IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 205 OF 2017 (NSJ)

IN THE MATTER OF THE ESTATE OF ISRAEL IGO PERRY DECEASED

B E T W E E N :

(1) LEA LILLY PERRY

(2) TAMAR PERRY

Plaintiffs

– and –

(1) LOPAG TRUST REG.
(a Trust Enterprise registered under the laws of the Principality of Liechtenstein)

(2) PRIVATE EQUITY SERVICES (CURAÇAO) N.V.
(a Company incorporated under the laws of Curaçao)

(3) FIDUCIANA VERWALTUNGSANSTALT
(an Establishment incorporated under the laws of the Principality of Liechtenstein)

(4) GAL GREENSPOON

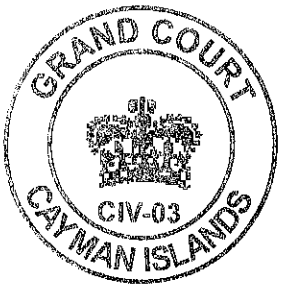
(5) YAEL PERRY

(6) DAN GREENSPOON

(7) RON GREENSPOON

(8) MIA GREENSPOON
(by **HAGAI GREENSPOON**, her *guardian ad litem*)

(9) ADMINTRUST VERWALTUNGS ANSTALT



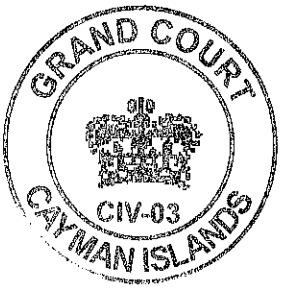
Defendants

HEADNOTE

Equitable mistake - claim by the estate of a deceased businessman to set aside an *inter vivos* transfer of a valuable share to trustees of a Liechtenstein trust on grounds of mistake – matrimonial proprietary rights – claim by the deceased's wife that the she had a joint interest in the share under Israeli law and that since the transfer was without her consent it should be set aside

JUDGMENT

Appearances:	**Mr David Brownbill QC instructed by Nicholas Dunne and Andrew Gibson of Walkers on behalf of the Plaintiffs** **Mr Justin Fenwick QC instructed by Mark Goodman, Shaun Tracey and Natasha Partos of Campbells on behalf of the First and Ninth Defendants** **Mr Graham Brodie QC instructed by Sam Dawson and Ardil Salem of Carey Olsen on behalf of the Fifth Defendant**
Date of trial:	**20-22, 25-28 February 1, 4 and 5 March 2019**
Further written submissions On further discovery:	**18 April 2019**
First Defendant's summons For permission to file new Evidence:	**2 October 2019**
Hearing of summons:	**24 October 2019**
Judgment on summons:	**24 October 2019**
Further hearing dealing with new evidence:	**9-10 January 2020**
Closing submissions after further hearing:	**17 January 2020**
Draft judgment circulated:	**21 May 2020**
Judgment circulated:	**27 May 2020**



Introduction and summary of my conclusions

1. This is my judgment, following trial, dealing with the Plaintiffs' claims relating to the share (the ***Share***) in Britannia Holdings (2006) Ltd, a company incorporated in the Cayman Islands (***BHO6***).

2. The Plaintiffs seek to set aside the transfer of the Share by the late Mr Israel Igo Perry (***Mr Perry***) to the First Defendant. The Share was to be held on a discretionary trust governed by Liechtenstein law. The trust is called the Lake Cauma Trust. The First Defendant was the original trustee of the Lake Cauma Trust. Subsequently the Ninth Defendant was also appointed a trustee.

3. There are two claims made by the Plaintiffs acting in different capacities. First, the First Plaintiff (who is Mr Perry's widow) claims that the transfer was made in breach of her proprietary rights in and to the Share arising under Israeli matrimonial property law, so that Mr Perry was not entitled to transfer the Share and to the extent he did so the transfer should be set aside as against her (the ***Israeli Matrimonial Property Claim***). Secondly, the First Plaintiff and the Second Plaintiff (who is the elder daughter of the First Plaintiff and Mr Perry) also claim, in their capacity as the representatives of Mr Perry's estate for the purpose of these proceedings, that the transfer was made by mistake (the ***Mistake Claim***). In particular, they argue that Mr Perry was mistaken as to the rights of discretionary beneficiaries under Liechtenstein law to enforce the obligations owed by the trustee and to apply to the court in Liechtenstein to remove the trustee and for other relief.

4. Both claims arise in the context of Mr Perry's relationship with his family and the investment and management of the wealth created by his business activities. The Mistake Claim arises out of Mr Perry's use of and transfer of assets into Liechtenstein trusts. The Israeli Matrimonial Property Claim arises out of the marriage and relationship between Mr Perry and the First Plaintiff and their use and treatment of such wealth and assets. There is a common context relevant to both claims. However, each claim involves different periods and fact patterns. The Mistake Claim focusses primarily on the reasons for and circumstances surrounding the creation of the Lake Cauma Trust on 1 May 2013 and the transfer of the Share to the First Defendant as trustee of the Lake Cauma Trust on 15 October 2013. The Israeli Matrimonial Property Claim focusses primarily on the nature of the relationship between Mr Perry and the First Plaintiff and the way in which they dealt with the property acquired or used by them

during their marriage in the period up to the transfer of the Share to the First Defendant on 15 October 2013.

5. Both claims also arise in the context of two, related, hotly contested and acrimonious disputes. The first is between the First Plaintiff and the Second Plaintiff on the one hand and the Fifth Defendant, the younger daughter of Mr Perry and the First Plaintiff, on the other. There is sadly a long history of tensions and disputes within the Perry family, in particular between the First Plaintiff and her daughters. There remains a serious split within the family over the division and use of the family's wealth following Mr Perry's death in March 2015. The second is between the First Plaintiff and the Second Plaintiff on the one hand and the First Defendant on the other. The First Plaintiff and the Second Plaintiff believe that the First Defendant has deliberately and improperly sought to deprive them of their entitlements and acted in breach of duty as trustee of a number of settlements established by Mr Perry. These proceedings followed, and are largely a consequence of, the failure of the First Plaintiff and the Second Plaintiff to obtain the relief they were seeking against the First Defendant in proceedings in Liechtenstein. In these proceedings the Fifth Defendant has opposed the relief sought by the Plaintiffs although she has not always remained uncritical of the conduct of the First Defendant. While the Plaintiffs, the First Defendant and the Fifth Defendant have often sought to explain each other's conduct by reference to these ongoing complaints and hostilities, and while criminal proceedings have been launched in other jurisdictions and there have been a number of decisions in other courts in which criticisms and adverse findings have been made against the First Defendant's representatives and others, I have generally not found it necessary to decide whether the Plaintiffs' complaints against the First Defendant or the First Defendant's complaints against the Plaintiffs are justified. The alleged misconduct, while in some cases relevant to credibility of certain witnesses, is not directly relevant to the Mistake Claim or the Israeli Matrimonial Property Claim.

6. The trial of the Plaintiffs' claims concluded on 5 March last year. During the trial, additional discovery documents were obtained from a law firm that had originally declined to disclose them on grounds of privilege. The parties requested that they be given the opportunity to file, and I gave directions for the filing of, further written submissions dealing with those documents by 18 April 2019. Further written submissions were filed on that date and I deal with the submissions made below when discussing all the evidence relied on by the parties. On 25 September 2019, I confirmed to the parties, via my personal assistant, that I intended to distribute my judgment on or before 9 October 2019.

7. However, shortly after that, on 30 September 2019, Campbells (the Cayman attorneys for the First Defendant) wrote to the Court and filed an affidavit of Mr Fernando Linares (***Mr Linares***) (the First Defendant's lawyer in Panama) that, in turn, exhibited translated statements from various individuals that included allegations that the Second Plaintiff had been involved in the fabrication of share certificates for a Panamanian company, European Holdings Investment Incorporation (***EHI***) in order to seize control of it from the First Defendant. The First Defendant claimed that this new evidence was highly relevant to the evidence given by the Second Plaintiff at trial on the subject of the ownership of EHI and to the credibility of her evidence in general. Subsequently, the First Defendant issued a summons seeking permission to adduce and rely on the new evidence.

8. The Second Plaintiff strongly denied the allegations and asserted that the new evidence was itself manufactured and improperly obtained. She accepted that permission should be given for the filing of further evidence by both the First Defendant and herself and alleged that the First Defendant's reliance on the further evidence demonstrated that it was behaving dishonestly (in that it had conspired with those who had produced the new evidence to advance a false case against the Second Plaintiff). She issued a summons on 15 October 2019 seeking an order that the First Defendant's defence and counterclaim, which following a judgment and directions I had previously given, was not dealt with at the trial, be struck out on the basis that the First Defendant had advanced false evidence regarding the allegation that the Second Plaintiff had been involved in the fabrication of the EHI share certificates (the ***Strike Out Summons***).

9. The First Defendant and the Plaintiffs eventually agreed that the Court should permit the filing by each of them of further evidence relating to issue of the share certificates in EHI and the Fifth Defendant filed submissions confirming that she did not object to this approach (although she had her doubts as to whether the filing of further evidence on the EHI issue was necessary). There were however differences of view as to the nature of the further evidence to be filed, in particular as to whether evidence from a handwriting expert should be given, and the scope of the proposed further hearing and the parties invited the Court to give a ruling on what directions should be given. Following a hearing on 24 October 2019, I delivered an *ex tempore* judgment on that day. I gave permission for the further evidence to be adduced but declined to order that further expert evidence be filed and ordered that there be a further but short hearing at which the new evidence could be tested by cross-examination. I said as follows:

> *"7. Carey Olsen [the Fifth Defendant's attorneys] question whether in these circumstances the new evidence would be likely to make a material difference to the outcome of the dispute, and therefore whether the second limb of the applicable test is satisfied in this case. There is, I consider, force in this view. However, in circumstances where the Trustees and the Plaintiffs have applied for permission and agreed that permission should be granted to rely on the further evidence and where that evidence does raise serious questions as to the honesty and integrity of (including the possibility of criminal conduct by) the parties – and therefore goes to and could significantly impact on the credibility of the Second Plaintiff and the Trustees, it is, in my view, right to grant the permission sought.*
>
> *8. But it is also important to have regard to the circumstances in which the applications are being made and to the overriding objective. In particular, the need to deal with the proceedings justly and proportionately. I am not satisfied that it is necessary or appropriate for experts to be appointed in order to deal with the issues raised by the fresh evidence. The allegation that the EHI share certificates relied on by the Second Plaintiff were forged and that the Trustees have manufactured, or procured the manufacture of, that evidence is based on affidavit evidence given by witnesses who, I understand, are available for cross-examination. It seems to me that their evidence can be properly tested by cross-examination at a short hearing (of a maximum of two days) to be listed shortly after the further evidence has been filed.....*
>
> *9. ..... The Court is not seeking to adjudicate on the question of whether the certificates were valid. Rather the Court must form a view of the evidence and its impact on the credibility of the parties for the purpose of deciding the issues in these proceedings. It is important, in view of the stage at which these applications have been filed, for there to be as little delay as possible to the conclusion of the proceedings and that these proceedings not be used as a vehicle for, or become caught up in, the resolution of a different – albeit hotly fought and related – dispute between the parties. Therefore I decline to make any order for the appointment of experts."*

10. I confirmed my view of the scope and purpose of the further hearing by email dated 7 January 2020 sent to the parties (via my personal assistant):

> *"The hearing has been listed for the limited purpose of allowing the evidence regarding the alleged forgeries of April 2018 to be tested by cross-examination."*

11. The further hearing was held on 9 and 10 January this year. The Strike Out Summons was also listed to be heard and submissions were made in relation to the Second Plaintiff's strike out application. Closing submissions were filed, after the conclusion of the hearing, on 17 January (the Fifth Defendant did not attend the hearing or make further submissions).

12. I have concluded that the Mistake Claim and the Israeli Matrimonial Property Claim should both be dismissed:

    (a). as regards the Mistake Claim, I have decided that the Plaintiffs have failed to show that on the evidence Mr Perry held the beliefs or made the tacit assumptions which they say he held (in my view the Court cannot and should not infer that Mr Perry mistakenly had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma

Trust would have effective rights as beneficiaries to apply to the court to enforce the trustee's obligations). I do not consider that the evidence establishes that Mr Perry turned his mind to litigation remedies at all nor that he considered or assumed that the litigation remedies for discretionary trust beneficiaries in Liechtenstein would be the same as those available in England. In addition, even had he made an assumption that, in a general and non-technical sense, the rights and remedies of the beneficiaries in Liechtenstein law and procedure would be "*effective*", he did not make a mistake.

(b). as regards the Israeli Matrimonial Property Claim, I find that there is insufficient evidence that when the First Plaintiff and Mr Perry moved to London they agreed that their matrimonial property rights were to be governed by English law; there is insufficient evidence that the First Plaintiff and Mr Perry entered into a binding separation agreement of the kind relied on by the First Defendant and even had they done so, such an agreement would have had to be in writing and approved by the Israel court in accordance with the requirements of Israeli law. However, I find that the First Plaintiff did consent to Mr Perry making transfers of matrimonial property, including the Share, into trust for tax planning and succession planning purposes and so cannot challenge the transfer of the Share to the First Defendant. I have also concluded that the Share is not to be treated as an asset of a purely family character, that Mr Perry did, under applicable Israeli law, have power and authority to transfer the Share (and other assets) for tax planning and succession planning purposes and that the transfer of the Share to the First Defendant was not a critical even which resulted in that power and authority being terminated. As a result of these conclusions it was not necessary for me to reach a concluded view on the estoppel and waiver defences relied on by the First Defendant although I do comment on these issues.

The witnesses of fact at trial

13. I heard evidence at the trial from four factual witnesses for the Plaintiffs and four factual witnesses for the Defendants.

14. The Plaintiffs' witnesses were the First Plaintiff, the Second Plaintiff, Mr Hagai Greenspoon and Mr Israel Wolnerman. I have already outlined the relationship of the First Plaintiff and the Second Plaintiff to Mr Perry and the Fifth Defendant. A brief description of the role of Mr Greenspoon and Mr Wolnerman is as follows:

(a). Mr Greenspoon is an Israeli lawyer. He was married to the Second Plaintiff in 1990 but they separated in December 2011 and, following divorce proceedings conducted during 2012, were divorced in May 2013. Mr Greenspoon and the Second Plaintiff had four children together, who are the fourth, sixth, seventh and eighth defendants in these proceedings (the eldest two children are adults and Mr Greenspoon was appointed the guardian ad litem of the other two children for the purposes of this litigation). After he married the Second Plaintiff, Mr Greenspoon started working with Mr Perry.

(b). Mr Wolnerman is also a qualified Israeli lawyer who had begun acting for Mr Perry at the beginning of 2008.

15. The First and Ninth[1] Defendants' three witnesses at trial were Mr Louis Oehri, Mr Dominik Naeff (I use this spelling throughout rather than Näff) and Mr Florian Zechberger. The role of Mr Oehri, Mr Naeff and Mr Zechberger can be outlined as follows.

(a). Mr Oehri was a founding member of the First Defendant which he established in 1989. He stepped down from an executive role in late 2016 (after he underwent heart surgery) but remains on the First Defendant's board. In February 1980, he joined Praesidial Anstalt, which was at that time the biggest trust company in Liechtenstein and worked for Praesidial Anstalt for almost a decade (until 1989), initially as an auditor and then as vice president and head of one of its major departments. During the course of his work for Praesidial Anstalt he met Mr Perry and Dr. Dieter Neupert. He first met Mr Perry in 1983. When Mr Oehri moved to the First Defendant, Mr Perry became a client of the First Defendant.

