsustainable on the evidence, and incompatible with the judge's other factual findings*" (skeleton argument, § 95). For similar reasons, he argued that the finding that the transaction was not an "*unusual transaction in breach of the duty of good faith*" and therefore did not constitute a "*critical event*" was not open to the judge. He also submitted (Reply skeleton argument, § 47) that another flaw in the judgment was that having found that Mr and Mrs Perry had not made a separation agreement, the judge ignored that finding when he considered the issue of consent.

88 Mr Fenwick submitted that the Appellants' point about the dispute between Mr and Mrs Perry was not in terms about whether assets should be put into trust and their point on absolute dispossession were new points not before the judge. Accordingly, they were not open to the Appellants.

89 I reject the first of these submissions. The reasons for the amendment to the definition of the beneficiaries of the Lake Cauma Trust were explored during the trial and in Mr Brownbill's closing submissions. Lilly's written evidence addressed the different attitudes of her and her husband to giving money to children and grandchildren, was not challenged in cross-examination, and the judge referred to those differences *inter alia* at J[255(b)] and J[270]. It may be that the focus of the difference between Mr and Mrs Perry was about the distribution of assets rather than the means of such distribution. Looking at the matter realistically, however, whether assets should be settled on trust for family members including children and grandchildren was within its general scope.

90 As to the submissions on the absolute dispossession point, it is undoubtedly the case, as Mr Brownbill submitted, that before the transfer of the share to the trust Lily Perry had been a joint owner. This was so whether or not the share was a business asset so that her joint ownership "*hovered*" over the assets in the way explained by the judge and summarised at [45(c)] above. It is also undoubtedly the case, as Mr Brownbill also submitted, that she is now a discretionary beneficiary of a Liechtenstein trust rather than a joint owner. Moreover, it is correct to state, as Mr Brownbill did, that the reason for the amendment to the

definition of the beneficiaries of the Lake Cauma Trust in December 2013 was explored at trial. But that exploration solely concerned the need to avoid the imminent extension of the reach of Israeli tax law over trusts.

91 There was no exploration with witnesses of fact of whether the initial omission of Lilly as a discretionary beneficiary of the Lake Cauma Trust was deliberate or a mistake. Mr Naeff's note of the March 2013 meeting before the creation of that trust might be invoked as support for the former. But there was equally no exploration of the reasons for this or whether the plan was (as the judge believed, see the passage from J[270] set out above) that she would receive her share of the matrimonial property through other means, as later envisaged by Mr Perry in the March 2015 Letter of Wishes. The fact that initially Mr Perry was also not a beneficiary may suggest that minimisation of liability for tax rather than the ultimate destination of the assets was the driving factor. Moreover, there was no exploration with the expert witnesses of the legal significance of initially excluding/omitting Lilly and then including her as a discretionary beneficiary.

92 In the light of the way the case was conducted at trial by the parties and the absence of such evidence, Mr Fenwick correctly submitted that the court cannot be sure of the legal significance of Lilly's initial exclusion or omission from the class of beneficiaries when the Lake Cauma Trust was created or of the significance of her later inclusion. In these circumstances, this court cannot take into account as a relevant factor that Lily Perry was not a beneficiary of the trust at the date of the transfer of the share in BH06.

93 In his written submissions for this appeal Mr Fenwick stated (skeleton argument para. 35) that logically the question is whether the share in BH06 is a business asset and whether its transfer to the Lake Cauma Trust was a critical event are prior questions to the question of consent. This, he said, is because no consent is required for dealing with business assets unless the transaction is a critical event in the marriage, which, as Mr Brownbill observed, includes a transaction regulating financial matters in case of death or divorce. The judge and both parties dealt with the question of consent first. In his written submissions Mr Fenwick said he was content to do so before this court because, if the judge did not err on consent, that was the end of the matter, but at the hearing he said (Day 2 page 55) that it was logical to look first at the factual position. In view of the overlap between the issues of consent and whether the transfer of the share in BH06 was a critical event it is convenient to deal with consent first here.

94 Accordingly, the first matter for consideration is whether on the evidence and the judge's other findings, it was perverse and not open to him to find that save in relation to property directly relevant to her domestic affairs, Lilly Perry in fact gave a general consent to her husband having power to deal with their assets and

to settle them on trusts. It was common ground between the experts that where writing and the formalities of the PRL are not required under Israeli law that consent can be implied by conduct, although Professor Halperin-Kaddari's evidence on this was more qualified. The next matter for consideration is the challenge to the judge's finding that Israeli law does not require specific knowledge of a particular transaction before effective consent can be given to that transaction.

95 There is some force in Mr Brownbill's submissions about the implications of the difference between Mr and Mrs Perry about gifts to children and grandchildren. That difference is a factor which had to be given due weight in deciding whether Lilly Perry's overall conduct between 2000 when Mr Perry created the Heritage Trust and May 2013 when he executed the transfer of the share in BH06 to the Lake Cauma Trust shows that she consented to him settling their assets, including the share, on trusts. But while that difference is a pointer away from inferring such consent, it is not inconsistent with the judge's finding and does not in itself mean that the finding was perverse and unsustainable on the evidence.

96 The judge found that Lilly Perry was not a credible witness. He rejected her evidence that she did not know of the existence and purpose of the trusts until after Mr Perry's death and that she would have objected to the transfer of the share in BH06. I summarised his assessment of her credibility at [53] – [55] above and his finding on consent at [58] above. I noted that he relied in particular on Lilly's own evidence that she would sign whatever she was asked to sign by her husband without any review, even when she was giving formal evidence in court proceedings. The judge stated that this showed the extent to which she treated her husband "*as being in complete control of her affairs*" and that she "*would accept whatever decisions he made":* J[255(c)(vii)] and J[265]. He rejected her oral evidence that "*in later years*" she took a different approach. He observed that she had not said in her evidence when or why her attitude changed or anywhere in her evidence that there had been a change in her relationship with her husband before the transfer of the share. She had also not listed the share in BH06 as one of her assets in her witness statement for the SOCA proceedings.

97 The last sentence of J[270], the concluding paragraph of the section of the judgment on consent, stated that there was "*no dispute over Mr Perry's authority and ability to transfer assets into the trusts*". The difference between the couple about gifts to children and grandchildren is also referred to by the judge in that paragraph. It cannot be said that he was unaware of it or did not have it in mind when reaching his conclusion. It is perfectly possible for one person to have a particular view on an issue but nevertheless to leave decisions on it or in general to another person or to defer to the views of that other person on that issue or in general. The judge rejected Lilly Perry's evidence on this and found that she knew of the creation

of the trusts and their purpose and had received funds from them. He also found abdication or deference by her in relation to Mr Perry's handling of their assets over a prolonged period, including putting them into trusts. In the light of those findings, the judge was entitled to find that she consented to him dealing with the family's assets for tax and succession planning purposes. This was particularly so since she had not listed the share in BH06 as one of her assets in her witness statement for the SOCA proceedings.

Is knowledge of the specific transaction required?

98 The Appellants submitted that the judge erred in ruling that Israeli law did not require knowledge of the specific transaction, here transferring the share in BHO6, in order for the consent of the relevant spouse (referred to as the untitled spouse) to be effective. They did not accept Professor Shifman's evidence which the judge largely accepted. They maintained that Professor Halperin-Kaddari's answer to the final question in re-examination (Day 9, page 50) that "*a general knowledge is not enough*" and "*there must be complete notification, awareness, understanding and consent and agreement*" was correct. They submitted that *RC v AC* shows that Israeli law protects spouses in Lilly Perry's position from being dispossessed of their matrimonial property rights without having prior specific knowledge of the transaction and real positive consent to it in advance.

99 The Appellants also criticised the distinction Professor Shifman made between transactions involving the matrimonial home where full knowledge and awareness by the untitled spouse was needed and those involving other assets where he distinguished the position of an intelligent person and that of an ignorant or illiterate spouse. On the latter question, they argued that the judge's summary did not accurately reflect that evidence. In the case of an ignorant or illiterate person, Professor Shifman had accepted that "*general knowledge*" or "*general information*" might not be enough but the judge's summary at J[215] erred in concluding that "*awareness meant understanding the situation*" and that "*this included knowing and understanding what the relevant transaction was*" without recognising the distinction made by Professor Shifman. Moreover, they submitted that, in the light of the finding at J[255(c)(vii)] that Lilly Perry would blindly sign whatever her husband asked her to sign, she could not be characterised as a sophisticated spouse. Accordingly, they maintained, it was not open to the judge to say that a general understanding of the situation without specific knowledge of the transfer of the share sufficed.

100 *RC v AC* concerned the transfer by the husband of 99% of the shares in two companies through which a carpentry business was run. He had transferred them to two of the couple's eleven children, all of whom had joined the business over the years. The husband's submission that his wife's general reliance on him in matters of business amounted to sufficient consent to deal with the shares was rejected. The Appellants

argued that despite accepting at J[263] that *RC v AC* contained a "*clear authoritative and recent statement of the applicable Israeli law*", the judge overlooked the significance of the rejection of the husband's submission. They also argued that he erred in relying on §38 of the judgment in *RC v AC* because that paragraph was concerned with opting out of the CPR regime using a "*property agreement*" which complies with the strict statutory requirements of the PRL rather than consent to transfers within the CPR regime. They submitted that his citation of the references in *RC v AC* at §§ 38 and 41 to the need for "*weighty evidence*" and "*real positive consent*" was therefore misplaced.

101 The Appellants submitted that it was "*plain*" that the judge "*simply misinterpreted RC v AC in so far as he purported to derive from it the proposition that a general consent by Lilly* [Perry] *to Mr Perry dealing with assets (as opposed to a specific consent to the transfer of the Share to Lopag) constituted sufficient consent*": see skeleton argument, §86. They maintained that this court is in just as good a position as the judge was to analyse the principles set out in *RC v AC* and to apply them to the fact of the present case.

102 What of the Respondents' submission that the specific knowledge of a transaction point is not open to the Appellants because it was not one of the questions the experts were asked to address and was not argued in their closing submissions? That must be rejected. The point was pleaded (see §§ 31.1 and 33.3 of the Appellants' Reply and Defence to Counterclaim), dealt with in the oral evidence of the Israeli experts on Days 9 and 10 of the trial and, albeit not in the detail deployed in the appeal, referred to in §§ 223 and 225-230 of the Appellants' closing submissions, and in the judgment: see J[223(a) and (c)].

103 The focus of the closing submissions on this matter was on the factual position rather than the requirements of Israeli caselaw. *RC v AC* was only referred to on two points, at §418 on the "*critical event*", and, at §§425.16 and 17, on whether an agreement dealing with less than the entire matrimonial property was a regular agreement or a "*property agreement*". But §418.18 refers to Professor Halperin-Kaddari's evidence on this point.

104 It was common ground between the experts that where writing and the formalities of the PRL are not required under Israeli law that consent can be implied by conduct, although Professor Halperin-Kaddari's evidence on this was more qualified. The question for this court on the knowledge of a specific transaction issue is whether the criticisms of the judge's treatment of *RC v AC* meant that his finding that the case supported Professor Shipman was obviously wrong so that it was not open to him to prefer Professor Shifman's view and in accordance with the principles set out at [81] – [84] above it is open to an appellate court to set that finding aside.

105 The discussion of consent in *RC v AC* must be seen in the light of the fact (see §§ 15, 19 and 45) that the shares in that case were business assets, and that it was common ground by the experts on Israeli law in the present case that for such assets no consent at all is required unless the transaction amounts to a "*critical event*". The appeal against the judge's finding that the share in BH06 is a "business asset" is considered at [112] ff below. But, for present purposes, it must be emphasised that the facts of *RC v AC* differ in several important respects from those of this case.

106 The first difference is that *RC v AC* concerned a one-off transaction whereas in the present case there had been a course of dealing going back to the creation of the Heritage Trust in 2000 in which Mr Perry had used Liechtenstein and BVI trusts of which Mrs Perry knew and from which she had benefited. Secondly, in *RC v AC* the factors relied on to show consent did not include the wife's conduct. They were a provision in the Articles of Association of one of the companies (§§40-41) and (see §43) the fact that the wife had been informed of the transfer and the reasons for it retroactively after the transfer. Not surprisingly it was held that consent could not be inferred from either. In the present case, however, the judge found (J[268], and see [59] above) that Lilly Perry was aware that Mr Perry was actively and regularly engaged in tax planning and succession planning involving the creation of such trusts and the transfer of assets to such trusts and had assented to him doing so. Thirdly, in *RC v AC* the primary motive for the share transfer was a family dispute: see § 14. Its purpose was to deprive the wife of her entitlement to a 50% share in the business which (see § 46) was the spouses' main source of income and to exclude all but two of the couple's children. In the present case the assets were placed in a family trust for tax and succession purposes.

107 The discussion of consent in *RC v AC* at §§ 39-43 is consistent with consent having to be proved as a matter of fact and that it could be implied from the circumstances without a requirement that implication was only possible where the spouse knew of the specific transaction. Consent was not proved in that case because the husband's evidence that there was consent (first raised when he was cross-examined at the trial) was rejected: see §§ 12, 42. There is no discussion of whether actual knowledge of a specific transaction was needed before there could be effective consent. Since there was no such knowledge in that case, if such knowledge is required under Israeli law, one would have expected the judgment to focus on that such knowledge.