(b). Mr Naeff is a member of the board of the First Defendant. He joined the First Defendant on 1 March 2010, at which time the First Defendant was largely managed by his father in-law, Mr Oehri. Mr Naeff has been a board member of the First Defendant since 9 March 2010. In the first few years after he joined the First Defendant he worked as a client advisor and manager of accounts and had overall responsibility for approximately half of the mandates managed by the First Defendant, including the trusts established by Mr Perry.

[1] The First and Ninth Defendants are the current Trustees of the Lake Cauma Trust. They were jointly represented at the trial. For convenience, in this judgment, where I refer to submissions being made by the First Defendant, this is a reference to both the First and Ninth Defendants.

(c). Mr Zechberger is a partner of the Liechtenstein law firm that has been acting as legal counsel for the First Defendant in proceedings in Liechtenstein. He gave evidence as to the history and status of those proceedings.

The Fifth Defendant also gave evidence. Once again, I have already outlined the Fifth Defendant's relationship with the Plaintiffs and Mr Perry.

16. I will not summarise here my view of the credibility and reliability of each of these witnesses. Rather I shall deal with this below when discussing their evidence on the important issues and the extent to which I have decided to accept or reject that evidence.

The issues of foreign law – the experts at trial

17. Liechtenstein law is relevant to the Mistake Claim. The Plaintiffs adduced expert evidence on the rights of discretionary beneficiaries under Liechtenstein law from Dr Bernhard Lorenz. The First Defendant adduced expert evidence from Mr Christoph Bruckschweiger.

18. Dr Lorenz is a lawyer qualified in Liechtenstein and admitted to the Liechtenstein bar. He has practised law in Liechtenstein on a self-employed basis since 2002. He is a partner in the firm of the firm of Lorenz Nesensohn Rabanser. Mr Bruckschweiger is also a lawyer qualified in Liechtenstein and admitted to the Liechtenstein bar. He has practised law on a self-employed basis since 2005 and since 2010 he has been a partner in the firm of Wolff Gstoehl Bruckschweiger. Dr Lorenz filed an expert report dated 21 December 2018 (***Dr Lorenz's First Report***) and a reply report dated 28 January 2019 (***Dr Lorenz's Reply Report***). Mr Bruckschweiger filed an expert report dated 21 December 2018 (***Mr Bruckschweiger's First Report***) and a reply report dated 28 January 2019 (***Mr Bruckschweiger's Reply Report***). Dr Lorenz and Mr Bruckschweiger filed a joint expert report on 18 January 2019 (the ***Liechtenstein Joint Report***).

19. Both Dr Lorenz and Mr Bruckschweiger appeared to be well qualified and competent Liechtenstein lawyers. They both sought to assist the Court and generally gave helpful and credible answers to the questions put to them. As I explain further below, on the critical Liechtenstein issues in dispute I generally found Mr Bruckschweiger to be more persuasive and to provide more cogent and well-grounded justifications for his opinions.

20. Israeli law is relevant to the Israeli Matrimonial Property Claim. The Plaintiffs' Israeli law expert was Professor Ruth Halperin-Kaddari. The First Defendant's Israeli law expert was Professor Pinhas Shifman.

21. Professor Halperin-Kaddari is a professor of law and the Founding Chair of the Rackman Centre at Bar-Ilan University in Israel. In addition to her work as a professor, Professor Halperin-Kaddari has, since 2007, been a member and Vice President of the Expert Committee of the UN Committee on Elimination of All Forms of Discrimination against Women, where she also heads the Working Group on Inquiries. She earned her LL.M and J.S.D. at Yale Law School, and served as law clerk to the former Chief Justice of the Supreme Court of the State of Israel, Professor Aharon Barak. She publishes extensively in her areas of expertise, including on family law, legal pluralism and feminism.

22. Professor Shifman is a professor (emeritus) of family law and succession law of the Faculty of Law of the Hebrew University in Jerusalem, Israel. He earned his LL.M, LL.B and Dr. Jur. from the Hebrew University, has held academic posts in Israel and the United States and served as a law clerk to Justice Silberg, Deputy-President of the Supreme Court of Israel. He has also published extensively and is the author of a textbook on Israeli family law.

23. Professor Halperin-Kaddari filed an expert report on 21 December 2018 (***Professor Halperin-Kaddari's First Report***) and a reply report on 5 February 2019 (***Professor Halperin-Kaddari's Reply Report***). Professor Shifman also filed an expert report on 21 December 2018 (***Professor Shifman's First Report***) and a reply report on 5 February 2019 (***Professor Shifman's Reply Report***). Professor Halperin-Kaddari and Professor Shifman filed a joint report, which was not dated (the ***Israeli Law Joint Report***).

24. Both Professor Shifman and Professor Halperin-Kaddari were impressive witnesses. They clearly are enormously experienced and knowledgeable in both Israeli family law and related legal disciplines. It is clear that Israeli law jurisprudence on the issues relevant to the Israeli Matrimonial Property Claim was often unsettled and the underlying principles were often not clearly stated in or settled by the case law (I must point out that on occasions the debates over the case law was seriously hindered and limited by the wholly inadequate and incomprehensible translations provided to the Court of a number of the judgments referred to in the expert evidence, such that I have only been able to rely on and use those cases where a

comprehensible translation was provided). It was therefore perhaps unsurprising that Professor Shifman and Professor Halperin-Kaddari often adopted fundamentally different positions. I found both to be convincing on different issues, as will become apparent from the discussion below. They both sought to assist the Court and provide full and helpful responses to questions although it seemed to me that on occasions Professor Halperin-Kaddari strained too hard to fit the case law into, and to derive clear and bright line (and rigid) rules (particularly with respect to formalities) from the case law to reflect, her strongly held view that each element of the law must provide maximum and inflexible protection to wives.

25. The Fifth Defendant did not adduce any expert evidence on Liechtenstein or Israeli law.

The New Evidence

26. The new evidence is relied on by the First Defendant for two main purposes. First, to support its submissions that the Second Plaintiff could not be relied on as a witness of fact when giving evidence at the substantive trial in March 2019 (and when giving her further evidence). She had sought to mislead the Court both during the trial and in the course of the further hearing and had fabricated false instruments in Panama in order to do so. Secondly, to rebut the allegation made at trial by the Plaintiffs that the First Defendant had sought, dishonestly, to obtain control over EHI by making false statements to the effect that it had lost the share certificates in EHI that it owned and held and persuading certain Panamanian lawyers to issue new certificates.

27. The new evidence is relied on by the Second Plaintiff to support her claim that the First Defendant has knowingly advanced a false case on the EHI share issue so as to damage the Second Plaintiff's credibility as a witness in these proceedings.

28. There is a dispute between the First Defendant and the Ninth Defendant on the one hand and the Second Plaintiff on the other as to who owns the shares in EHI. They both claim to be in possession of EHI share certificates and other documents that establish their status as the sole shareholder of EHI. But the ownership of EHI is not an issue that falls to be decided in these proceedings. It is a live issue in proceedings in Panama and has been raised in other proceedings in Israel and Liechtenstein (the EHI shares are valuable as EHI owns, amongst other things, a controlling interest in a company – Kikar Albert Limited - that owns valuable real estate in Israel).

29. The new evidence, while raising very serious allegations of dishonesty, are primarily relevant in these proceedings to a much narrower and limited set of issues, namely the extent to which it has been proved that the Second Plaintiff and First Defendant have behaved dishonestly by manufacturing evidence and whether as a result their evidence in these proceedings is to be disbelieved or given substantially less weight, and whether the First Defendant should be sanctioned by the striking out of its defence and counterclaim.

30. Because of the time at and manner in which the new evidence was filed, there has been a serious risk of it assuming disproportionate significance and distracting attention from the core issues in these proceedings. The new evidence gave rise to the risk of there being a trial within a trial. It was for that reason that I was only prepared to allow limited further evidence to be filed and a short further hearing. I do not downplay the seriousness of the allegations made and deal with these allegations and the new evidence below, but I do not intend to consider the evidence and disputes in great detail. To do so would be both disproportionate and add further length to an already overly long judgment. Furthermore, as will become clear from my discussion below, I do not, for reasons given below, give substantial weight to or substantially rely on the written or oral testimony of the Second Plaintiff or the First Defendant when deciding the Mistake Claim and the Israeli Matrimonial Property Claim so that their credibility is not an issue of great significance. I shall however briefly explain the nature of the parties' positions and submissions, assess the evidence and provide my conclusions. I do so at this point in the judgment, before dealing with the background to and arguments made in relation to the Mistake Claim and the Israeli Matrimonial Property Claim because the new evidence raises a discrete set of issues which can conveniently be dealt with separately and before discussing the evidence given by the Second Plaintiff and the First Defendant at trial.

31. According to the First Defendant, EHI is a company that is now owned by the Citizen Trust, one of the trusts established by Mr Perry (having previously been held in another one of Mr Perry's trusts, the Heritage Trust). The First Defendant asserts that share certificate number 12 (***Certificate No 12)*** is the latest and valid share certificate in the company which is held by it. The First Defendant says that the evidence makes it clear that EHI has always been understood as being owned by the trusts established by Mr Perry. EHI was mentioned by Mr Perry in the Letter of Wishes he dictated shortly before his death (as to which see below) as a trust company and in the Second Plaintiff's first and sixth affidavits in these proceedings as being owned by a trust.

32. The First Defendant provided details of the history of the issue and transfer of bearer and nominee shares in EHI (thereby effectively deducing title to Certificate No 12):

(a). it asserted that the original bearer share certificates were executed on 26 April 1991 (there was one bearer share and twenty four blank certificates – the twenty four blank certificates were produced because share certificates were always printed in books of twenty five) (the ***First Defendant's Certificates***). These certificates were signed and notarised by Mr Ovidio Arauz Pitti (***Mr Pitti***) and Cecilia Alveo de Arauz (***Ms de Arauz***), who is Mr Pitti's wife. Mr Pitti and Ms de Arauz were the original subscribers for shares in EHI. However, the First Defendant relied on documents in which Mr Pitti and Ms de Arauz disclaimed any interest in the shares and asserts that the First Defendant has been the sole shareholder of EHI since it was incorporated. The originals of the First Defendant's Certificates were shown to Mr Pitti (and produced in Court) and Mr Pitti during his cross-examination gave evidence that he recognised the originals "*Because those are the ones that I printed. The security paper that I use is what I use in my method.*"

(b). on 25 January 2013, the original bearer share was cancelled and replaced by five nominee (or nominative) share certificates (certificates numbered 2 to 6) in the name of the Heritage Trust. The First Defendant produced copies of these certificates in evidence.

(c). then on 1 June 2013, the Heritage Trust assigned the shares to the Ludwig Polzer-Hoditz Foundation (now the BGO Foundation). Certificates numbered 2 to 6 were cancelled and certificates numbered 7 to 11 were issued in favour of the BDO Foundation. Copies of these certificates were also put in evidence.

(d). on 7 January 2016, the shares were assigned to the Citizen Trust and the certificates numbered 7 to 11 were cancelled and a new certificate issued in favour of the Citizens Trust (Certificate Number 12).

33. The Second Plaintiff asserts that she is the owner of EHI and has relied upon share certificates (the ***Second Plaintiff's Certificates***) which were also dated 1991 and signed by Mr Pitti and Ms de Arauz (and a minute of an extraordinary general meeting of EHI's shareholders of the same date) (the minute and the Second Plaintiff's Share Certificates being the ***Second Plaintiff's Documents***).

34. The First Defendant (and the Ninth Defendant) however assert that the Second Plaintiff's Documents were forged and rely on the circumstances surrounding the forgery to support the submissions I have summarised above. The First Defendant relies on the evidence of Mr Pitti and Ms de Arauz that in March or April 2018 they were contacted through Facebook by Ms Gonzalez, then the Second Plaintiff's legal adviser in Panama (who is now dead) and were paid to sign the Second Plaintiff's Documents which were dated 1991. The First Defendant submits that the Second Plaintiff either directly or indirectly (a) arranged for false instruments in EHI to be created in April 2018; (b) falsified notarial stamps which purported to show that these documents were notarised in 1996 and (c) agreed to pay individuals (notably Mr Mordok) to give evidence to this Court which both the Second Plaintiff and they knew to be false.

35. The First Defendant called or served evidence from the following witnesses:

(a). Mr Pitti. Mr Pitti said that he worked with Dr Boutin, a Panamanian lawyer and provided services as a nominee subscriber, director and officer of companies registered by Dr Boutin. He gave brief evidence as to the circumstances in which he came to sign the Second Plaintiff's Certificates in April 2018. In his first affidavit he just exhibited an affidavit that he had filed before the Fifth Public Notary of the Circuit of Panama (dated 6 August 2019) and provided further details of relevant events in his second affidavit. He said that he had been contacted by Ms Gonzalez on his mobile telephone (which contains details of the phone number of Ms Gonzalez) around the end of March 2018 (he revised his initial statement that this had been in April 2018 based on the dates of bank deposits he made when depositing the funds he says were paid to him by Ms Gonzalez). This was after Ms Gonzalez had contacted his son by way of a Facebook message. Mr Pitti and Ms Gonzalez arranged to meet at the Sheraton Hotel in Panama City. Ms Gonzalez handed him a cheque in the sum of US$ $5,000. At a meeting the following day also attended by Ms de Arauz Ms Gonzalez handed him a further check for $1,000. He says that these were significant sums for him and his wife. He said that the payments were "*to cover some personal needs.*" He said that he cashed the cheques and used the funds to pay family expenses and make deposits in his son's bank account (and produced evidence from his son's deposit book showing deposits of $2,000 on 28 March 2018 and $1,000 on 2 April 2018).

(b). Ms de Arauz. Ms de Arauz also signed documents as nominee subscriber, director or officer at the request of Dr Boutin or Mr Pitti. She just exhibited her affidavit filed before

the Fifth Public Notary of the Circuit of Panama in which she set out the circumstances in which she signed the Second Plaintiff's Documents in 2018. She said that she and Mr Pitti had met Ms Gonzalez at the Sheraton Hotel in April 2018, who had asked them to sign the documents "*since supposedly [they] had not waived the right as a subscriber of shares in [EHI]*" and they had agreed to sign "*in good faith, signing and stamping our fingerprint on them.*"

(c). Mr Zechberger gave evidence about the proceedings in Liechtenstein relating to EHI in which the Plaintiffs had refused to provide original documents to the Liechtenstein court, despite this being expressly ordered on two occasions and as to the events in Israel regarding Kikar Albert Limited.

(d). Ms Nicola Boulton ***(Ms Boulton)***. Ms Boulton is a partner in Byrne and partners, the First Defendant's London solicitors. She filed three affidavits. Her sixth affidavit was filed in support of the First Defendant's application for permission to adduce further evidence and her eighth affidavit was filed to exhibit documentation which had been located by the First Defendant from various sources and which she considered to be relevant. Her sixth affidavit contained various conclusions which she had reached after reviewing the documentation then available to her including the conclusion that the evidence relied on by the First Defendant and which had recently been obtained in Panama, confirmed that documents that had been relied on by the Plaintiffs during the trial had been fabricated. She referred to the proceedings in Liechtenstein and said that the evidence from Panama made it clear why the Second Plaintiff had not produced the originals of the Second Plaintiff's Documents. The evidence of Mr Pitti and Ms de Arauz was credible and showed that Mr Pitti and Ms de Arauz had signed them in 2018 at the request of the Second Plaintiff's Panamanian lawyer for money, in order to assist in a dispute that Ms Gonzalez told them concerned brothers depriving their sister of her rights.

(e). Mr Linares. He was the First Defendant's Panamanian lawyer. He set out details of EHI's corporate history and the events in Panama relating to the Second Plaintiff's attempts to assert ownership of EHI. He explained why in his view the 1991 minute of an extraordinary general meeting of EHI's shareholders relied on by the Second Plaintiff was not consistent with and failed to comply with Panamanian law. He said that in September and October 2017 the Second Plaintiff had been able to remove

and appoint directors of EHI by writing to Panamanian lawyers and signing documents stating that she was the owner/shareholder in EHI and by purporting to pass shareholder resolutions. He said that initially the Second Plaintiff did not claim to have share certificates in her possession and it was not until April 2018 that she first produced and relied on the Second Plaintiffs' Share Certificates in Panama.

36. The Plaintiffs' case was that the First Defendant's allegation was false because there was overwhelming evidence that the Second Plaintiff's Documents were in existence long before March/April 2018 so that it was impossible that those documents could have been forged in March/April 2018 in the manner now alleged by the First Defendant in reliance on the evidence of Mr Pitti and Mrs de Arauz. The Second Plaintiff filed evidence from various third parties to the effect that they had seen the Second Plaintiff's Documents in periods before April 2018. The Plaintiffs relied on the evidence of the following witnesses:

(a). the Second Plaintiff. She denied having procured, or having instructed Ms Gonzalez to procure, any false documents. She said that she first became aware of the Second Plaintiff's Documents in the last quarter of 2017 when Mr Greenspoon called her to explain that he had found documents relating to EHI among his old papers, including EHI share certificates in her name. She asked him to send the certificates to her assistant in Israel so that a notarised copy of the documents could be produced. She arranged for her friends, Natasha and Barak Roffman, to take the documents to a notary. They took them to Mr Guy Dov Zuzovsky (***Mr Zuzovsky***) and had a copy notarised, on 31 December 2017. She subsequently visited Israel in January 2018 when her friends handed over the documents to her. On 25 January 2018, she met a group of Israeli-Panamanian businessmen, among them Mr Josef Mordok (***Mr Mordok***) with whom she discussed the disputes with the First Defendant in relation to EHI. Mr Mordok offered to assist and obtain Panamanian legal advice. So the Second Plaintiff gave him the original Second Plaintiff's Documents to take with him to Panama for this purpose. In or around 6 March 2018 she met Mr Mordok again, in Zurich when Mr Mordok introduced her to Mr Rafael Ruiz (***Mr Ruiz***), who was the former FBI attaché in Panama. He offered to provide assistance to the Second Plaintiff in her "*worldwide battles with [the First Defendant], particularly on the criminal side of the matter.*" In her view the evidence of Mr Pitti and Ms de Arauz that they signed the Second Defendant's Certificates in April 2018 was demonstrably false. The Second Defendant's Documents existed long before April 2018. She was unable to think of a plausible reason why Mr Pitti and Ms de Arauz

would have spontaneously come forward to give false evidence to attack her credibility (and that of Ms Gonzalez who was dead and unable to defend herself). The only possible explanation in her view for their evidence was that the First Defendant or its agents had persuaded Mr Pitti and Ms de Arauz to produce false evidence in support of the First Defendant's case.

(b). Mr Greenspoon. He gave evidence that he had discovered the Second Plaintiff's documents among previously archived papers in or around 14 December 2017.

(c). Mr Zuzovsky, an Israeli notary and lawyer. He gave evidence that he notarised copies of the Second Plaintiff's Share Certificates on 31 December 2017.

(d). Mr Mordok, a Panamanian businessman, who gave evidence that he had been given the Second Plaintiff's Documents by the Second Plaintiff on or around 28 or 29 January 2018. He said that on 25 January 2018 he had met the Second Plaintiff in Israel with some of his colleagues and she had explained to him that she was having trouble in connection with EHI in Panama and invited him to go to her office to discuss these issues further. At a subsequent meeting on 28 or 29 January 2018, the Second Plaintiff explained to him that the First Defendant had been trying to deprive her of her rights as a shareholder of EHI. She told him that she had share certificates which recorded that she was the sole shareholder in EHI. Mr Mordok says that he then suggested that he could assist by arranging for his Panamanian lawyer to look into the matter and review the status of EHI. The Second Plaintiff then gave him the originals of the Second Plaintiff's Share Certificates together with the original of the minutes of the EHI shareholders' meeting. He said that he returned to Panama on 31 January 2019 and engaged, on behalf of the Second Plaintiff, Ms Gonzalez (as to civil matters) and Mr Giovanni Olmos (as to criminal matters). Ms. Gonzalez and Mr Olmos attended a meeting with Mr Mordok at his office on 20 February 2018 at which he briefed them and gave them copies of the Second Plaintiff's Documents (Ms Gonzales subsequently died on 7 July 2019). On 8 October 2019 he contacted Mario Velasquez Chizmar (***Dr Chizmar***), another Panamanian notary, who he believed had notarised the Second Plaintiff's Documents on 13 March 1996 and Dr Chizmar agreed to provide an affidavit confirming the authenticity of those documents.

(e). Dr Chizmar. He gave evidence that he had notarised the Second Plaintiff's Documents on 13 March 1996 (that is more than twenty two years before the date on which the First Defendant alleges that the Second Plaintiff's Documents were created). He said that he had been given copies of the Second Plaintiff's Documents and, even though since the documents were signed many years ago and he had been unwell in recent years, he was unable to recall actually signing them, from his inspection of the copies provided to him he recognised the notary seals and his signature and believed them to be authentic and genuine.

(f). Mr Ruiz, a former attaché to the FBI in Panama, who says that he saw a share certificate in EHI in the Second Plaintiff's name at meetings in Zurich on 6 and 7 March 2018.

37. Following the cross-examination of these witnesses the First Defendant made the submissions I have summarised above and argued that the evidence established that:

(a). EHI had been treated as a company owned by Mr Perry's trusts for many years and the Second Plaintiff had been of the same view and not asserted her claim to be a shareholder until April 2018.

(b). the First Defendant's Share Certificates had been in existence and relied on for many years before Mr Perry's death.

(c). the Second Plaintiff's Share Certificates were printed on a modern printer and so cannot have been produced in 1991.

(d). there was no explanation as to why the Second Plaintiff's Share Certificates had been notarised at all, let alone in 1996 when no changes were made to EHI (even on the Plaintiffs' case).

(e). no one other than the Second Plaintiff, Mr Greenspoon and Mr Mordok claimed to have seen the original of the Second Plaintiff's Share Certificates as allegedly certified in 1996. The Plaintiffs had consistently resisted making the alleged originals available for independent inspection and the only explanation for this could be that the notarisation was not authentic (which was supported by an analysis of the colour copies of what was

said to be the originals of the Second Plaintiff's Share Certificates where the notarial stamp was black suggesting that the stamp had been photocopied from elsewhere).

(f). there were numerous errors in the corporate documents relied upon by the Second Plaintiff which did not comply with the provisions of Panama law.

(g). there was no explanation as to how the Second Plaintiff's Share Certificates were in the possession of Mr Greenspoon or how this was only fortuitously discovered shortly after the Second Plaintiff started to assert that she was the owner of all the shares in EHI.

(h). the Second Plaintiff had entered into a contingency fee agreement (which had not been provided to the Court) with Mr Mordok in which he was to be paid a substantial sum for, on the Second Plaintiff's case, instructing lawyers to register a genuine share certificate in Panama. The level of remuneration was not consistent with an agreement with Mr Mordok to provide legitimate services.

(i). it was not in dispute that Ms Gonzalez contacted Mr Pitti and that they met in March 2018 (the authenticity of the Facebook messages being unchallenged and an innocent explanation for the contact, other than to procure the production of false certificates, had only been provided by the Plaintiffs on the second day of the hearing). The meeting could only have taken place on instructions from the Second Plaintiff. If she had the Second Plaintiff's Share Certificates in her possession at the time, there would have been no need for Ms Gonzalez to contact Mr Pitti (whether to carry out due diligence or otherwise) and certainly no reason not to disclose the fact and content of such meeting if free from fraud.

(j). both Mr Pitti and Ms de Arauz had given clear evidence as to what happened in April 2018 which should be accepted by the Court. The fact that Ms de Arauz was plainly confused during her cross-examination about some of the documents and was seemingly overwhelmed by the process of giving evidence did not detract from her evidence on the critical issue.

(k). there was no motive for Mr Pitti or Ms de Arauz to have given false evidence. During their cross-examination it was not suggested to either of them that they were bribed or paid for giving evidence in these proceedings. Ms Boulton had also confirmed that she

was not aware of any payment being made to them and that no payment had been, so far as she was aware, authorised.

38. The Plaintiffs submitted that:

(a). in order for the Court to accept the First Defendant's allegations the Court would have to reject the evidence not only of the Second Plaintiff, Mr Mordok, and Mr Greenspoon but also the evidence of an independent Israeli lawyer and notary (Mr Zuzovsky), the Panamanian ambassador to Chile (Dr Chizmar), and a retired FBI agent (Mr Ruiz).

(b). any allegation that each of these witnesses could have engaged in a conspiracy with the Second Plaintiff, to forge the Second Plaintiff's Documents in around late March 2018 was unsustainable (and such an allegation had not been put to the Second Defendant, Mr Greenspoon, Mr Ruiz or Dr Chizmar during their cross-examination, although it was half-heartedly suggested to Mr Zuzovsky and Mr Mordok).

(c). by contrast, the evidence of Mr Pitti and Mrs de Arauz was repeatedly shown to be implausible. It was impossible for the Court to place any reliance whatsoever on their evidence, especially in relation to allegations which all parties agreed were extremely serious and which would require the Court to make findings of dishonesty against the Plaintiffs' witnesses, including independent professionals.

(d). Mr Pitti was an unreliable and evasive witness. The manner in which Mr Pitti gave his evidence indicated that he was not a truthful witness. It emerged for the first time in the course of examination in chief that Mr Pitti's eyesight was so bad that he could not read documents without his glasses and he does not "*see well with them either.*" In fact, Mr Pitti had to have documents read to him and was unable to read them for himself even with his glasses. As the Plaintiffs put in in their closing submissions, "*This was an inauspicious beginning for a witness who purported to be able to identify documents that he says he signed in 1991 and in 2018 by sight.*"

(e). Mr Pitti's explanation as to why he and Ms de Arauz had been prepared to sign the Second Plaintiff's Documents was completely implausible. Mr Pitti had claimed in his original affidavit for the Panamanian authorities that he trusted Ms Gonzalez because he remembered "*seeing her as a child waiting for transportation to attend school in*

Bugaba." This was unbelievable. Even if Mr Pitti had recognised her that would not have explained why he trusted her enough to agree to sign documents for her in somewhat suspicious circumstances. In reality, given his eyesight problems and the fact that when he claimed to have met her she was a middle-aged woman with an adult son who he did not recognise originally and whose name he had not known, it was implausible that he could have recognised her in this way at all.

(f). Mr Pitti strongly emphasised that he considered it to be unusual to put his fingerprint on the share certificates, stating that "*I would never put my seal or my finger on any other document other than my passport or something called Cedula which is an ID used in Central America.*" When it was subsequently pointed out to Mr Pitti that he had put his fingerprint on a number of other documents contained in the bundle, including his Panamanian notarial declaration concerning the Facebook messages allegedly received by his son from Ms Gonzalez and his statement for the Panamanian prosecutor so that it was obvious that he did in fact apply his fingerprints to documents other than his passport and Cedula ID, he was unable to respond and provide a satisfactory explanation.

(g). Ms de Arauz's evidence was completely unreliable. Her evidence began to unravel right at the start of her examination in chief. Having been asked whether she had read and understood the contents of her affidavit before signing it, she initially said "*not everything, but yes*" but then went on to qualify that statement by saying that she "*signed it because it was explained to me after*" which was obviously a non-sequitur because she surely could not properly have signed the document unless it had been read out to her before she signed it. What little credibility Ms de Arauz had left disintegrated when she revealed shortly afterwards that she had not signed her Panamanian notarial declaration in front of a notary at all (indeed she confirmed that she had "*never been to a notary before*"). The true position was that "*in 2019 my husband brought this document home and I signed it because I was working.*" When she was asked by me whether she had even read it, she said "*no, all I did was sign it.*" She did not even recall appearing before the Panamanian prosecutor. When she was taken to her declaration she did not appear to recall the document or the prosecutor, stating "*I just signed, I don't know any other persons.*" That she did not know anything about the prosecutor was later confirmed under cross-examination.

(h). when it was put to Ms de Arauz that she did not sign any share certificates in 2018 she said that "*In 1991 was my first signature, I didn't sign again until 2018 and I put my fingerprint*". When she was asked to confirm that she had said that she first signed the share certificates in 1991 she said "*yes, in 1991 when I signed it we used our index finger that in Panama is what we use.*" She was unable to explain how she was able to tell the difference between a fingerprint applied in 1991 and a thumbprint applied in 2018 and unable to provide a coherent answer. The Plaintiffs submitted that this confusion may well have been the result of a half remembered pre-rehearsed line that she had agreed with Mr Pitti about the importance of emphasising the distinction between a thumbprint and a fingerprint.

(i). it was clear that Mr Pitti had exercised an improper influence over his wife. She was not a sophisticated witness and was almost certainly giving evidence because she had been pressed into doing so by her husband.

(j). Mr Linares was an unsatisfactory witness and Ms Boulton was unable to provide any useful evidence as to whether the Second Plaintiff's Documents had been forged. Mr Linares was an evasive and dishonest witness. It was clear that he had invented a story about being visited by Ms Gonzalez's son in October 2017, which he had referred to for the very first time only in his third affidavit in order to support his evidence about the involvement of Ms Gonzalez in relation to EHI. However, in circumstances where the Second Plaintiff and Mr Mordok both gave unchallenged evidence that Ms Gonzalez had only been introduced to the Second Plaintiff after her first meeting with Mr Mordok at the end of January 2018, this new allegation was plainly untrue. Mr Linares was also unable to advance any credible explanation as to why he had not pursued any further enquiries with Dr Chizmar after his original contact in July 2018.

(k). there was more than sufficient evidence to justify a finding that the First Defendant had dishonestly conspired with Mr Pitti and Ms de Arauz knowingly to advance a false case so as to attack the Second Plaintiff's credibility in these proceedings. If the Court was satisfied, on the balance of probabilities, that this was the case then the Court should immediately strike out the First Defendant's counterclaim because the First Defendant had forfeited the right to have an adjudication of its claim, a fair trial was completely impossible when the First Defendant was prepared to behave in such a dishonest way, and the Court's resources should not be wasted in permitting it to pursue its counterclaim

in those circumstances. The Court clearly had jurisdiction in such circumstances to strike out the First Defendant's defence and counterclaim and debar the First Defendant from defending the claim (see *Arrow Nominees v Blackledge* [2000] 2 BCLC 167; *Masood v Zahoor* [2010] 1 WLR 746; and *Summers v Fairclough Homes* [2012] 1 WLR 2004). The Plaintiffs' accepted, however, that in the light of the authorities the Court will not generally strike out a defence or make a debarring order after the trial of a claim has already taken place and that in general the Court in those circumstances will simply proceed to deliver a judgment on the claim whilst taking into account the dishonesty of the defendant in its assessment of its evidence. However, if the Court was not yet sufficiently convinced of the First Defendant's dishonest conduct and therefore unable to reach a final conclusion on that issue then the evidential threshold for making a further discovery order in the terms sought at paragraph 2 of the Plaintiffs' summons dated 14 October 2019 had been met.