108 In these circumstances, and in the light of the common ground between the experts referred to above that, where writing is not required under Israeli law, consent can be implied from conduct, the judge's finding that *RC v AC* supported Professor Shifman's view was one that was open to him. In conclusion it is to be

noted that the final response of Professor Halperin-Kaddari in re-examination (set out at [98] above) on which the Appellants relied, was not a response to a question on implied consent but on a situation in which a property agreement is required. Such an agreement must be in writing and be approved by the court: see [44(d)] above.

Inconsistency of the judge's finding of consent with his reasoning as to when a "property agreement" was required

109 The Appellants also submitted that if, contrary to their primary case, Lilly Perry had given general consent to Mr Perry having full control of and authority to deal with their financial affairs and assets for tax and succession planning purposes, that could not be binding and effective without a property agreement satisfying the formal requirements of the PRL. This it was said was because the consent implied from Lilly Perry's conduct was for the purpose of succession planning. It was submitted that in the light of the decisions in *Shai v Shai* and *BAM,* for consent to a transaction for that purpose to be effective, a property agreement was required. The judge had so found at J[247(c), (e) and (i)] and see [47] – [48] above. It was maintained that his finding that a property agreement was not required where consent to a transaction is implied for these purposes is incompatible with that finding. For the reasons given below I reject this submission.

110 The judge, as the Appellants' skeleton argument recognised, correctly identified the principles in *Shai v Shai* and *BAM*. For the reasons given above, he did not misunderstand *RC v AC.* He also recognised (J[247(h)]) that the fact that an agreement dealt with only part of a couple's assets did not preclude it requiring a "*property agreement*" within the PRL and stated that such an agreement could require a property agreement. Applying the approach in *Shai v Shai,* he stated that the fact the agreement dealt with only part of the marital assets was an indication that it was not looking forward to, contemplating, or designed to regulate rights to property on termination of the marriage but stated that it was not a decisive factor. As seen from the discussion at [46] – [48] above, *Shai v Shai* makes it clear that not all agreements between spouses about their property require a property agreement. In that case, Ben-Porat VP stated that to fall within the statute the agreement must be "*not simply forward-looking but is rather specifically designated for the event of death or divorce*" and referred to "*an ordinary agreement or granting of a gift or other transaction between the spouses throughout the marriage in accordance with the general law*" as one not requiring a property agreement. She thus recognised that spouses are entitled to enter into ordinary agreements concerning their assets.

111 In the present case, although the conduct from which the judge inferred consent in the present case in part concerned succession planning, it also concerned tax and investment planning and was not premised on the end of the relationship of the spouses. Like the transaction in *BAM* referred to at [48] above, it concerned dealing with assets during a long marriage which, albeit with the difficulties referred to at [15] above, subsisted.

The appeal on the Business Asset Issue

112 This ground also concerns the judge's application of Israeli law in the circumstances of this case rather than his identification of the principle. The Appellants accepted the judge's statement at J[277] set out at [49] above of the requirements for property to be a "*business asset*". They, however, submitted that he was wrong to characterise the share in BH06 as a "*business asset*" in which Lilly Perry would only share after the occurrence of a "*critical event*". They maintained that the judge "*failed to have any (or sufficient) regard*" to five matters. Two were the very significant value of the share and that to transfer it or deal with it would have "*a major economic impact*" on Lilly Perry's position "*and on her marriage to Mr Perry (in particular her position after Mr Perry's death)*". The third was that BH06 was a holding company which conducted no business of its own and no evidence that there was ever a need to transfer or deal with the share for business reasons. The fourth was that BGNIC had stopped taking new business some years earlier, and it was not anticipated that the share in BH06 would be traded.

113 The fifth matter relied on by the Appellants was that while the share in BH06 remained regulated by CIMA, it could not be disposed of without a lengthy prior approval process. They pointed to the use in *Shalem* v *Twenco* [2006] 2 Is. LR 430 at [27] of the protection of the spouses' residential apartment as an example of the middle path taken by the intermediate approach. Barak P stated that safeguarding the spouses' main property haven did not create "*a significant imposition on the rules of commerce*" because "*transactions in real estate involve lengthy and complex proceedings and both spouses should therefore be involved …*".

114 The Appellants reiterated their submission that Lilly Perry had not consented to her husband disposing of substantial assets for succession planning purposes. They also maintained that there was no evidence to support the judge's conclusion (see J [279] summarised at [61(a)] above) that it was reasonable to expect that Mr Perry might need to deal with the share in BH06 for reasons connected to his business and purposes connected with his business.

115 Although the Respondents submit that the appeal on this point is against a factual finding, strictly the error relied on is the misapplication of the agreed principles of Israeli law to the circumstances of this case. But the regime was described in *Shalem* v *Twenco* [2006] 2 Is. LR 430 at [27] as "*complex*", requiring "*distinctions between types of assets and spheres of activity and between different periods of time*". It is an example of a multifactorial evaluation of facts and factors. It is clear from the reliance by the experts in this case on *Shalem* v *Twenco* that what is needed is "*a fact sensitive assessment*" or evaluation of the different factors. That is what the judge sought to do in J [277] – [281]. In *Assicurazioni Generali SpA v Arab Insurance* [2003] 1 WLR 577 Clarke LJ stated at [16] that "*different judges can legitimately differ"* on such assessments and evaluations of factors which have to be weighed against each other. In such cases a reason for circumspection by an appellate court is that there may be no sharply defined borderline between a wrong conclusion and a merely different but possible conclusion. A challenge to such an assessment must either show that it was based on an error of law or that it was one that no reasonable judge could have made.

116 Was the judge's assessment based on an error of law? The fact that he did not find that the share was not a business asset because it was not illiquid was not such an error. The Appellants' reliance on a general comment by Barak P about the position of the matrimonial home is misplaced. It is not possible to derive a general rule about illiquid property or support for such a rule from that comment, from other parts of the judgment, or from the expert evidence. Such a rule would also be impractical. As the Respondents observed, there are assets which are undoubtedly business assets, for example the premises in which the business is conducted or shares in a private company, which may be illiquid.

117 Bearing in mind the caution needed by an appellate court when considering a matter concerning foreign law, it is to be observed that the Appellants' approach would potentially subject all illiquid assets to joint ownership throughout a marriage rather than, as the structure of the regime requires, only after "*a critical event*". It would significantly weaken the recognition in *Shalem* v *Twenco* of the autonomy of one spouse before a "*critical event*" to conduct business affairs without reference to the other. So, for example, Barak P stated at [27] that "*during the marriage, in the sphere of the everyday and normal management of assets and the sphere of the business activities of the spouses, it recognises an area of separate activity*". Earlier in his judgment, at [10], he had stated that "*the joint ownership rule seeks to preserve the autonomy and the independent identity of each of the spouses*" and that "*even within the framework of the joint ownership rule separate spheres of activity are recognized in which the spouses maintain and realize their independent will and their personal autonomy*".

118 Was the conclusion that the share was a business asset one that no reasonable judge could have made? It was clearly, as the judge stated at J[279], "*an asset closely connected to and part of Mr Perry's business*". BH06 was a holding company but it owned 100% of BGNIC, the business which played a central role in managing the Organisation, the German Pension Program, which produced much of Mr Perry's wealth. BGNIC's business had understandably been running down after the criminal and civil proceedings against the Organisation and Mr Perry. But it was still in existence and subject to regulatory supervision by CIMA at the time of the transfer of the share in 2013. That remained the position at the time of the trial in 2019 and 2020 and when the appeal was heard in April 2021: see Day 2, p 102. The judge was entitled to regard the factors at the time of the trial as pointing to the share being a business asset. As the Respondents submitted in para 108(2) of their skeleton argument, "*the fact that the insurance business of BGNIC was being slowly wound down does not turn the paradigm example of a business asset into a family asset".*

119 What of the submission based on the significant value of the share in BH06? The cases, especially *RC v* AC, suggest that value and whether an asset is the sole family asset are factors to be taken into account when considering whether an event is "*a critical event*". In that case the husband's 99% holding in the family carpentry business which was its sole source of income was not characterised as a family asset but the event, his transfer of the shares to two of the couple's eleven children, was held to be a "*critical event",* crystallising the wife's interest in 50% of the shares.

120 The last strand in the Appellants' submissions on this issue is that there was no evidence to support the judge's conclusion that it was reasonable to expect Mr Perry might need to deal with the share in BH06 for purposes connected to the business. It might have been helpful to spell out the reasons more fully. But given the judge's statements at [61] and [62] above, he was entitled to find that both spouses understood that Mr Perry would need and was to have the sole power to manage and dispose of assets for the purpose of tax and succession planning. In the light of that and in view of the connection of the share to Mr Perry's continuing investment activities, such as through the shares held in Solid, as well as its connection to BGNIC, to which the judge referred, he was also entitled to conclude that it was reasonable to expect Mr Perry might need to deal with the share in BH06 for business purposes.

The "critical event" issue

121 The focus of this ground and its link to the finding on consent was summarised at [105] – [107] above. Its basis is that the judge wrongly interpreted *Shalem* v *Twenco* and *RC v AC* which dealt with a very similar situation. The Appellants relied on the references in *RC v AC* at §§45 – 47 to removing a major asset from the spousal property by an act that was not part of the normal day to day management of the asset, and

which had significant consequences of both an economic and family nature. They submitted that Lilly Perry's reliance on Mr Perry could not justify her absolute dispossession from her rights over the share which was the consequence of its transfer. Given her attitude to matters of succession planning, they submitted that it was inconceivable that Mr Perry believed he was doing something to which she agreed, and he was thus in clear breach of his duty to act in good faith.

122 The Appellants are entitled to rely on the fact that the transfer was of an asset of very substantial value. But the judge's reasoning at J[285] reflects the fact-specific and sensitive inquiry required by *Shalem* v *Twenco* in determining whether a transaction is "*a critical event*". The evidence, including that given by Lilly Perry, entitled him to conclude that the transfer of the share in 2013 was not an event that fell within the first two of Barak P's three indicia of such an event: an event which meant "*the marriage face[d] a real danger to its continuation because of a serious crisis between the spouses*" or "*significantly endanger[ed] the relationship between the spouses*". That evidence was that save for a number of real estate assets and personal items that were important to her, Lilly Perry was content to allow her husband to deal with their assets for tax planning, investment and succession planning purposes as well as in order to conduct the relevant businesses, and to do so by transferring assets into trust. He had done this since the time of the creation of the Heritage Trust in 2000. It is for that reason that the Appellants' submission that *RC v AC* is closely analogous to this case and that the judge erred in his analysis of it and its application to the facts is misplaced. There are material differences between the factual circumstances of that case and the present case: see [105] ff above.

123 Did the judge err, as the Appellants submit, in concluding that the transaction did not fall within the third of Barak P's indicia in determining whether a transaction is "*a critical event*", whether the event was "*an unusual economic action",* because he found at J[285] that "*these transfers were not, and did not result in a breach by Mr Perry of his duty of good faith*"? They submit that the key factor is the unusualness of the transaction rather than a breach of the duty of good faith. *RC v AC* may, as they suggest, show that it is not necessary to plead that a transaction is in breach of the duty of good faith, but it does not follow that in determining whether a transaction constitutes "*unusual economic activity*" the evidence of how spouses had behaved in relation to their assets, in this case over a prolonged period, is not a relevant factor. Again, the evidence and findings as to what Lilly Perry was content with, including the transfer of assets into trust for tax and succession planning, is important. In the light of the evidence he accepted, the judge was entitled to find that in the context of their relationship the transfer was not "*unusual economic action*".

124 For these reasons, I would dismiss the appeal against the judge's order on the matrimonial property claim.

F. The appeal against the rejection of the equitable mistake claim

125 The Appellants submitted that the judge made four errors in rejecting their claim that Mr Perry mistakenly believed or assumed that Liechtenstein trust law and that the rights and remedies of discretionary beneficiaries under it were either not materially different from their rights and remedies under English and Cayman law or, in any event, were "*effective remedies*". The first of these is that because Mr Perry was a qualified lawyer it was "*likely*" that he was aware not only that the Liechtenstein legal system was materially different to the English system, but that discretionary beneficiaries did not or might not have the same rights as other beneficiaries and might have only limited enforcement rights.

126 The second error that is alleged is that, because there was no evidence that Mr Perry had sought or received advice on the rights of beneficiaries or engaged in discussion on those matters always aware of the rights from previous advice or discussion, no inference could be drawn that he held a belief or assumption about the level and type of protection available for discretionary beneficiaries by litigation in the Liechtenstein courts. The third error that is alleged is that the judge was not entitled to find that Mr Perry's primary concern in settling property on a Liechtenstein trust was tax planning, and that insofar as he wished to exercise control over the trustees this could be achieved by the protector's powers. The fourth error is that, even if Mr Perry did believe or assume discretionary beneficiaries would have effective rights under Liechtenstein law, he was not mistaken.

127 The first three alleged errors therefore challenge findings of primary facts and inferences the judge drew from the conduct or absence of conduct by Mr Perry. The question is whether the principles outlined at [71] – [76] above permit an appellate court to set aside those findings. The fourth ground challenges a finding as to foreign law and the question is whether the principles outlined at [79] – [84] above permit an appellate court to set it aside.

128 In substance, the Appellants' case amounts to the proposition that a general desire to provide for family members meant Mr Perry must have assumed they would have the rights of discretionary beneficiaries under English trusts or substantially similar rights. Rather chauvinistically, the model of effective rights presented in their written and oral submissions is entirely based on the position in English law. Moreover, the judge's fact-sensitive conclusions about whether inferences could be drawn from the evidence in this case have, as the Respondents' submitted, been re-characterised as matters of legal principle and conclusions of law.