39. As I have said, the true ownership of EHI is not an issue in these proceedings. I am concerned primarily with whether the evidence undermines and puts in doubt the credibility of the evidence at trial of the Second Plaintiff and the First Defendant. Does the new evidence establish that the Second Plaintiff has sought to mislead the Court and fabricated false instruments in Panama in 2018 in order to do so? Alternatively, does the new evidence establish that the First Defendant dishonestly conspired with Mr Pitti and Ms de Arauz knowingly to advance a false case so as to attack the Second Plaintiff's credibility in these proceedings? In my view, having carefully considered all the evidence and submissions, the answer to both questions is in the negative.

40. I accept the Plaintiffs' submission that the Court should not and cannot, on the basis of the written and oral evidence, reject the evidence of the Plaintiffs' witnesses and conclude that they were engaged in a conspiracy with the Second Plaintiff to forge the Second Plaintiff's Documents in around late March 2018. While there are problems with the Plaintiffs' evidence, it does present a coherent and corroborated account, maintained during cross-examination, of how the Second Plaintiff came into possession of the Second Plaintiff's Documents before April 2018. The evidence presented by the First Defendant raises some serious doubts as to the credibility of the account given by the Plaintiffs' witnesses but is also weak in material respects.

41. The discovery by Mr Greenspoon of the Second Plaintiff's Documents seems to be both fortuitous and timely and their delivery to Mr Mordok without any documentary receipt, someone whom the Second Plaintiff had only just met, seems inherently improbable. But improbable as that may be, that is the clear evidence of Mr Greenspoon and the Second Plaintiff. It makes sense to me that the Second Plaintiff would want the documents to be notarised immediately after their discovery and so the role of Mr Zuzovsky, confirmed by his evidence, seems credible and understandable. It also seems reasonable that the Second Plaintiff would need Panamanian advice and would wish to provide copies of the Second Plaintiff's Documents to her advisers. The roles of Mr Mordok and Mr Ruiz are understandable and credible although it is unclear why the Second Plaintiff gave Mr Mordok the originals rather than the notarised copies. The First Defendant sought to discredit the Plaintiff's witnesses but I am not persuaded and do not accept that it would be right to reject their evidence based on the materials before me. I reject as having no foundation the First Defendant's submission that Mr Zuzovsky was "*persuaded to back date the notarisation for some reason*" (see the First Defendant's Closing Submissions Regarding the Forgery of the EHI Certificates at [126]). The fact that Mr Mordok is being paid a substantial contingency fee (of 20% of certain property, which was not explained) weakens the weight to be given to his evidence but does not in my view allow the Court to ignore it. Mr Greenspoon's evidence, subject to the point made above, was straightforward and credible. The First Defendant suggested that he might have a financial interest in the outcome of the EHI proceedings but there was absolutely no evidence of that. And while the Second Plaintiff clearly has a substantial self interest in showing that the Second Plaintiff's Documents were found and in her possession before April 2018, her account was reasonably detailed and on its face credible. I accept that it is damaging to the Plaintiffs' case that the Second Plaintiff has not and had never produced the originals of the Second Plaintiff's Certificates for independent examination but I do not consider that of itself undermines the account of the Second Plaintiff and the Plaintiffs' other witnesses regarding the events surrounding the discovery, viewing and use of the documents relied on by the Second Plaintiff.

42. The First Defendant's evidence of the bribery of Mr Pitti and Ms de Arauz is at best inconclusive. It appears to be likely from the evidence that Ms Gonzalez did approach and contact Mr Pitti. The Plaintiffs submitted that it was not possible to decide whether the Facebook messages were genuine. The First Defendant submitted that there had been no challenge to the authenticity of the Facebook records and therefore they should be treated as reliable. But the hearing, as I have explained, was not designed for and did not allow there to be a detailed forensic examination of the documents, which would have required expert evidence

in order to enable the Court to draw conclusions. The validity of the Facebook messages was therefore not conclusively established. However, it seems to me to be likely that there was an approach by Ms Gonzalez. But I do not find Mr Pitti's account of what was discussed and of Ms Gonzales' bribery to be reliable. In the witness box (even taking into account the difficulties caused by the fact that he was giving evidence via an interpreter and is not a businessman used to giving evidence in court) he gave the impression of sticking firmly to a pre-prepared script and was repeatedly unable to give comprehensible and coherent answers to basic questions. His recent realisation of his earlier misjudgement and errors (in agreeing to be paid for signing documents) was unconvincing and much of his evidence gave the impression of being an ex post facto reconstruction. This applied to Mr Pitti's evidence regarding the making of the bank deposits (as the Plaintiffs noted, there was no evidence of the source of the funds or who deposited them), his ability to identify the certificates he had signed by recognising his thumb print (and saying that these were the only certificates to which he had ever attached his thumb print) and the image of the share certificate he produced (even though there was no testing of the metadata, the reasons given by Mr Pitti as to why the photograph was taken seems to me to be, as the Plaintiffs' submitted, "*deeply implausible*"). As was his evidence that Ms Gonzales would have handed over the $5,000 at their first meeting. I accept the Plaintiffs' submission that there *could have been* a plausible and innocent explanation as to why Ms Gonzalez contacted Mr Pitti, namely that she had recently been instructed to advise the Second Plaintiff in relation to the Second Plaintiff's Documents and therefore it would have been reasonable for her to conduct a due diligence exercise that would have involved contacting Mr Pitti.

43. I also found Ms de Arauz to be wholly unreliable (once again even after taking into account the difficulties caused by giving her evidence via a translator and her understandable lack of sophistication and experience of court hearings). I accept the Plaintiffs' characterisation and criticism of her evidence. She gave the impression of having no understanding of her evidence and of following a pre-prepared script that reflected what she had been told to do and say by her husband.

44. I do not consider that the First Defendant's other witnesses can make up for these problems and deficiencies. I have considered the First Defendant's evidence as to the form and printing of the certificates, the applicable Panamanian law and legal problems with some of the Second Plaintiff's Documents and as to the history relating to the issue and use of the First Defendant's Certificates. But without expert evidence it is not possible to determine whether the documents were printed in 1991 or 2018 or were otherwise authentic. That is not a matter that needed to or

could have been done in these proceedings. It will be for the Panamanian (or possibly another) court to decide these issues.

45. In these circumstances, it seems to me that the Court is unable to conclude, and should not conclude, that the evidence of Mr Pitti and Ms de Arauz is reliable. In my view, it is certainly not strong enough to displace the evidence given by the Plaintiffs' witnesses as to the Second Plaintiff's Documents being in existence before April 2018. This is not to say that the allegations surrounding the activities of Ms Gonzales are not serious and troubling. They are. But the evidence presented to this Court is not in my view sufficient to prove to the requisite standard (the balance of probabilities) that she bribed Mr Pitti and Ms de Arauz, and on the instructions of the Second Plaintiff procured the production of false documents.

46. But I do not accept the Plaintiffs' submission that the only possible explanation for Mr Pitti's and Ms de Arauz's evidence was that the First Defendant or its agents had persuaded Mr Pitti and Ms de Arauz to produce false evidence in support of the First Defendant's case. That is not a conclusion, involving a very serious finding of dishonest and criminal conduct, which I can properly reach, based on the evidence presently before me. It is possible, indeed reasonably likely, that the First Defendant in vigorously pursuing its case relating to the ownership of EHI and relying on the other evidence it believes demonstrates that the EHI shares have always been trust property, had discussions with Mr Pitti and were told his story. There is no evidence to show that the First Defendant knew or must have known that the Mr Pitti's and Ms de Arauz's account and evidence, even if limited, was untrue and that Mr Pitti's and Ms de Arauz were lying (although it was surprising to me that the interviews and discussions with Ms de Arauz had not been more thorough and had failed to identify the serious inconsistencies and confusions in her evidence).

47. I consider that the Plaintiffs' application for a further discovery order (in the terms sought at paragraph 2 of the Plaintiffs' summons dated 14 October 2019) should be dismissed. I do not consider that further discovery is necessary or proportionate at this stage of the proceedings, in view of my analysis of the Mistake Claim and the Israeli Matrimonial Property Claim. I also do not consider that it would be appropriate at this stage, based on the evidence presented, to strike out the First Defendant's defence or counterclaim. The Strike Out Summons is therefore also dismissed.

The evidence and disclosure process

48. The Plaintiffs and the First Defendant were each highly critical of the other's discovery process. They each accused the other of failing properly to discharge their duties with respect to discovery and of conducting a deficient discovery process. I do not propose to discuss the allegations in detail but a number of aspects are important and need to be mentioned:

(a). immediately before the commencement of the trial, the Plaintiffs raised very serious allegations (and served two affidavits of Yvo Gisler) about the First Defendant's discovery and sought an adjournment of the trial to allow time for an investigation to be conducted into whether the First Defendant had properly discharged its discovery obligations. The Plaintiffs' application was dealt with during the first two days of the trial. In response to this application the First Defendant's counsel and attorneys conducted an urgent review of the First Defendant's hard copy and electronic documents in Liechtenstein and London and one document was identified as potentially discoverable and immediately discovered.

(b). I dismissed the Plaintiffs' application for an adjournment (and delivered an ex tempore judgment explaining my reasons). I also ordered that there be an accelerated independent review of the First Defendant's discovery process, to be undertaken by an independent reviewer selected by the Court, of a sample of its preserved electronic searches and hard copy documents The reviewer completed his task on Friday 1 March 2019 having reviewed over 21,000 documents and identified the documents that were potentially relevant. Upon further review by Leading Counsel instructed by the First Defendant, a small number of further documents were identified as documents which should have been discovered. I have concluded, based on the result of this review, that it has not been shown that there was any serious or material failure by the First Defendant to conduct a proper discovery process.

(c). the First Defendant issued a summons to require the Plaintiffs to carry out searches for documents from April 1998 to January 1999 after the First Plaintiff disclosed in her evidence that the marital difficulties she experienced with Mr Perry took place around July 1998. The Plaintiffs subsequently gave the discovery requested without the need for a hearing.

(d). the First Defendant issued a summons seeking an order requiring that documents held by a London firm of solicitors (Asserson Law - ***Asserson***) be discovered. The Plaintiffs had

taken the view that most of the documents requested were subject to legal advice and litigation privilege in favour of Mr Perry and should not be disclosed without the consent of his personal representatives. A contested hearing was held and I delivered judgment holding that Asserson had been jointly retained by the First Plaintiff and Mr Perry so that the privilege could not be relied on to prevent the First Plaintiff being given access to the documents.

(e). during the trial there were allegations that the First Plaintiff had failed to comply with her discovery obligations and that Mr Greenspoon had only ever been asked by the Plaintiffs to search one email address, an email address which he confirmed he had never used.

(f). during the trial there were also allegations that the First Defendant had failed to comply with its discovery obligations (for example by failing properly to examine its records relating to the Teios Foundation and its administrator).

(g). after the end of the trial further documents from Asserson Law and another firm of solicitors who advised Mr Perry and the First Plaintiff, Field Fisher Waterhouse (***FFW***) were discovered by the Plaintiffs. Seventy four boxes and over 61,000 electronic documents came from Asserson while the documents that came from FFW extended to over 6,000 pages.

(h). the Plaintiffs in their post-trial submissions complained that since the First Defendant had also been a client of FFW it was entitled to obtain copies of FFW's files and should have done so and discovered the relevant documents. The Plaintiffs also submitted that First Defendant's withholding of the documents raised further concerns about the manner in which the First Defendant had carried out its discovery exercise.

49. The late production of documents has resulted, to some extent, in the evidence being presented in stages, which has not been helpful. In addition, for whatever reason, there appear to be gaps in the written record and only a limited number of contemporary documents. This problem was compounded by the difficulties arising from the fact that Mr Perry is deceased and few documents that originated by him were available (indeed it appears from the evidence that as a general rule he kept few records). Furthermore, a number of the events which are the subject of the disputes in this case took place a number of years ago and much of the witness evidence has involved recollections of undocumented discussions and serious conflicts over what was said

and happened. In these circumstances, I have had to do my best to piece together and reconstruct the factual matrix and work with the documents and testimony that have been adduced in evidence.

50. Where contemporary documents have been produced and are available I have given them significant weight but have also taken into account the impact of there being only a limited documentary record as I have just explained. I note and have sought to follow the approach adopted and explained by Mr Justice Marcus Smith in the English High Court in *High Commissioner for Pakistan In the United Kingdom v Prince Muffakham Jah & Ors* [2019] EWHC 2551 (Ch)

> *60. In the ordinary course, when assessing factual evidence, a Judge has well in mind the approach of Lord Goff in Grace Shipping Inc v. CF Sharp and Co (Malaya) Pte Ltd [1987] 1 Lloyd's Rep. 207 at 215.*
>
> > *"In such a case [where witnesses were seeking to recall events and telephone conversations of five years earlier] memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."*
>
> *61. In this case, none of the critical actors at the time of the Transfer.... – could give evidence. After the event – for instance during the course of the 1954 Proceedings – some of these actors did give evidence. But that evidence suffers from all of the fragilities that I have described [above]. For those reasons, the contemporary documents, particularly those directly related to the Transfer, are critical. Of course, the greater effluxion of time between the relevant events and the date of the document, and the remoter the subject-matter of the document, the less cogent such documentary evidence is. I also must bear in mind the potential for the contemporary record to mislead by reason of its incompleteness, known and unknown. I have well in mind Lord Goff's injunction to have regard not only to the contemporary documents, but also to the overall probabilities. My intention is to view the overall picture having well in mind the overall probabilities, and to consider specific events in that light."*

The Fifth Defendant

51. The Fifth Defendant gave evidence and her counsel made submissions, both in writing and during the hearing, on her behalf. These submissions, both as to the facts and the applicable law, largely supported the position taken and adopted the submissions made by the First Defendant. While I have referred to the evidence given by the Fifth Defendant I have not separately set out the Fifth Defendant's legal arguments to avoid unnecessary duplication.

The factual background to the Mistake Claim and the Israeli Matrimonial Property Claim

The business of the Organisation

52. Mr Perry and his family acquired substantial wealth. Mr Perry was an Israeli qualified lawyer and businessman. In 1983, he established the Organisation for the Implementation of the Social Security Treaty (the ***Organisation***). This was an Israeli company whose business was to assist Israeli residents to participate in the (West) German social security pension scheme. By purchasing pensions Israeli residents acquired an opportunity for an attractive investment return. The Organisation provided funding to the Israeli residents so that they could pay the up-front cost of participating in the pension scheme and obtaining life insurance cover. The Organisation was very successful and was the source of a significant part of the Perry family's wealth.

Mr Perry and the First Plaintiff's marriage and the Perry family

53. Mr Perry and the First Plaintiff married in Israel on 22 March 1964. They had two children – the Second Plaintiff (who was born on 23 June 1966) and the Fifth Defendant (who was born on 2 October 1969).

54. Unfortunately, as I have already mentioned, relations between the family members have been difficult and on occasions hostile. These hostilities have emerged during these proceedings. The Fifth Defendant has vigorously opposed the Plaintiffs' claims. The Plaintiffs on the one hand and the Fifth Defendant on the other have criticised the other's conduct with respect to family matters and these proceedings. The Fifth Defendant has also been highly critical of the action taken by or on behalf of the Plaintiffs between May and November 2017 in relation to a Cayman subsidiary of BH06, Britannia Guarantee National Insurance Company (***BGNIC***) and its subsidiary Solid Holding NV (***Solid***) (a Curacao corporation). Furthermore, the Fifth Defendant has sided with the First Defendant over the serious criticisms made by the Plaintiffs of the First Defendant's conduct as trustee of the Lake Cauma Trust and related trusts (while raising challenges of her own to the First Defendant's conduct as trustee of another trust created for her benefit).