129 The judge was entitled to take into account Mr Perry's background and experience. He was a sophisticated and very wealthy Israeli businessman who had managed his assets in a number of jurisdictions for many years, using advisors, including legal advisors, in several countries. It appears that his contact with Mr Oehri went back to 1983. In the light of this background, the judge was entitled to state that Mr Parry would have understood that Liechtenstein's legal system and litigation culture differed from England's. Mr Perry had originally qualified as an Israeli lawyer and had had many years' experience with Liechtenstein trusts and lawyers in Liechtenstein, England, and other countries.

130 There was, moreover, evidence from which the judge could conclude that Mr Perry's primary motive was tax planning and his own control of the trusts rather than the rights and remedies of the beneficiaries. It is summarised at [64(d)] above.

131 Importantly, the judge did not conclude that no inference as to Mr Perry's belief or assumption as to the rights of discretionary beneficiaries under Liechtenstein law could be made because there was no evidence that he had sought or received advice on the position of such beneficiaries. While he regarded the taking of such advice in *Pitt v Holt* and the other cases relied on by the Appellants as "*an important fact that allowed the inference to be drawn*", he accepted that the basis for the inference could be found in other evidence. He closely examined the other evidence relied on by the Appellants in this case (see [64(d)] above) but concluded that no inference could be drawn from the other evidence.

132 The Appellants relied heavily on Lord Walker's direction in *Pitt v Holt* that courts should lean in favour of drawing inferences from ignorance in appropriate cases and to similar statements in other cases. The judge was acutely aware of the direction. He referred to it three times and considered the other cases relied on by the Appellants. But he was also aware of the fact sensitivity of the answer to the question whether such an inference should be drawn. Lord Walker stated at [2013] UKSC 26 at [108] that judges should not shrink from drawing the inference "*when there is evidence to support such an inference*". The judge carefully considered the evidence before him. It cannot be said that, in accordance with the principles about the approach to appeals against findings of fact discussed in Part D of this judgment, there was no evidence to support his conclusion or that it was one to which no reasonable judge could come.

133 In view of this conclusion, it is not strictly necessary to consider the second limb of this part of the appeal, that the judge erred in concluding that Liechtenstein law provides discretionary beneficiaries with effective enforcement rights. It suffices to make two observations. The first is that the Appellants are not assisted by their submissions on what the judge said about the Cayman STAR trust regime.

134 The second and more substantive observation is that the judge carefully set out the opinions of the two Liechtenstein experts and his reasons for preferring Mr Bruckschweiger's evidence to that of Dr Lorenz. In evaluating their opinions, he was entitled to consider the passage from §9.15.7 of the Supreme Court's judgment on which Mr Bruckschweiger relied referred to at [68] above. It is clear from his judgment that he was aware of Dr Lorenz's view that the passage was wrong or was *obiter*. It cannot be said that no reasonable judge should have used that passage to assist him assessing the expert evidence. Indeed, on other issues, notably in relation to the matrimonial property claim, the Appellants argued on the basis of cases such as *Parkasho v Singh* that this court should examine Israeli cases, notably *RC v AC,* for just that purpose. Here the court is concerned with Liechtenstein law, a system very different to those of the Cayman Islands or England and Wales, and where the Liechtenstein experts were cross-examined for a day. The discussion of the approach to an appeal against a finding of foreign law in such circumstances at [77] ff above shows that this court is not in as good a position as the trial judge and cannot review his findings of foreign law in the way it reviews findings of domestic law as the Appellants suggest it should.

135 For these reasons, I would dismiss the appeal against the judge's order on the *~~matrimonial property~~ equitable mistake claim.

G. Conclusion

136 In view of the conclusions in Parts E and F of this judgment, it is not necessary to consider the submissions in the Respondents' Notice. For the reasons in Parts E and F, if the President and Field JA agree, the appeals on the matrimonial property ground and the mistake ground will be dismissed.

H. The application made by the Appellants on 6 August 2021

137 The hearing of this appeal was on 26 and 27 April 2021. On 6 August 2021, the Appellants, now represented by Conyers Dill & Pearman LLP, filed notice of an application to include a new ground of appeal and to stay the judgment in the appeal pending the determination of the application. On 30 August 2021 the court stayed the judgment and gave directions as to submissions and evidence on behalf of the Respondents and a reply on behalf of the Appellants. These were filed on 14 and 24 September and on 12 October 2021. On 28 October 2021 the court refused the applications and lifted the stay. These are its reasons for doing so.

138 The essence of the proposed new ground is the apparent bias of the judge as a result of his involvement in a summons he heard remotely on 1 June 2018 sitting in London. In it, the trustees successfully sought a declaration that a proposed agreement with a commercial litigation funder to fund their defence did not

constitute or involve unlawful maintenance or champerty in the underlying proceedings. Because the order was a final order, it could only be made by a judge sitting in the Cayman Islands, which McMillan J did on behalf of the judge on 18 July 2018. The ruling was handed down in a redacted form as *The Trustee* v *The Funder* Cause No. 98 of 2018 (NSJ) on 26 July 2018 and was published on 8 August 2018.

139 Relying on *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] QB 451 and *Halliburton Co v. Chubb Bermuda Insurance Ltd. and others* [2020] UKSC 48, [2020] 3 WLR 1474 it is submitted on behalf of the Appellants that the judge's involvement in the funding application gave rise to apparent bias and that he had failed to disclose this to them and to recuse himself from conducting the trial which started in February 2019. They also rely on the analogy of guidance provided by the requirements under *Re Beddoe* [1893] 1 Ch. 547 and other cases concerning the procedure when a trustee seeks directions as to whether to bring or to defend legal proceedings in that capacity. The Appellants' case is that they and their legal representatives did not know until 26 June 2021 of the judge's involvement in the funding application in the Cayman court and his ruling.

140 It is submitted by the Appellants that "*in the event that they are unsuccessful in their appeal on the Original Grounds*", the judgment be set aside, and a new trial ordered on the new ground. They also seek leave: (a) to inspect the court's file in respect of the funding application because they should have been parties to it, (b) specific discovery of documents relating to the judge's ruling in the funding application because they should have been parties to it; and (c) specific discovery of the documents relating to the application including copies of relevant court orders, the evidence filed, skeleton arguments, the funding agreement, and a transcript or note of the hearing.

141 The application was originally supported by affidavits of Lilly Perry and Tamar Perry, sworn on 5 August 2021, and of Yvo Gisler sworn on 24 August 2021, and a skeleton argument dated 20 August 2021.[8] Mr Gisler was employed by Lopag until November 2018 and gave evidence supporting an unsuccessful application by Lilly and Tamar Perry to adjourn the trial because of breaches by Lopag of its duties with respect to discovery: see J[48(a) & (b)]. The judge made adverse comments on Mr Gisler's credibility and reliability as a witness when rejecting the application to adjourn, and in his judgment dealing with costs on 1 December 2020.