55. These hostilities and tensions are relevant because they provide colour and context to a number of important factual disputes. There is a significant difference of view between the Plaintiffs on the one hand and the Fifth Defendant on the other concerning the happiness and stability of Mr

Perry's and the First Plaintiff's marriage. The First Plaintiff says that hers was generally a happy marriage although there were difficult periods, particularly a "*rocky patch*" around July 1998 when she discovered that Mr Perry had had an extra-marital affair. But there was no split or decision to separate their assets at that point or thereafter. The Fifth Defendant says that her parent's marriage was not a happy union and that Mr Perry and the First Plaintiff discussed divorce on several occasions. Her evidence was that her parents negotiated a separation and division of their property in the late 1990's in recognition of the fact that their marriage was effectively over by that time. The Second Plaintiff denies that such a split and separation ever took place. Furthermore, there are significant differences regarding Mr Perry's reasons for relocating to the UK in 1999/2000 and for transferring the Share to the First Defendant to be held on the Lake Cauma Trust. I shall discuss these different views and the evidence given to support them further below in relation to the issues where they are relevant.

The state of Mr Perry and the First Plaintiff's marriage in the late 1990's

56. It appears that Mr Perry and the First Plaintiff experienced difficulties in their marriage at the end of the 1990's.

57. Around July 1998, the First Plaintiff discovered that Mr Perry had had an extra-marital affair. She explained the position as follows in her trial (and third) affidavit (at [31]):

> *"I was very surprised by what [Mr Perry] said [in the letter of wishes he issued in 2015] regarding our marital difficulties many years before. It is true that around July 1998 my marriage went through what can only be described as a rocky patch when I discovered that my husband had had an affair. I confronted him about this and initially said that I wanted a divorce and asked him to leave. We had some angry conversations and we did talk about how there would have to be a division of our matrimonial property. From what I remember [Mr Perry] suggested an arrangement whereby I would receive the real property in Israel and 50 million Deutsche Marks. This is what I believe [Mr Perry] refers to in the [2015 letter of wishes]. However, there were no formal meetings or discussions about this and we did not reach any agreement or settlement whatsoever (either verbally or in writing). [Mr Perry] apologised to me and within a couple of weeks we had resolved our differences: he never did leave the house and we always remained together. From then on we continued to have a happy marriage. Indeed, shortly after on 20 September 1998 we travelled to New York together, to visit the apartment we had bought there in Trump Tower a few months earlier, we returned together on 29 September. We spent this time at the new apartment working on the apartment."*
>
> [underlining added]

58. The Second Plaintiff confirmed that the affair had taken place. She explained that the First Plaintiff told Mr Perry to move out and initially said that she wanted a divorce. However,

according to the Second Plaintiff, the disagreement was short lived and Mr Perry never needed to move out of the matrimonial home.

59. The Fifth Defendant in her evidence says that her parents' marriage was not a happy union and a divorce had been discussed on several occasions (from the time when she was young). She believed that they had never actually divorced only because they were conservative. However, in the late 1990's they did negotiate a separation and decided to split Mr Perry's property in recognition of the fact that their marriage was effectively over (but the property that the First Plaintiff had inherited from her family was never part of the agreement).

60. According to the Fifth Defendant, the First Plaintiff received substantial assets from Mr Perry because of the matrimonial settlement. For example, Mr Perry had transferred his interest in 10 Rekanati St. Tel-Aviv in Israel to the First Plaintiff. It was registered in her sole name. She also received an additional flat (which was very valuable), a jewellery collection (with an estimated value of $20 million), a collection of loose diamonds (with an estimated value of $8 million) as well as a number of other highly valuable items. The First Plaintiff's flat at 64 Pinkas Street was purchased shortly after the alleged settlement and was also registered in her sole name.

61. As I explain later, in March 2015, Mr Perry, when he was seriously ill, gave an account of how he wished his and the family's assets to be administered and distributed after his death. He said that "*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 [the First Plaintiff] plus 50 million Marks that will be payed to her after I collect them from the German Pension Program. An amount of one million Marks was payed to her in advance."

62. The First Defendant claims that the evidence demonstrates that in 1998 Mr Perry did make a payment of DM 1million to the First Plaintiff. The First Defendant submits that that this was part of (and evidence of) the marital settlement. The First Plaintiff accepts that in 1998 two payments (each of DM 500,000) were paid by Mr Perry. The first payment was made to an account in her name with Migros Bank. The second payment was made to an entity called Codex. However, she denies that these payments were made for her benefit. She says that the Migros Bank account had previously been in the name of her mother and Mr Perry had asked her to have her mother transfer the account into the First Plaintiff's name. She claimed that the funds paid into the account were not intended for her or for her benefit and she dealt with them

as instructed by Mr Perry. The First Plaintiff says that the funds in the account were paid away on Mr Perry's instructions and that she has no recollection of the person to whom they were paid. She also claims to have no knowledge of Codex or the payment made to it, allegedly for her benefit. Mr Greenspoon, during re-examination, said that the First Plaintiff was just a vehicle through whom the funds were paid and that the funds paid to Codex were used by Mr Perry to acquire artwork. The First Defendant rejects the First Plaintiff's and Mr Greenspoon's account and explanations. It claims that Codex was very likely to have been the service provider and/or trustee administering the Teios Foundation, which was a Liechtenstein Foundation that was set up to hold assets for the First Plaintiff. Mr Oehri's evidence was that in or around 1998 Mr Perry had asked him to acquire two Liechtenstein Foundations, one for Mr Perry's benefit and one for the First Plaintiff's benefit. The latter foundation was, he said, called the Teios L.T.P. Foundation. Mr Oehri was not told (and did not ask) about the specifics of the personal issues between Mr Perry and the First Plaintiff that led to Mr Perry's decision to establish the separate foundations, but he recalled Mr Perry telling him that he had to give the First Plaintiff part of his assets to "*calm her down.*"

Israeli tax claims and the start of the Israeli authorities' investigation

63. After achieving considerable financial success through the Organisation, Mr Perry ran into serious difficulties. During 1999, the Israeli tax authorities commenced an investigation into the tax affairs and management of the Organisation's business (then carried on by BGNIC which was in turn at that time owned by Mr Perry). The purpose of the investigation was to assess the income tax payable on income generated in the Organisation (and related companies). In 2000 the Israel authorities sought the assistance of the Swiss authorities who opened their own money laundering investigation and froze Mr Perry's Swiss bank accounts.

Move to London

64. As I have already noted, Mr Perry and the First Plaintiff started spending more time in London at some point in 1999 or 2000. The precise timing is unclear but it is common ground that this occurred around 1999. However, the purpose and effect of the move are disputed. There is a dispute as to whether Mr Perry and the First Plaintiff agreed or are to be treated as having agreed when they moved to change their marital domicile. The Plaintiffs assert that the move to London was planned for some time, was connected with the Second Plaintiff's residence there, was intended to be temporary and that Mr Perry maintained a continuing connection with

Israel. The First Plaintiff says that even after the move she regarded Israel and not the UK as her permanent home. The Fifth Defendant says that Mr Perry was angered by the actions of the Israeli authorities and decided to abandon his domicile in Israel, became a non-domiciled resident in the UK, subsequently resumed his domicile of origin in Poland and only made brief visits to Israel before his subsequent imprisonment in 2009.

The use of Liechtenstein trusts – the creation of the Heritage Trust

65. When Mr Perry and the First Plaintiff first arrived in London they lived in a property called Chesterfield House in South Audley Street. Global Group Inc., a Turks and Caicos Islands company, owned this property. It appears that Mr Perry held the shares in this company in the period before 2002.

66. Subsequently, in 2000 Mr Perry and the First Plaintiff decided to acquire another house in London at 41 South Street (the ***South Street Property***). This required renovation and would not be ready for occupation until 2004. Mr Perry acquired the property through a BVI company called Mallet Ford Inc. (***Mallet Ford***). Rather than hold the shares directly they were to be held via a Liechtenstein discretionary trust. Accordingly, the shares in Mallet Ford were transferred to the First Defendant to be held on a Liechtenstein discretionary trust called the Heritage Trust. The deed of settlement for the Heritage Trust was dated 24 March 2000 (Mr Perry gave an address in New York). In addition to the shares, a loan owed by Mallet Ford was also transferred to the First Defendant subject to the Heritage Trust. Mr Perry had made the loan to Mallet Ford to enable it to fund the purchase of the South Street Property. A number of tax benefits resulted from structuring the acquisition of the South Street Property in this way. For example, there would be no liability to UK income or inheritance tax.

67. The Heritage Trust deed of settlement stipulated that during his life the income from the trust property was to be paid to Mr Perry, after his death to the First Plaintiff and after her death to the beneficiaries of the trust who were also entitled to the capital. The key terms were as follows:

(a). the trustee was to hold the income and capital of the trust assets on trust for *"the benefit of all or such one or more of the Beneficiaries.....as the [trustee] by any deed or deeds revocable during the Trust Period or irrevocable and executed during the Trust Period shall appoint"*.

(b). subject to and in default of such an appointment the trustee was required during the lifetime of Mr Perry to pay or apply the income of the trust fund to or for his benefit.

(c). on his death the trustee was required to pay or apply the income of the trust fund to or for the benefit of the First Plaintiff (as Mr Perry's wife) if living with him at the date of his death if she shall survive him.

(d). on Mr Perry's and the First Plaintiff's death the trustee was required to pay or apply the income and the capital of the trust fund to or for the benefit of Mr Perry's children in equal shares between them absolutely.

(e). if and so far as not wholly disposed of for any reason whatever by the above provisions the capital and income of the trust fund was to be held upon trust for the personal representatives of the beneficiaries in equal shares absolutely.

(f). notwithstanding these provisions the trustee was entitled at any time to pay or apply the capital of the trust fund to or for the benefit of any of the beneficiaries in such shares and manner as the trustee in its absolute discretion thought fit.

(g). Mr Greenspoon was appointed as the first protector. Mr Greenspoon was at the time married to the Second Plaintiff. The protector had the power to remove and appoint a new trustee.

(h). the trustee could remove or add further beneficiaries subject to obtaining the consent of Mr Perry or, following his death, the First Plaintiff if she survived him or following the death of both of them, the protector.

(i). the beneficiaries were Mr Perry and the First Plaintiff and Mr Perry's children (together with any other persons nominated by the trustee in accordance with the power mentioned above).

68. Mr Oehri stated in his written evidence that Mr Perry received advice in connection with the establishment of the Heritage Trust from his London solicitors, FFW. He refers to a number of meetings with FFW. Although he was unable to recall the details of the discussions he did

remember that "*the focus was on how the trust would function*" and that there was a discussion of the differences between an English trust and a Liechtenstein trust. In his trial affidavit he said as follows:

> *"26. I remember that someone noted that a Liechtenstein trust would apparently give the settlor more influence over the running of a trust than an English trust might...*
>
> *27. On the third occasion, [FFW] provided me with a draft trust deed which they suggested would be the basic trust deed for the Heritage Trust. I took this back to [the First Defendant's] offices and discussed the draft trust deed with Dr. Klaus Biedermann, a former colleague of mine at PA who was a Liechtenstein trust lawyer. This draft trust deed formed the basis of the Heritage Trust. Mr Perry approved the final trust deed and on 24 March 2000 the Heritage Trust was established in Liechtenstein, per the advice and instructions of [Mr Perry's] English lawyer.*
>
> *28 I recall that around this time, prior to the setting up of the Heritage Trust, I had a discussion with [Mr Perry] during which I told him that Liechtenstein has an English translation of its trust legislation. [Mr Perry] requested that I provide the Liechtenstein trust law in English to him, which I did. [Mr Perry] also asked me to provide the lawyers of [FFW] with copies of the Liechtenstein trust legislation as well. I provided the lawyers of [FFW] with an English translation of the Liechtenstein Company Law (Personen- and Gesellschafisrecht "PGR") (the "Blue Book", which contains Liechtenstein Trust and Foundation law). I recall that at a meeting in London, I tried to give [Mr Perry's] copy of the Blue Book to [FFW], but I remember him refusing and saying that this was his copy to keep, so I gave [FFW] an extra copy. [Mr Perry] did not want to pay for the copies (the book cost about 200 CHF) so I gave copies to him, and to [FFW] as a present."*

69. During his cross-examination, Mr Oehri provided further details of what had happened at the meetings with FFW.

> *Q. You can't remember. You say in paragraph 26 that the focus.... was on how the trust would function. Could you tell us what you mean, "how the trust would function"?*
>
> *A. Basically a trust in Liechtenstein functions in the same way as a trust would function in England.*
>
> *Q. I see. You then go on to discuss, at this meeting, you say, "the differences between an English trust and a Liechtenstein trust". Who was qualified at this meeting to comment on Liechtenstein law of trusts?*
>
> *A. What I can say is that, apart from myself and Mr Perry, three additional persons from [FFW] were present.*
>
> *Q. But my question was: who was qualified at this meeting to discuss the differences between the English trust law and Liechtenstein trust law?*
>
> *A. An English trust [lawyer], if you would call it that, will very certainly know that.*
>
> *Q. He will certainly know about [the] Liechtenstein law of trusts?*
>
> *A. I would assume that, yes.*

Q. On what would you base that?

A. English lawyers know best about the trust system, so it is obvious.

JUSTICE SEGAL: Can I ask a question: is Mr Oehri saying that the people from [FFW] were the people who discussed Liechtenstein law as to trusts?

A. First thing, I handed over the English translation of Liechtenstein trust law to these people. So on this basis, I would assume that these people would know these things. Certainly, I was not the person qualified to tell about Liechtenstein law and Liechtenstein trusts because I have not -- have never been and I am not a trust expert. But it is very plausible to me that Mr Perry contacted other persons too.

Q. ....What were the differences between the two trust law systems that were identified at the meeting?

A. As far as I remember, it was mainly the degree of influence that the settlor would have on the trust."

Settlement with the Israeli tax authorities

70. On 17 May 2001 the Israeli tax authorities (the State of Israel) and Mr Perry entered into a settlement agreement (the ***Israeli Settlement Agreement***). The Israeli Settlement Agreement resolved the authorities' monetary claim. It also confirmed that Mr Perry would not be required to file future tax returns if he was an overseas resident and had no taxable income in Israel. But the Israeli Settlement Agreement did not relieve Mr Perry from criminal sanctions. The parties agreed that there would also need to be a criminal prosecution. The Israeli Settlement Agreement recited the fact that a criminal investigation was continuing and that Mr Perry and the Organisation's legal advisers had been given a draft indictment sheet containing tax and other criminal offences.

Mr Perry becomes tax resident in the UK

71. On 18 June 2002, Mr Perry completed (and I assume filed) an "*Arrival in the UK*" form prepared by and to be filed with the Inland Revenue (the "***IR UK Arrival Form***"). In this form, Mr Perry confirmed that he had arrived in the UK on 7 May 2002. He also stated that his domicile of origin in Poland had revived; that he had decided on his sixtieth birthday (23 April 2002) to make London his primary home as a convenient centre to look after a number of business interests; that he ceased to intend to return to Israel and that he intended to leave the UK and move to France before his seventy-fifth birthday. He also provided details of the number of days on which he had been in the UK in the period 1990 – 2002. This revealed that he had been in the UK for sixty-eight days in 1998-1999, one hundred and fourteen days in

1999-2000; one hundred and eighteen days in 2000-2001 and one hundred and seventeen days in 2001-2002.

72. On 20 September 2002, FFW wrote to the Home Office in London. They confirmed, "*Mr Perry does propose to make the UK his main residence.*" On 4 October 2002, FFW wrote to Mr Perry with detailed tax advice (the ***FFW October Letter***).