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8 The Appellants' skeleton argument and their reply skeleton (referred to at [143]) were signed by Mr Paul Chaisty QC and another leading counsel not admitted in this jurisdiction for the purpose of the application.

142 In a letter dated 16 August 2021, Campbells, on behalf of the Respondent trustees, invited the Court to dismiss the application without any further order as being wholly without merit. They noted *inter alia* that it was telling that no evidence had been served from any of the appropriate lawyers at Walkers (Cayman) LLC who, until 6 August 2021, represented the Appellants throughout the four-year litigation before the judge and this Court. On 30 August, the Court ordered the Respondents to serve any submissions in response to the application, together with documents and evidence as to the relevant factual background and authorities upon which they relied, by 14 September. It gave the Appellants leave to respond to the Respondents within 10 days of receipt of the Respondents' submissions. As stated, it also stayed its judgment in the appeal.

143 The Respondents filed a skeleton argument on 14 September 2021 and an affidavit of Klaus Boehler sworn on 16 September. A further skeleton argument dated 24 September 2021, and affidavits sworn by Mr Nicholas Dunne on 22 September, by Mr Gisler on 24 September, and by Tamar Perry on 12 October were filed on behalf of the Appellants. Mr Dunne is the partner in Walkers who had conduct of the proceedings before the judge and of this appeal until 6 August 2021. Walkers remains instructed in respect of matters before the Grand Court in FSD 205 of 2017 (NSJ). Mr Boehler is on the Board of the 9th Respondent, a co-trustee of the Lake Cauma Trust. Tamar Perry's most recent affidavit was served as a result of a request in a letter dated 28 September 2021 by Carey Olsen, who represent Yael Perry. Carey Olsen asked the Appellants to file corrective evidence on the ground that Mr Dunne's evidence had the capacity seriously to mislead this court as to the date when the Appellants' legal representatives first became aware of the judge's decision in the funding application.

144 The skeleton argument and evidence by Lilly and Tamar Perry in support of the application state that the Appellants were ignorant of the funding application and the judge's involvement in it until after the hearing of the Appeal. Mr Gisler told Tamar Perry in 2019 that the trustees had obtained litigation funding for the proceedings and there was a reference to the existence of the funding agreement at the hearing on costs in September 2020 and in the judge's decision in December 2020. But the Appellants' case is that until 26 June 2021 they had no idea how the trustees had obtained such funding or that they had made an application to the Cayman court. It was only on that date that they and their legal team first ascertained the existence of a ruling by the judge on the matter. They submit that the failure to serve them in advance with the funding summons and evidence relied on deprived them of the opportunity to oppose it, and the failure after the hearing to disclose the judge's involvement deprived them of the opportunity to apply that the judge recuse himself.

145 Mr Gisler's August 2021 affidavit states that he was aware of discussions by Lopag as to whether to get approval for the litigation funding from the Liechtenstein court but did not know if an application had been made. It also states that he saw a first draft of a litigation financing agreement but was excluded from further discussions, did not see any more developed drafts, and did not tell Tamar Perry or anyone else about the contents of the draft he had seen. As to the Cayman court, in that affidavit he states that he "*never heard about any request*" and "*knew nothing of any application to the Grand Court of Cayman in relation to the funding".*

146 Mr Boehler's affidavit challenges Mr Gisler's evidence and seeks to demonstrate that significant parts of it are untrue. He exhibits documents which show *inter alia* that Mr Gisler: (a) commented on an early draft of the funding agreement, (b) was emailed a copy of the final draft and was involved in obtaining and collating the signature pages for it, (c) received a copy of the application to the Liechtenstein court, and (d) later emailed Nicola Boulton of Byrne and Partners LLP explaining the court's decision. Mr Boehler also exhibits documents showing Mr Gisler suggested amendments to a draft of his affidavit for the Cayman application, and received counsel's note of the hearing and unredacted copies of the judge's order and ruling in it.

147 In his most recent affidavit, Mr Gisler states that his earlier affidavit was sworn without access to any paperwork or emails, which were retained by Lopag. He states that, when he swore his affidavit, he honestly believed what is stated in it to be true and that, when faced with emails alleged to have been sent to him, he had no recollection of receiving or reading them, but that, having reviewed them, he did recall translating the Liechtenstein judgment.

148 Mr Dunne's evidence is that he was not aware of the judge's ruling until 26 June 2021. He states that, on that day, Mr Brownbill QC, leading counsel for Lilly and Tamar Perry at the trial and the appeal, told him that Mr Brodie QC, leading counsel for Yael Perry at the trial, had indicated that there was an anonymised report of a funding decision in relation to the litigation. Mr Dunne states that Mr Brownbill asked him to check and that the ruling was located shortly afterwards by junior counsel. He also states that it was not his or his firm's practice to review unreported decisions of funding applications and is unable to recall or identify any reason why, in 2018, he would have any reason to think that such a decision would be, or might have been, issued in relation to this litigation. He had not seen any of the articles by local firms referring to the funding decision and was unaware of them until reviewing Mr Boehler's affidavit. His recollection and a review of Walkers' files is that the firm was first informed of a funding agreement on 22 May 2020 when Campbells asked for permission to share the draft judgment with, amongst others, the trustees' litigation funders.

149 The reason Carey Olsen considered Mr Dunne's affidavit had the capacity seriously to mislead this court as to the date when the Appellants' legal representatives first became aware of the judge's decision in the funding application is that there had been without prejudice and privileged telephone conversations between Mr Brownbill and Mr Brodie on 7 and 9 April 2021, and email communications between 7 and 14 April 2021. Carey Olsen's letter, dated 28 September, asking the Appellants to file corrective evidence states that in one of the telephone conversations Mr Brodie informed Mr Brownbill of the Cayman funding decision and that Mr Brownbill was aware of it by 9 April. The significance of this is that, if true, it was almost three weeks before the hearing of the appeal. There were further exchanges between Conyers, Campbells and Carey Olsen on 5, 8 and 11 October 2021. Because all parties were unable to reach agreement that any email by Mr Brownbill setting out his recollection of what he was specifically told about the funding application would not constitute a waiver of privilege, there is no further evidence before the court. In Conyers' letter dated 11 October they state that they do not accept the inference that Mr Brownbill was fully aware of the funding decision and Segal J's involvement at the time of his conversations with Mr Brodie on 7 and 9 April.

150 There are a number of troubling features about the evidence and the circumstances. First, Tamar Perry knew in 2019 that the trustees had obtained litigation funding. There is no explanation by her of when the concerns she refers to in paragraph 15 of her August 2021 affidavit arose; when she instructed her legal team to investigate the matter; or of what changed on 26 June 2021. Mr Dunne's evidence is that his firm first knew of a funding agreement in respect of this litigation on 22 May 2020 but that it was a communication from Mr Brownbill on 26 June 2021 in the light of his exchanges with Mr Brodie that indicated that there was an anonymised report of a funding decision. The implicit suggestion is that it was the communication from Mr Brownbill which changed matters. Carey Olsen's letters, referred to above, state that that suggestion is seriously misleading. But, for the reasons explained, there is no evidence from Mr Brownbill or from Carey Olsen as to the date when the Appellants' legal representatives first became aware of the judge's decision in the funding application. Secondly, there is the fact that, as Mr Gisler now accepts, material and significant parts of the evidence in his August 2021 affidavit are not true and he knew of the Liechtenstein decision and the funding application and decision in the Cayman court. The Appellants invite the court to accept his evidence and that of Tamar Perry that, while he informed her in 2019 that the trustees had obtained litigation funding for the proceedings, he did not refer to the Cayman application and the decision made by the judge in 2018. Thirdly, because of the change of representation after the hearing of the appeal, those now representing the Appellants do not have first-hand knowledge of what transpired at the earlier stage.

151 The state of the evidence means that, despite the matters of concern, the court is not able to decide when the Appellants and their representatives knew of the judge's involvement in the funding application and decision, and whether there has been culpable delay in putting these matters before the court. In order to determine the matter, there would also have to be further consideration of whether, although Mr Dunne may not have been aware that the funding decision was published in a redacted form or of the articles by local firms about it, it would have been apparent from the decision or the articles that it concerned these proceedings. If so, there would also have to be further consideration of whether Walkers are open to criticism for not being aware of the position. If they are, that and the evidence of Mr Gisler's knowledge and involvement suggest that the first limb of the test in *Ladd v Marshall* [1954] 1 WLR 1489, that the evidence which the Appellants wish to adduce could have been obtained with reasonable diligence, would not be satisfied. For the reasons given below, however, the court has concluded that, whether or not there has been such delay, the new ground of appeal does not have the required prospect of success that would justify granting leave to amend.

152 The starting point is the test for apparent bias. It is clear from the Appellants' submissions that, although they rely on non-disclosure by the judge, their principal ground is his apparent bias because of his involvement in the funding application. The formulation of the test for apparent bias by the House of Lords in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103], and see [57], [59], [131] and [161] reiterated by the UK Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd.* at [52], is whether:

> "*the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the tribunal was biased"*.

It is clear from, for example, *Attorney-General of the Cayman Islands v Tibbetts* [2010] UKPC 8 and *Almazeedi v Penner* [2018] UKPC 3, 2018 (1) CILR 143 that the same test and approach applies in this jurisdiction.

153 In *Halliburton's* case, Lord Hodge also referred to Lord Hope's explanation in *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [2] and [3] of the term "fair-minded" and "informed" and the importance of context and stated that "*the 'real possibility' test ensures the exercise of a detached judgment"*. In *Helow's* case, Lord Hope at [2] and [3] stated that an observer who is fair-minded *"is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument"*; *"is not unduly sensitive or suspicious",* whose approach "*must not be confused with that of the person who has brought the complaint"* and that *"[t]he assumptions that the complainer makes*

are not to be attributed to the observer unless they can be justified objectively". But he also stated that such an observer is also not complacent but knows "*that fairness requires that a judge must be, and must be seen to be, unbiased",* "*that judges, like anybody else, have their weaknesses",* and that the observer "*will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially".* In short, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509 "*the fair-minded and informed observer is neither complacent nor unduly sensitive or suspicious*".

154 *Halliburton's* case concerned a presiding arbitrator appointed by the High Court because the party-appointed arbitrators could not agree and who was subsequently appointed as an arbitrator in two related arbitrations. In one of them he was appointed by one of the parties to the original case. The other party to the original case sought an order that the presiding arbitrator be removed on the ground that the circumstances gave rise to justifiable doubts as to his impartiality. Lord Hodge at [70] approved of the statements in *Davidson v Scottish Ministers (No. 2)* [2004 UKHL 34, 2005 1 SC (HL) 1 at [54] that "*the best safeguard against a challenge after the event … lies in the opportunity of making a disclosure before the hearing starts*" and that *"a proper disclosure at the beginning is in itself a badge of impartiality"*. But in *Halliburton's* case it was held that the presiding arbitrator's failure to disclose the existence of potentially overlapping arbitrations with one common party involving the same or overlapping subject-matter did not mean that he had to be removed. This was because the UK Supreme Court concluded that a fair-minded and informed observer looking at the facts and circumstances would not conclude that there was a real possibility of bias or that circumstances existed that gave rise to justifiable doubts about the arbitrator's impartiality.

155 The background to the funding application considered by the judge in this case is seen from Mr Boehler's affidavit in response to the present application. A redacted version of his earlier 3rd affidavit sworn in support of the funding application on 23 May 2018 is included in the exhibit to his recent affidavit. Paragraphs 21 – 34 of the 3rd affidavit summarise and seek to explain the main terms of the funding agreement. That agreement, which was before the judge, and the other documents exhibited by him and by Nicola Boulton of Byrne and Partners LLP and Loren Bowerman of Campbells in the evidence before the judge, are not exhibited in Mr Boehler's affidavit in response to the present application. He stated that this was because the provisions of the funding agreement and those documents are confidential.

156 The trustees' case to the judge was that they had been mandated to defend the proceedings brought by the Appellants by a decision of the Liechtenstein Court dated 15 February 2018. Mr Boehler's 3rd affidavit

stated that the Liechtenstein Court recognised that the effect of the proprietary injunction originally made on 17 October 2017 (see [2] above) was that Lake Cauma Trust did not have the necessary funds to do so and stated that the trustees' duty to safeguard trust assets meant they "*must ensure the appropriate financing"* to do so. The trustees concluded that they had no alternative to obtaining third-party litigation funding and made the application because they were concerned that under Cayman law the litigation funding agreement could be treated as maintenance or champerty which, at the time,[9] were crimes and torts in the Cayman Islands: see Mr Boehler's 3rd affidavit, § 11 and § 4 of the judge's ruling on the application. In § 12 of Mr Boehler's affidavit in response to the present application he states that the evidence he put before the judge was solely concerned with the funding agreement and that he did not give evidence on the underlying proceedings or their merits.

157 The judge's ruling states at § 11 that counsel for the trustees had confirmed that: (a) the only issue which arose on the application was whether, in entering the funding agreement, the trustees and the funder would be committing the criminal offence or tort of maintenance or champerty; (b) the application was not by the trustees for directions qua trustees; (c) the trustees had obtained an order from the court which they regarded as having jurisdiction to supervise their conduct as trustees, and (d) the application did not involve any consideration of whether the trustees were properly exercising their powers or otherwise acting in accordance with the applicable law and in the best interest of the beneficiaries.