> *"You were considering becoming primarily based in any one of the USA or the UK or France (and you have a home in each of these jurisdictions as well as Israel) and that you were waiting for advice on this in addition to considering personal issues until shortly after your 60th birthday on 23 April 2002. At that time you made the decision to make your principal home in the UK and your decision is made on the basis that you will leave the UK at the latest before your 75th birthday or earlier on the ill-health of either you or your wife. At that time you will move to France. On the basis of all the above it is clear to me that you now have and will continue to have a Polish domicile of origin as your domicile until you move to France.*
>
> .....
>
> *You deliberated whether to base yourself primarily in the USA, the UK and France. You waited for advice from your US, UK and French lawyers before making a decision. You also consider[ed] other personal factors because, for example, you prefer the weather in France. You only made a decision on this issue shortly after your 60th birthday on 23 April 2002. You have decided in favour of the UK, and you have now applied for a residence permit from the UK government. You will now for certain be in the UK for more than 91 days in each UK tax year from 6 April 2002 onwards (until you leave).....On the basis that you have decided to base yourself primarily in the UK and you have now applied for a residence permit to the UK, it is my view that you have become resident in the UK from 6 April 2002.....All of this assumes that Method 3 does not apply. You have of course occupied Chesterfield House and will in due course occupy South Street but you do not own or lease either of these properties. In addition, Method 3 only applies to you if you are a "longer term visitor" in the UK or possibly if you "remain" in the UK as each of these terms as defined in IR20. On the basis of all the above it is my view that Method 3 does not apply to you for the following reasons. This on the grounds that you have not been until later April 2002 a "longer term visitor" in the UK nor until then have you been "remaining" in the UK. A longer term visitor requires an individual to come to the UK intending to remain indefinitely in the UK or for an extended period. This is essentially what has not been the case in your circumstances until you formed the intention to primarily base yourself in the UK in later April 2002."*

As can be seen, FFW advised that in their view, while the position was not beyond doubt, Mr Perry had become resident in the UK for tax purposes from 6 April 2002. Accordingly, on 4 October 2002, FFW wrote to the Inland Revenue in the UK to confirm that Mr Perry had become UK resident from that date and attached copies of the forms previously completed by Mr Perry.

73. As part of the tax planning required in connection with Mr Perry becoming tax resident in the UK, various other assets were transferred to the Heritage Trust. The shares in Global Group Inc. (***Global***) were gifted by Mr Perry to the First Defendant as trustee of the Heritage Trust on

21 March 2002. This was a company incorporated and resident outside the UK which owned the substantial art collection acquired by Mr Perry. FFW advised that this company should lend the art works to the First Defendant as trustee of the Heritage Trust on terms that the trustee maintain and preserve them pursuant to an arm's length agreement and that the First Defendant on lend the works of art to Mr Perry on the same terms. This would ensure that the art remained in the UK without adverse tax consequences (for example, there should be no inheritance tax, capital gains tax or income tax liability).

74. Accordingly, by mid-2002 Mr Perry had (in effect) agreed with the Israeli tax authorities that he would no longer be resident in Israel; had become tax resident in the UK and had transferred valuable property to a Liechtenstein trust in order to avoid or minimise the adverse tax consequences that flowed from his change of residence and status. This property included the property in which Mr Perry and the First Plaintiff were then living and the property they intended to move into upon completion of the renovation works.

The criminal charges against and trial of Mr Perry

75. Mr Perry was eventually charged with a number of serious offences relating to the Organisation's business (including obstructing the course of justice, fraud, theft and knowingly or unknowingly violating Israeli law regarding the regulation and sale of insurance). His trial took place before the Tel Aviv District Court during December 2003. He was convicted on 24 October 2007. On 19 February 2008, he was sentenced to twelve years' imprisonment and fined the equivalent of approximately £3 million. On 24 February 2008, he filed an appeal of the District Court's judgment with the Israeli Supreme Court. On 5 February 2009, the Israeli Supreme Court dismissed the appeal but reduced his sentence from twelve to ten years. He began to serve his sentence in an Israeli prison on 16 February 2009. Further appeals against his conviction and sentence were unsuccessful (although there was a modification of the lower court's findings as to precisely what had been stolen). The final decision dismissing Mr Perry's appeals was delivered on 28 August 2012.

The creation of further trusts

76. While Mr Perry was in prison (from 16 February 2009) another Liechtenstein trust was created. This was the Damerino Trust. The deed of settlement constituting the Damerino Trust was dated 9 March 2009. The settlor was the First Defendant as trustee of the Heritage Trust. The First Defendant was, once again, the trustee of the Damerino Trust and Mr Greenspoon was the

initial protector. The deed was in similar terms to the Heritage Trust deed. However, the beneficiaries of the Damerino Trust were the Second Plaintiff, Mr Greenspoon, their children and the Fifth Defendant (subject to the trustee's right with consent to add or remove beneficiaries).

The SOCA Proceedings

77. Following Mr Perry's conviction in Israel the Serious Organised Crime Agency (***SOCA***) in the UK also took action against him (the ***SOCA Proceedings***). On 28 October 2009 Mr Justice Cranston in the High Court in London made an *ex parte* worldwide freezing order (***WFO***) against Mr Perry and other parties including the First Plaintiff and the Heritage Trust (SOCA failed to name and join the First Defendant as the trustee of the Heritage Trust). The WFO was eventually discharged following a judgment of the UK Supreme Court (on 25 July 2012) that there was no statutory basis for the grant of freezing injunctions over foreign assets. However, following a rapid change in the law, SOCA commenced fresh proceedings on 25 September 2012.

78. Both Mr Perry and the First Plaintiff filed witness statements in the SOCA Proceedings regarding their assets. Mr Perry and the other respondents to the WFO subsequently sought to vary and succeeded in varying the WFO so as to exclude assets outside the UK, the Channel Islands and the Isle of Man. However, on 27 January 2010, while the application to vary the WFO was pending, a consent order was made by which the court ordered that Mr Perry and the First Plaintiff (as well as the other respondents) provide statements of their overseas assets to be held by a court-appointed independent supervising solicitor in a sealed envelope pending the determination of the application. In addition, Mr Perry and the First Plaintiff filed a number of witness statements in the SOCA Proceedings in connection with the disclosure orders made by the English court.

79. In his second witness statement dated 20 May 2012, (***Mr Perry's Second SOCA Witness Statement***) Mr Perry gave evidence as to his dealings with a substantial amount of cash which had been withdrawn for him by the First Defendant. He had then placed the cash in a safe at the South Street Property. Mr Perry provided a brief explanation as to why he had used a Liechtenstein entity for this purpose. After explaining that he had worked with Mr Oehri since 1989 and that the First Defendant had acted as a trustee to trusts beneficially owned by Mr Perry and/or members of his family) he said (at paragraphs 30-32) as follows:

"*The use of a Liechtenstein Entity*

30. Contrary to SOCA's suggestions, I did not utilise a Liechtenstein entity in order to take advantage of Liechtenstein security laws or to minimise the chances of scrutiny. The use of a Liechtenstein entity in the first instance was decided upon in accordance with legitimate tax planning, and following consultation with BHF Bank and with Peat Marwick (now KPMG) in the Isle of Man.

31. I have always structured my financial affairs on the basis of advice from appropriately qualified professionals. It was on the basis of such advice that assets are held through a number of companies in various jurisdictions. From around 2001 my principal advisers were FFW, although KPMG remain informed of relevant matters. Since then, where I was an ultimate beneficiary of companies, I was listed as such in the filings made with the relevant authorities in respect of each relevant company. I made payments of funds to the various companies without trying to conceal the origin of those funds. The degree of complexity was driven by legitimate tax planning and other commercial considerations, and the arrangements were made on the advice of relevant professionals."

80. In her first witness statement dated 24 December 2009 (***LP's First SOCA Witness Statement***), the First Plaintiff dealt with certain matters relating to the scope of the WFO as it related to her. She noted that some of the items referred to in the WFO were expressed to be held by the Heritage Trust and said that "*I do not know whether this is accurate. I am a beneficiary of the Heritage Trust but do not control it.*" In her second witness statement dated 18 November 2010 (***LP's Second SOCA Witness Statement***), the First Plaintiff provided details of her assets located outside the UK. In her third witness statement, also dated 18 November 2010, the First Plaintiff provided details of her other assets in the UK (that is assets which were not frozen by the WFO). These comprised personal effects (such as clothes), jewellery, furniture, and a collection of fans.

81. LP's Second SOCA Witness Statement contained the most extensive list of assets. The Second Plaintiff stated that:

"3 .....I have already made one witness statement dated 24 December 2009 in which I provided details of certain assets of mine within the UK. This witness statement deals with those assets of mine, which are located outside of the UK.

6. Over the years I have inherited and been gifted a number of properties as well as jewellery and cash from my parents. These assets have always remained entirely separate from my husband's assets. Since those assets do not derive from my husband's funds, SOCA can have no arguable case that such assets constitute recoverable property and SOCA has agreed that no details be provided.

7. SOCA claims that the [WFO] requires me to provide information about all of my worldwide assets excluding personal effects and household items valued at under £500. I own a number of pieces of jewellery, paintings, art, antiques and Judaica, which are kept at my home at 64 Pinkas Street, Tel Aviv. I do not know the present value of any of these items.

……

8. *I have or control the following assets that have a value of more than £500:*

i) Various personal effects such as watches and clothes. I am unable to itemise these from memory or to give any values for such items. Some of these items might be worth more than £500. Such items might be variously located at the apartment in New York at 1 Central Park West or at Villa la Treille, Villefranche Sur Mer, France or at my home in Tel Aviv.

ii). I am the owner of the freehold interest in an apartment located at 64 Pinkas Street, Tel Aviv, Israel. The apartment was purchased in February 2000 for NIS 9,982,819.

iii) Safra Monaco bank account jointly held with my husband at 15-17 av, d'Ostende, Belle Epoque, 98006 Monaco Cedex, Monaco, account number 0024158. As at 31 December 2009 the balance of this account was USD $43,339.45. I do not have a more recent balance for this account;

iv) Banque Populaire de Cannes current account held jointly with my husband at 141 rue D'antibes, 06400, Cannes, France, account number FR76 1560 7000 3069 0274 8216 200. As at 31 December 2009 the balance of this account was €27,938.22. I do not have a more recent balance for this account;

v) Banque Populaire de Cannes deposit account held jointly with my husband at 141 rue D'antibes, 06400, Cannes, France, account number FR76 1560 7000 3069 0274 8216 787. As at 31 December 2009 the balance of this account was €276,237.84. I do not have a more recent balance for this account;

vi). A pair of platinum, onyx, emerald and diamond pendant earrings by Cartier identified at number 14 of Schedule 3 to the PFO. This item is located at my home in Tel Aviv. SOCA indicates that the purchase price for this item was £14,400.

vii). A diamond tiara identified at number 20 of Schedule 3 to the PFO. This item is located at my home in Tel Aviv. SOCA indicates that the purchase price for this item was £82,700.

viii). A painting by Ferdinand Leger, 'Les Amoureux', identified at number 9 of Schedule 3 to the PFO. I do not recall precisely where this painting is located. SOCA indicates that the purchase price for this item was £95,200.

ix). Several items of other jewellery of varying value kept variously at my homes at 64 Pinkas Street, Tel Aviv, at Villa LaTreille, France, and at the apartment at 1 Central Park West, New York.. I cannot now recall the specific details of these items. Some of these items were purchased with my own funds and others from funds which might have come from Mr Perry. I propose to arrange for photographs of those items to be taken and exhibited to a witness statement supplemental to this statement, but I have not managed to arrange for this to be done yet.

x). Several items including paintings, art and antiques of varying value variously located at my homes at 64 Pinkas Street Tel Aviv, at Villa LaTreille, France, and at the apartment at 1 Central Park West, New York. I cannot now recall the specific details of these items. Some of these items were purchased with my own funds and others from funds which might have come from Mr Perry. I propose to arrange for photographs of those items to be taken and exhibited to a witness statement supplemental to this statement, but I have not managed to arrange for this to be done yet.

xi). *1000 ordinary shares in Kikar Albert Properties Limited, a company incorporated in Israel with company number 5116201 06 and registered address at 48 Montefiore Street, Tel Aviv 65201, Israel. These represent 7.5% of the ordinary shares. I have not seen up to date estimates of the value of the assets of Kikar Albert. I have no idea of the likely value of my shareholding.*

xii). *Other assets obtained from my parents, or purchased with funds not connected to Mr Perry, which have no connection to Mr Perry's funds, and of which I am providing no details in this statement."*

9. .....

(2). *Except as set out in xii above, I have the following income arising outside of the UK:*

a. *such income, including interest, as might arise from time to time from the investments listed above; and*

.....

(6). *I am a discretionary beneficiary of the Heritage Trust, a Liechtenstein based trust and the Seventh Respondent to the PFO.*

[underlining added]

The BVI trusts

82. On 23 January 2012, Mr Perry created two BVI trusts. These were called the Catolac Family Trust and the Roseland Family Trust. The trustee was Mr Rozanes and the First Defendant was not involved. The initial trust property was US$10 million in each case. The protector of these trusts was a Panamanian company called Ballestier Finance Corp.

83. The trustee was given a power to apply, subject to obtaining the consent of the protector, the whole or part of the trust fund for the benefit of any one or more of the beneficiaries (and to the exclusion of others) in such amounts, time and manner as the trustee in its discretion thought fit. But at the end of the trust period the trust fund was to be distributed to the beneficiaries in accordance with their stipulated entitlement.

84. The identities and entitlements of the beneficiaries were as follows. In the Catolac Family Trust the primary beneficiaries were (i) the First Plaintiff, (ii) the Second Plaintiff, (iii) the Fifth Defendant and (iv) the children of the Second Plaintiff and the Fifth Defendant, each of whom were entitled to 25% of the trust fund during their lifetimes. After the death of any of the

primary beneficiaries, the children of the Second Plaintiff and the Fifth Defendant acquired their rights (as second beneficiaries). Thereafter the heirs of the second beneficiaries acquired the rights.

85. In the Roseland Family Trust the beneficiaries were as follows. The Second Plaintiff was the primary beneficiary. After her death, the children of the Second Plaintiff and the Fifth Defendant in equal shares were the beneficiaries and after the death of any of them, their share went to their heirs.

The Class action

86. Following Mr Perry's conviction in October 2007, claims were brought against Mr Perry and the Organisation by a large number of the Israeli residents who had received loans from the Organisation for the purposes of financing the retroactive payment of premiums, fees and insurance premiums (and who had made repayments of capital, interest, commissions and premiums out of the monthly pension allowance to which they were entitled from the authorities in Germany). Proceedings were issued in the Tel Aviv District Court. In June 2012, the court certified the proceedings as a class action and representative plaintiffs were appointed to conduct the litigation. Mr Perry (and the other defendants) lodged an application to dismiss the claims but the application was dismissed on 20 November 2012. Mr Perry then lodged an application for leave to appeal with the Supreme Court. The proceedings were continuing at the time of Mr Perry's death and were subsequently settled in December 2015. A mediation took place during Mr Perry's final illness and a settlement agreement was eventually entered into after his death, on 17 December 2015. Under the settlement agreement payments were made to the claimants without any admission of liability

Mr Perry's illness

87. In March 2012, Mr Perry was diagnosed with advanced colon cancer. In April 2012 he was released from prison into house arrest in Tel Aviv (at the house at 64 Pinkas Street owned by the First Plaintiff). In January 2013 he was advised that the cancer was terminal.

Succession planning

88. On 19 March 2013, Mr Perry met with representatives of the First Defendant in Tel Aviv (the ***19 March Meeting***). Mr Oehri and Mr Naeff both attended this meeting. Two items were discussed. First, Mr Perry provided an update on the progress and prospects of the appeals he had made against his conviction. Second, he explained that it was now his objective to undertake succession planning. The note of the meeting records that Mr Perry said that:

> *"It is now the objective of [Mr Perry] to plan succession. He wants a solution where the assets are as far as possible divided between TP, her children, and YP. The individual vessels should be strictly separate because there are certain tensions between TP and YP. Also, access to the assets for the children of TP should not be given to the beneficiaries until they know how to handle them.*
>
> *A distribution from the existing structure will have substantial tax implications [and] Prof. Gliksberg expressly advises against it. There is the question whether it will constitute a distribution if the old trust becomes the settlor of a new trust. Will be clarified by Prof. Gliksberg. Gliksberg advises to form sub-trusts of the existing trust and will clarify how such a sub-trust must be structured under the aspect of taxation.*
>
> *Follow-up if no answer."*
>
> [underlining added]

The Lake Cauma Trust

89. According to Mr Oehri, Mr Perry had asked the First Defendant to assist with the creation of a new Liechtenstein discretionary trust during the first quarter of 2013. Mr Naeff says that he provided Mr Perry with a copy of the First Defendant's standard form draft trust deed at the 19 March meeting and in the period between March and May 2013 he discussed with Mr Perry the arrangements for setting up the new trust that was to be called the Lake Cauma Trust. Mr Naeff explained that Mr Perry had first raised his plan to transfer the Share to the First Defendant into the Lake Cauma Trust at the 19 March Meeting.

90. There were further meetings in Tel Aviv on 30 April and 1 May 2013. It is Mr Naeff's evidence that at the meeting the Lake Cauma Trust was discussed extensively and the trust deed to establish that trust and other related documentation were finalised. On 1 May 2013, Mr Perry executed the deed of settlement in relation to the Lake Cauma Trust (the ***Lake Cauma Trust Deed***). The Lake Cauma Trust Deed provided that the First Defendant as trustee could at its absolute discretion pay or apply any part of the income or capital of the trust for the benefit of one or more members of the beneficiaries. On termination of the trust the First Defendant was required to transfer any income and capital to such of the beneficiaries then living in such

shares (if any) as the First Defendant determined in its absolute discretion. The definition of the beneficiaries was as follows: "*The circle of potential beneficiaries includes all descendants [sic] of [Mr Perry]*". As a result, at the date of its creation the beneficiaries of the Lake Cauma Trust were the Second Plaintiff and the Fifth Defendant. The original protector was Dr Neupert. However, from 24 August 2015, the protector became the Swiss Protectors Association (the ***SPA***). The SPA originally had two members who were both on its executive board, namely Dr Neupert and Mr Neil Duggan (but in May 2015 Professor Yadlin was appointed as a further member of the SPA).

91. Mr Perry also appears to have executed on 1 May 2013 an assignment of the Share (together with the shares in an Isle of Man company called Leadenhall Property Limited) to the First Defendant. However, since the assignment of the Share involved a change of control of BGNIC, an insurance company regulated by the Cayman Islands Monetary Authority (***CIMA***), it required the approval of CIMA. CIMA, following requiring and receiving confirmation of the beneficiaries of the Lake Cauma Trust, gave its approval on 3 October 2013 and the formal transfer of the Share was effected on 15 October 2013.

92. Following Mr Perry's conviction in October 2007, CIMA had written (on 2 November 2007) to BGNIC requiring it to take steps to protect its assets and prevent Mr Perry from having or exercising any management or control rights in relation to BGNIC. Consequently, BGNIC's memorandum of association was amended to create management shares, which were issued to a third party trustee (with rights to income and capital being held on trust for BH06). A declaration of trust to this effect was executed on 28 February 2008.

Further Israeli tax issues

93. In June 2013, the Israeli government announced amendments to Israeli law governing the taxation and reporting obligations of trusts and foundations. These amendments were to come into force on 1 January 2014. Under the old law foreign settlor trusts, with or without Israeli resident beneficiaries, were exempt from tax and reporting duties. Under the new law if at least one beneficiary of a trust was an Israeli resident that trust would be subject to the same liabilities to tax and subject to the same reporting obligations as an Israeli resident trust. These changes to Israeli tax law were designed to limit the use of offshore discretionary trusts as mechanisms for avoiding Israeli tax.

94. Mr Perry had received advice on the amendments to the Israeli Income Tax Ordinance from Rosak, an Israeli law firm. They provided a memorandum of advice on 12 August 2013. He was also receiving tax advice from Professor Gliksberg.

95. According to Mr Naeff, during telephone calls with Mr Perry "*at the end of 2013*" Mr Perry instructed him to draft a document to amend or record his wish that there be an amendment of the definition of the beneficiaries in the three Liechtenstein discretionary trusts. Mr Naeff prepared a document in manuscript, which was headed "*Letter of Wishes*", signed by Mr Perry and dated 28 November 2013 (the ***Letter***). The Letter stated that Mr Perry declared that he:

> "*....wished to amend the circle of potential beneficiaries of [the BGO Foundation], the Heritage Trust, the Damerino Trust and the Lake Cauma Trust as follows:*
>
> *The circle of potential beneficiaries shall include:*
>
> *(a). all descendants of Mr Isidor and Mrs Gittel Gutmann and their relatives except persons that are tax residents in Israel or the [USA] and except persons that are domiciled resident in the UK*
>
> *(b). British Friends of the Israel Museum, Jerusalem, the Jewish Museum in London, Amsterdam, Prag[ue] organisations for cancer research and cancer treatment.*"

96. On 2 December 2013, the First Defendant executed a deed of amendment to the Lake Cauma Trust in exercise of its powers as trustee (based on a request that was submitted to it by the economic settlor) to amend the definitions of the beneficiaries and excluded persons so that:

> "*The class of beneficiaries includes:*
>
> *• All descendants of Mr. Isidor and Mrs. Gittel Gutmann, PL-Cieszyn, and their relatives. Mr. Isidor and Mrs. Gittel Gutmann are grandparents of Mr. Igo Israel Perry, date of birth: 23.04.1942. • British friends of the Israel Museum, Jerusalem • The Jewish Museum in London • The Jewish Museum in Amsterdam • The Jewish Museum in Prag[ue]*
>
> *The following persons are excluded from the class of beneficiaries:*
>
> *• Persons that are tax resident in Israel, the United States of America and the United Kingdom (except persons with UK-non-domiciled status) • The Trustees and Protector for the time being together with their employees, their spouses and children and any entity in which the persons named above have any direct or indirect interest. • The Protectors for the time being together with his/her/its/their employees, spouses and children and any entity in which the persons named above have any direct or indirect interest.*"

97. Mr Naeff says that he understood that after this amendment was drafted Mr Perry made inquiries of his tax advisers and the First Defendant was not involved in such discussions. On 27 December 2013 Mr Naeff emailed Mr Perry requesting that Mr Perry obtain tax advice. He said:

"We would appreciate if you could share your opinion and the opinion of [Professor Gliksberg, Mr Perry's Israeli tax adviser] with us regarding the impact of the announced changes.

Commencing January 1, 2014, Israel will start taxing any trust anywhere in the world which has an Israeli resident beneficiary. The New Rules: Under the new 2014 rules, if the settlor or his/her spouse are still alive and related to the beneficiary (a "Relatives' Trust"), then Israel will start imposing tax at a rate of 30% of income distributed to beneficiaries. Alternatively, it will be possible to elect 25% on annual trust income, regardless of distributions. Existing family Trusts must be reported by January 27, 2014. The 25% tax rate, if desired, must be elected by the same date. So time is of the essence. However, if the settlor and his/her spouse are both deceased, the trust becomes an "Israeli Residents' Trust" and will need to pay Israeli tax at rates of 30% to 52% of annual trust income, regardless of distributions. The onus is on the trustee to report and pay the tax, notwithstanding any foreign law. The Israeli Tax Authority can also enforce unpaid tax debts against the beneficiaries.

How will the Israeli Tax Authority know? Beneficiaries must report trust distributions received since August 1, 2013."

Restructuring the settlements – further Liechtenstein trusts

98. Mr Perry had a series of meetings in Tel Aviv on 12, 13 and 14 January 2015. At these meetings, he discussed the creation of further trusts. He wanted to create a separate trust for each beneficiary into which a separate pool of assets would be transferred. According to Mr Naeff (who attended all the meetings, with Dr Neupert, Mr Duggan and Mr Oehri - the Second Plaintiff and Omri Yadlin also attended parts of the meetings):

"The intention was that each potential beneficiary would have an individual trust, but this would remain a discretionary trust under the control of independent trustees. Even once personalised, the potential beneficiaries would not therefore have any absolute entitlement to distributions...Additionally, at this time [Mr Perry] had not instructed us in detail as to which assets should be allocated to each trust. We made numerous requests for him to write a letter of wishes so that we would have instruction once he passed away, but this was not forthcoming until he was on his deathbed."

99. After the meetings, steps were taken to complete the documentation required to create the new trusts. By 15 February 2015, a further seven trusts had been formed (including the Ypresto Trust for the Fifth Defendant) and there was a total of eleven trusts.

100. During early March 2015, Mr Perry became gravely ill and had to undergo major surgery (Mr Perry ultimately died shortly after the surgery). Before the surgery, he contacted Mr Wolnerman and arranged a meeting at which he could explain how he would like his assets to be dealt with if he did not survive the surgery. Mr Wolnerman's evidence was that Mr Perry had told him that his intention was "*to do away with the old structure of trusts he had created and change it so that that each beneficiary would have property that would be held for them in*

separate trusts designated for them (with the same first letter of their name)." Mr Wolnerman met Mr Perry at his hospital bedside on 5 March 2015. At this meeting, Mr Perry dictated his wishes to Mr Wolnerman. This conversation was recorded and a transcript of the conversation was produced (with a translation in English). Mr Wolnerman also prepared a typed note of the conversation with headings and numbered paragraphs. The following is an extract from the English translation of the transcript of the conversation, which sets out verbatim the words used by Mr Perry (the ***Letter of Wishes***):

> *Not that there is a big life threatening situation, but from surgery, sometimes you don't wake up and there are things I haven't done, most of the things I didn't have time to arrange so I'm doing this now as I sit with you and you write everything down and as it's recorded.*
>
> *For a long time now I've tried to get my wife and daughters to have good communication between them and between my daughters as well so they get along after I'm gone.*
>
> *Unfortunately, I think I was unsuccessful in that mission and so 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.*
>
> *Personally, I always objected to situations where parents control their children, sometimes I don't know until what age, by the power of money, by virtue of money, and one of my goals is to avoid this situation in all levels, I mean between my wife and my daughters, between my first born and her children and so on.*
>
> *As a result of this, I've made arrangements in which there will be a number of trusts, that in the end result, each trust is destined to a future beneficiary as I plan and as I will prepare in what is called a Letters of Wishes.*
>
> *I don't know if I'll be able to sign my letters of wishes so I grant power of attorney to Israel Wolnerman.*
>
> ……
>
> *…..now Lilly.*
>
> *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 payed to her after I collect them from the German Pension Program. An amount of one million Marks was payed 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.*

Perry (to Lilly): Are you going out? You look ready for going out

Perry: I do not intend to deprive Lilly but I fear that due to her approach on which we must control our children — at all ages and the grandchildren, i.e. "you behave nicely —you get, you don't behave nicely — you don't get".

That's why I'm convinced and so 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 this 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 Ville French, France and 39 41 South Street.

I wasn't talking about the office building in Israel, we need to remember to get to that later.
Wolnerman: OK
Perry: all estates in Ville French, London and New York are given to Lily, 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 manage.

Now, let's say in general

Wolnerman: General in matters of Lilly or generally?

Perry: no, generally

Wolnerman: we're done with Lilly?

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 I do come"

[underlining added]

101. On 12 March 2015, Mr Wolnerman and Mr Naeff met with Mr Perry in hospital after his surgery.

Mr Perry explained that his wishes and orders for the disposition of his wealth after his death were recorded in the Letter of Wishes. During the meeting Mr Wolnerman prepared notes in Hebrew of the points discussed with Mr Perry, which Mr Perry signed. He then had these notes typed and translated into English (the ***12 March Meeting Notes***). Mr Naeff and Mr Wolnerman

subsequently signed a declaration on 9 June 2015 confirming that they had met with Mr Perry on 12 March and that at the meeting Mr Perry had confirmed his wishes as to the division of his assets and the management of the trusts he had created and *explained that any further details should be found in the written Protocol [the 12 March Meeting Notes] that was made by [Mr] Wolnerman and was signed by the deceased..... Furthermore Mr. Perry [had] asked [Mr] Wolnerman to sign the Letter of Wishes ..... based on a power of attorney on his behalf.*" Before the 12 March meeting, Mr Naeff had sent to Mr Perry the relevant documents for the new structure for Mr Perry's amendment and approval, including the deeds of the various trusts. However, at the meeting in the hospital Mr Perry refused to approve the relevant documents for the structure, including the deeds, and asked Mr Naeff to leave all the documentation with Mr Wolnerman.

102. The 12 March Meeting Notes recorded the following in relation to the new trust for the First Plaintiff that Mr Perry wished to be created:

> *"G) Wishes relating to LLP-Trust*
>
> *Preamble: Already transferred to LLP personally: Real Estate Pinkas, Rekanty, Yeminmoshe, large collection of jewellery.*
>
> *To be dedicated to this Trust:*
> *1) USD 50M. To be invested in investment grade bonds and equities of high quality (blue chips).*
>
> *2) Real Estate South Street 39 / 41, London*
>
> *3) Côte D'Azur Estate LLC, Villa in Villefranche*
>
> *4) All expenses for real estate shall be financed by the IPG Trust as long as [the Fifth Defendant/Second Plaintiff] and their children get the right to visit/utilize said properties."*

103. Mr Perry subsequently died on 18 March 2015.

Events following Mr Perry's death and the proceedings in Liechtenstein

104. Various disputes arose following Mr Perry's death. These have ultimately led to the breakdown in the relationship and litigation in various jurisdictions between the First Plaintiff and the Second Plaintiff on the one hand and the First Defendant on the other and between the First Plaintiff and the Second Plaintiff on the one hand and the Fifth Defendant on the other.

105. A number of disputes related to the manner in which the value of shares in Mobileye NV (***Mobileye***) should be distributed. Mobileye was a technology company in which Mr Perry invested in 2000. The shares were held by Solid and were therefore (indirectly) an asset of the Lake Cauma Trust. Some of the shares however were held by Solid subject to a nominee agreement between Solid and Mr Greenspoon (Mr Greenspoon transferred these shares to the Second Plaintiff when they divorced and the Second Plaintiff claimed that these shares were not part of the Lake Cauma trust fund). The Mobileye shares were very valuable and some of them were sold for a substantial sum (from October 2014, Mr Perry, on advice, had been hedging and selling Solid's position in Mobileye shares - in light of Mr Perry's illness and his wish to allocate assets to the new and separate trusts, he planned to sell all or most of the Mobileye shares as soon as a lockup was lifted, in January 2015). It appears that some of the shares were sold and following the sale the proceeds of sale were upstreamed by Solid, BGNIC and BH06 to the First Defendant (BH06 declared a dividend and made payments to the First Defendant).