158 The judge referred (at §§ 15-17) to his decision in *Re a Company v a Funder* FSD 68 of 2017(NSJ), 2017 (2) CILR 710. In § 45 of the earlier case he had set out the test that was to be applied and the features of a funding agreement and the factors that were of particular significance to the question of whether it was unlawful maintenance or champerty. He also stated that notice of such applications should in future be given to the Attorney-General (as was done in the present case). The judge reiterated (at § 15) the concerns he had expressed in the 2017 case as to the appropriateness of the court adjudicating on what as a matter of substance could be characterised as an advisory opinion. This was because it would not determine the issue of criminal liability or prevent the other parties in the funded litigation from claiming that the agreement constituted unlawful maintenance or champerty.

159 As to the funding agreement in this case, the judge applied the approach he had taken in the 2017 case. After considering each of the factors to which he had referred, he concluded that on the evidence before him the funding agreement did not constitute or involve unlawful maintenance or champerty. He was

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9 The law was changed by the Private Funding of Legal Services Act 2020.

concerned by the substantial amounts payable to the funder if the trustees' defence succeeded. But he did not consider that those sums were unrelated to the risks to the funder or were so large that they should be treated as creating an abuse or a material risk to the integrity of the litigation process. He was also concerned by what he described as the cross-collateralisation feature of the funding agreement under which it appeared that recoveries by the trustees of trust assets might be used to pay sums owed in respect of the costs of proceedings relating to the recovery of assets of other trusts. But he noted that the trustees remained accountable to the courts with jurisdiction over them in relation to the exercise of their powers as trustees and at § 26(b) concluded that on the evidence before him the views of the trustees about this feature of the agreement were reasonable and did not create a material risk of abuse.

160 For the reasons in the remainder of this section, the court has concluded that, having considered all the material and circumstances before us in the light of the approach required by the authorities, a fair-minded and informed observer would not conclude that there was a real possibility that the judge was biased in the substantive proceedings because of his involvement in the funding application.

161 The consideration and determination of whether the funding agreement was unlawful under Cayman Islands law did not involve consideration of the merits of the Appellants' claims against the trustees. It is true, as the Appellants' reply skeleton states, on the basis of the note of the hearing by Mr Fenwick QC and Campbells, that there was some consideration as to what would constitute "success" in the main proceedings. But as is apparent from § 26(a) of the judge's ruling, this was in the context of whether the size of the amounts payable to the funder if the trustees succeeded gave rise to an abuse or risk to the integrity of the litigation process rather than about the merits of the trustees' defence. In this case it was for the Liechtenstein Court and not the Grand Court to consider the issues as to the merits and other matters that would arise and be resolved in England and in these islands by a *Beddoe* application. Mr Boehler's evidence is that the Liechtenstein Court did so in its decision in February 2018. The fact that a number of funders had refused funding because they did not wish to be associated with the litigation in the light of the late Mr Perry's reputation also did not concern the merits of the trustees' defence to the Appellants claims.

162 While such matters are sensitive and will depend on the precise circumstances, there are other situations in which a judge dealing with an aspect of a case can properly also deal with the substantive underlying issue even where he or she has expressed a preliminary view. The observations in the cases that the fair-minded and informed observer is neither complacent nor unduly suspicious and that his or her approach must not be confused with that of the person who has brought the complaint are particularly pertinent. For example, a judge who has given a preliminary view on the merits of a case by refusing leave to appeal which is later

granted by other judges or by granting leave to apply for judicial review may sit in the substantive hearing: see *Dwr Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97 and *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB) at [73].

163 Again, in *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] QB 451 and the four other cases heard with it, the English Court of Appeal stated at [25] that:

> *"[t]he mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection".*

164 The position would be different where a judge committed himself to a view of the facts or decided that a party or a witness was a crook or a rogue so that he might not be able to put himself back into a state where he has no preconceptions about the merits of the case. So might it, where he has expressed a preliminary view "*in such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called on to revisit it*": see *Sengupta v Holmes* [2002] EWCA Civ 1104, 99 LSG 39 at [34]. But in the present case, it appears from counsel's note and the judge's ruling that there was not even a preliminary view or adverse comment.

165 The analogy which the Appellants seek to draw between the funding application and a *Beddoe* application is also in our view misplaced because of the difference between the purpose of a *Beddoe* application and the matters considered in it and the purpose of the funding application to the judge. In a *Beddoe* application, as Lightman J stated in *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220, 1225, "*the purpose of the application is to inform the judge as to the strengths and weaknesses of the trustees' case and the course to be taken, e.g. in respect of a possible compromise*". It was for that reason that he concluded that "*[i]t would be quite inappropriate for all this to be revealed to the court which has to try the case or the other parties to the litigation*".

166 It is also to be observed that, even in a *Beddoe* application by a trustee to inform the judge of the strengths and weaknesses of the trustees' case, if a beneficiary of the trust is an adverse party, although the beneficiary will be a necessary party to the application, it is not the practice for the beneficiary to be present at the hearing or to be served with the evidence put before the court: *Re Moritz* [1960] Ch. 251 and *Re Eaton* [1964] 1 WLR 1269. Although the practice can be adapted insofar as this is practicable in order to do justice in the particular circumstances of the case, the fact that the trustees needed litigation funding in order to

defend the underlying proceedings did not mean that justice required the beneficiaries to be given an opportunity to object to the application. The independent and informed observer would not expect an adverse party to litigation to be privy to the arrangements made to enable the other party to bring or defend the proceedings.

167 The judge's declaration that the proposed funding agreement was lawful would not have had an impact on the value of the trust property if the trustees' defence did not succeed but would have had a significant impact on its value if it succeeded. This is because the terms of the Lake Cauma trust included the customary indemnity clause for professional trustees. Clause 14.3 provided that the trustees "*shall be fully indemnified for any liability they may be exposed to due to their engagement and acting as Trustees of this Settlement"*. Clause 14.4 provides that they are to be granted a lien upon the trust fund in respect of all sums to which they are entitled under clause 14. This, however, is not in our judgment a factor relevant to the question of bias. The Appellants have to live with the indemnity clause and any resulting cost to the trust assets from the trustees successfully resisting the Appellants' claim.

168 The applications for leave to inspect the Court's file and for discovery of the documents referred to in Appendix C of the notice of application to amend are also rejected. They depend on the new ground of apparent bias. They would, in any event, be contrary to the practice approved in *Re Moritz* and *Re Eaton.* Even if, despite the confidential nature of the matters relating to funding that came before the court, some disclosure to the Appellants was required, as in *Halliburton's* case, the failure to make it did not mean that the judge was not entitled to sit on the underlying case brought by the Appellants against the trustees.

The. Hon Sir Richard Field, JA

169 I agree.

The Rt. Hon Sir John Goldring, President

170 I also agree.