106. Following various discussions and negotiations as to how the proceeds and the remaining shares should be allocated and distributed, an agreement was reached. On 25 August 2015, the First Defendant (in its capacity as trustee of the Lake Cauma Trust) signed a written resolution. It was titled "*Resolution Regarding the Principles of Future Distributions*". It stated that the First Defendant ("*after extensive deliberation*") approved certain "*distribution principles*" to be applied to the allocation of the proceeds among the various trusts. SPA also signed the resolution to give its approval as protector. The distribution principles were said to be "*based on a target value of USD 38 per Mobileye Share.*" The resolution listed the sums allocated to each of the nine trusts. "*US$40 million*" was allocated to the Ypresto Trust. The Second Plaintiff was allocated "*263'158 Mobileye Shares (equivalent to USD 10 Mo.)*"

107. Pursuant to the principles set out in the resolution, the First Defendant paid US $40 million to the Ypresto Trust in September 2015 (for the benefit of the Fifth Defendant).

108. However, problems subsequently emerged. The Fifth Defendant objected to the basis on which the Mobileye shares had been allocated. In her evidence, the Fifth Defendant asserted that around May 2016 the First Defendant discovered that the allocation of Mobileye shares had been based on an error. The First Defendant had been misled by individuals acting for the Second Plaintiff into using the US$38 per share figure. The shares were in fact worth considerably more. As a result, there had been an allocation to the Second Plaintiff's trust of more shares than she was entitled to. The Fifth Defendant claimed that the First Defendant

subsequently (on 20 September 2017) passed a further resolution revoking the resolution of 20 August 2015 and that the Second Plaintiff was "*furious*." She says that, "*From that point on, [the Second Plaintiff] set out to find a basis to remove [the First Defendant] and reconstitute the SPA in her favour by removing [Dr Neupert]. Her approach was essentially two pronged. First, she began litigation in Switzerland and Liechtenstein to change the SPA and the trustees. Secondly, she started a brutal, defamatory attack on, and issued criminal complaints against, [Dr Neupert and the First Defendant] by alleging inter alia that [Dr Neupert] stole money from [Mr Perry] during a historic property transaction in Herzliya, Israel.*"

109. The Second Plaintiff denied this account. She says that the use of US$38 per share was fair and legitimate. It had become necessary to select an assumed price per share for purposes of the allocation since the Second Defendant did not want immediately to sell her shares. She wanted to retain them while the Fifth Defendant wanted to sell her shares. US$38 per share was chosen since it was the price of the shares when a portion of the Mobileye shares had previously been sold to raise money for the Fifth Defendant. No one had been misled. Furthermore, there was clear failure to account for the proceeds of sale of two plots of the land in Herzliya and evidence of wrongdoing by Dr Neupert. The Second Plaintiff asserted that it was her attempts (and those of others working on her behalf) to find out what had happened to the proceeds of the Herzliya land that caused Dr Neupert to adopt a hostile attitude to, and to begin what she characterises as his campaign against, her and her family.

110. What is clear is that during 2016 the First Plaintiff and Second Plaintiff (with other members of their families) resorted to litigation and launched proceedings in Liechtenstein against the First Defendant. The various applications and judgments were described in detail in Mr Zechberger's evidence. The main proceedings and decisions in Liechtenstein can be summarised as follows:

(a). on 23 September 2016, an application (the ***Application***) was filed for an injunction seeking (i) the removal of the First Defendant as trustee of all the trusts (save for the Ypresto trust), and the appointment of a new trustee, First Advisory Trust (***First Advisory***); alternatively, the appointment of First Advisory as co-trustee with the First Defendant; and (ii) an order that the co-trustees only act jointly; (iii) alternatively, an order that the First De

(b). on the same day, the Princely Court granted the ex parte injunction in part by appointing First Advisory as co-trustee of the trusts (excluding the Ypresto Trust) and ordered that

the co-trustees could only act jointly. However, the court refused to remove the First Defendant as trustee.

(c). the First Defendant appealed this decision to the Court of Appeal. On 1 December 2016, the Liechtenstein Court of Appeal ordered that the Application be struck out because the First Plaintiff and Second Plaintiff (with other members of their families) had failed to establish that they had standing (as discretionary beneficiaries) to bring the claims made and obtain the relief sought. The First Plaintiff and Second Plaintiff (with other members of their families) appealed this decision to the Supreme Court.

(d). in the period before the decision of the Supreme Court there were disputes between First Advisory and the First Defendant. On the application of the SPA, and in order to allow the trusts to be administered, on 13 January 2017 the Princely Court appointed Fiduciana Verwaltungsanstalt (***Fiduciana***) as an additional (and neutral) co-trustee (for so long as First Advisory was a trustee).

(e). on 3 March 2017, the Supreme Court upheld the Court of Appeal's decision (the ***Liechtenstein Supreme Court Judgment***). The Application was dismissed and the ex parte injunction discharged. Both First Advisory and Fiduciana were removed as trustees. However, on 8 March 2017 Fiduciana was reappointed as co-trustee by the SPA.

(f). the First Plaintiff and Second Plaintiff (with other members of their families) applied to the Liechtenstein Constitutional Court for permission to appeal the Supreme Court Judgment. However, this appeal was withdrawn on 16 October 2017.

(g). on 25 October 2016 the First Plaintiff and Second Plaintiff (with other members of their families) had issued the proceedings to which their injunction application related.

(h). on 11 July 2017, the First Defendant and Fiduciana applied for an order to remove the SPA as protector of the trusts and to appoint a neutral third party in its place. On 12 July 2017, the Princely Court granted an injunction and appointed Dr Peter Schierscher (***Dr Schierscher***) as a temporary protector of all the trusts. Mr Duggan appealed this decision and on 16 November 2017 the Court of Appeal dismissed the appeal with respect to all trusts other than Heritage Trust and the Damerino Trust. With respect to these two trusts the Court of Appeal upheld Mr Duggan's appeal and this was confirmed by the Supreme

Court on 6 April 2018. (Thus, Dr Schierscher was removed as temporary protector of the Heritage and Damerino Trusts).

(i). following Mr Duggan's appointment as protector of the Heritage and Damerino Trusts, on 24 March 2017 he passed two resolutions purporting to replace the trustees of the Heritage and Damerino trusts. On 15 May 2017, the Princely Court granted an injunction which prohibited the party appointed by Mr Duggan from acting as trustee until the court decided whether Mr Duggan's resolutions were valid. An appeal against the injunction was dismissed by the Court of Appeal.

(j). on 25 October 2017 the Princely Court granted the First Defendant and Fiduciana's application for an injunction against (inter alia) the First Plaintiff and the Second Plaintiff. The injunction made the following orders:

(i) it prohibited the Commercial Registry of Liechtenstein from deleting the First Defendant and Fiduciana as trustees of ten of the trusts and from deleting the First Defendant as trustee of the Ypresto Trust, or from registering any new trustees.

(ii). it prohibited the First Plaintiff and Second Plaintiff (and other members of their families) from passing resolutions in respect of the trusts on the grounds of their position as alleged beneficiaries and/or descendants of the settlor.

(iii). it prohibited the First Plaintiff and Second Plaintiff (and other members of their families) from referring to resolutions already passed and using them to justify any changes of trustee, protector or directors of subsidiaries.

(iv). it prohibited the First Plaintiff and Second Plaintiff (and other members of their families) from interfering with the management of the trusts or their associated companies or from disposing of the assets of any of the associated companies of the trusts in circumvention of the trustees and the court appointed protector.

(k). on 7 February 2018, Fiduciana resigned as trustee of the trusts. Dr. Schierscher took the view that in light of the complaints made against the First Defendant it was necessary to have another, neutral and independent trustee. After interviewing various candidates, on 16 February 2018, Dr Schierscher appointed the Ninth Defendant, Admintrust Verwaltungsanstalt Anstalt (***Admintrust***), as co-trustee of all trusts.

(l). on 23 April 2018, the Princely Court (Mag. Stefan Rosenberger) delivered a reasoned written decision (the ***Ex Officio Ruling***) after a review of a substantial volume of documents) in the exercise of the court's supervisory jurisdiction over Liechtenstein trusts. The court had been requested to exercise this jurisdiction by the First Plaintiff and Second Plaintiff (with other members of their families). These are *ex officio* or supervisory proceedings. The court may exercise its powers under this jurisdiction either on its own initiative or after being notified by those with a sufficient interest in the trust. The First Plaintiff and Second Plaintiff (with other members of their families) had notified the Liechtenstein court of its complaints regarding the conduct of the First Defendant and requested the court to remove the First Defendant as trustee of the trusts in the exercise of its supervisory jurisdiction. In its decision of 23 April 2018, the Princely Court decided (after noting that the multiplicity of proceedings in multiple jurisdictions pending between the trustees and the First Plaintiff and the Second Plaintiff had given rise to a "*problematical situation*") that it was not necessary to remove the First Defendant. The Princely Court was satisfied that sufficient safeguards were in place to protect the interests of the class of discretionary beneficiaries. The Princely Court stated:

> "*Through the appointment of a second trustee, Admintrust Verwaltungs Anstalt and the neutral protector Dr. Schierscher, good trust governance is thus ensured with the result that [the First Defendant] need not be removed as trustee, specifically in view of its efforts to retrieve the trust assets.*"

(m). the Princely Court also decided that the SPA must be removed as protector. It was necessary to have a neutral person acting as protector. The SPA was unable properly to perform its role because of the "*stalemate and internal turbulence extending over years*" to which it had been subject and the fact that Mr Duggan and Omril Yadlin were "*exposed to substantial conflicts of interest.*" Dr Schierscher was known to the court as an honest and conscientious lawyer and was considered to satisfy the requirements for an independent and competent protector. The Princely Court therefore appointed Dr Schierscher as protector of all eleven trusts on a permanent basis (this decision was at the time of the trial the subject of an appeal by the First Plaintiff, the Second Plaintiff and the SPA).

The Mistake Claim – the Plaintiffs' arguments

The basis of the Mistake Claim

111. The Mistake Claim is a claim (made on behalf of Mr Perry's estate) to set aside Mr Perry's voluntary (and gratuitous) transfer of the Share to the First Defendant under the equitable principles governing relief for the consequences of a transaction entered into by mistake.

112. The factual basis on which the Mistake Claim is advanced is set out at paragraphs 20-22 of the Plaintiffs' amended statement of claim (the ***Statement of Claim***). These state that:

> *"20. On 7 March 2016 in case 07.HG.2016.212 the Liechtenstein Supreme Court held that discretionary beneficiaries of a Liechtenstein law trust have, under that law, no effective right to enforce the trustee's obligations or to apply to the court to supervise the administration of the trust. They thus have no useful right to trust information, to apply to court to prevent action by the trustee in breach of trust, or to apply to the court to remove a trustee.*
>
> *21. Mr Perry was a lawyer and businessman and knowledgeable about financial matters. He did not know of the above feature of Liechtenstein trust law. It is to be inferred that Mr Perry mistakenly had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma Trust would have effective rights as beneficiaries to apply to the court to enforce the trustee's obligations, including rights to apply to the court to supervise the administration of the trust; to obtain trust information; to apply to court to prevent action by the trustee in breach of trust; and to apply to the court to remove a trustee.*
>
> *22. Had he known the true position, Mr Perry would not have transferred the share in BH06 to Lopag, whether on the trusts of the Lake Cauma Trust or at all."*
>
> [underlining added]

113. The Plaintiffs' case is that the Court can and should infer from the facts and circumstances established at trial that Mr Perry intended to benefit his family members by settling the Share on the Lake Cauma Trust and that he must at least have assumed that they would have effective remedies in proceedings in the Liechtenstein court for enforcing the obligations of the First Defendant (and its co-trustees). That assumption was mistaken. The Liechtenstein Supreme Court Judgment shows that such remedies are not available. It follows, the Plaintiffs submit, that the transfer of the Share should be set aside and any property derived from the Share should also be returned to Mr Perry's estate.

The law – what must be established to make out the Mistake Claim?

114. The Plaintiffs' say (and it is not in dispute) that the Mistake Claim is governed by Cayman law. They submit that the test for equitable mistake was considered in detail in the UK Supreme Court in *Pitt v Holt* [2013] 2 AC 108 where, at paragraphs 122-128, Lord Walker held that a cause of action for equitable mistake comprises three elements:

(a). the donor must have been mistaken;

(b). the mistake was sufficiently serious, such that

(c). the assertion of the donees' rights would be unconscionable.

115. The Plaintiffs point out that this test has been followed and applied in numerous cases in England and overseas, including the Cayman Islands. In *Kennedy v Kennedy* [2014] EWHC 4129 (Ch.) at [36] Etherton C, as he then was, summarised the principles set out in *Pitt v Holt*:

> *"(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence...but...the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference. (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition... (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. (4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."*
>
> [underlining added]

116. In *Schroder Cayman Bank and Trust Company Limited v Schroder Trust AG* [2015 (1) CILR 239] the Chief Justice considered that *Pitt* represented the proper approach to the doctrine of mistake as a matter of the law of the Cayman Islands. He went on to approve (at paragraph 77) the following guiding principles set out in *Pitt*:

> *"(i) the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief;*
>
> *(ii). a causative mistake differed from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, could lead to a false belief or assumption which the law would recognize as a mistake;*
>
> *(iii). the gravity of the mistake had to be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences, including tax consequences, for the disponor; and*

(iv). the court then had to make an objective evaluative judgment as to whether it would be unconscionable or unjust to leave the mistake uncorrected."

117. The Plaintiffs also relied on the judgment of Morgan J in *Van der Merwe v Goldman* [2016] 4 WLR 71. At paragraph 26 of his judgment, Morgan J described the applicable principles as follows:

> *"In a case concerning a gift made as the result of a mistake, the relevant legal principles are those which were recently restated in Pitt v Holt..... These principles apply even if the transaction is under seal: see at [115]. For present purposes, the principles can be summarised as follows (references in square brackets are to the paragraphs in Pitt v Holt):*
>
> *(1) a donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift: [101], quoting Ogilvie v Littleboy (1897) 13 TLR 399 at 400;*
>
> *(2) a mistake is to be distinguished from mere inadvertence or misprediction: [104];*
>
> *(3) forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake: [105];*
>
> *(4) it does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong: [114];*
> *(5) equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability: [124];*
>
> *(6) the evaluation of unconscionability is objective: [125]*
>
> *(7) the gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition: [126];*
>
> *(8) the court needs to focus intensely on the facts of the particular case: [126];*
>
> *(9) a mistake about the tax consequences of a transaction can be a relevant mistake: [129]-[132];*
> *(10) where the relevant mistake is a mistake about the tax consequences of a transaction, then:*
>
> > *"[i]n some cases of artificial tax avoidance, the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy." [135];*
>
> *(11) it is not pointless, nor is it acting in vain, to set aside a transaction and to remove a liability to pay tax, even where that is the principal, or the only, effect of the setting aside: [136]-[141]."*

118. An issue in *Van der Merwe* was whether the transaction creating the trust involved a contract (engaging the limited rules for rescission at common law) or was a voluntary disposition. Morgan J found that:

"the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction. If the effect of rescission (or a declaration that a transaction is void) would deprive a party of a benefit for which he gave consideration, then the common law rules apply and there is no separate equitable jurisdiction to order rescission."

119. The Plaintiffs submitted that in this case it is clear that no consideration was given by any of the beneficiaries in return for their inclusion as beneficiaries under the trust. The First and Ninth Defendants are trustees and are not entitled to any benefit as trustees and their sole function is to act on behalf of the beneficial class.

Did Mr Perry make a mistake and if so what mistake did he make?

120. The Plaintiffs argued that the evidence establishes facts that demonstrate that Mr Perry made a mistake in transferring the Share to the First Defendantas trustee of the Lake Cauma Trust. They say that Mr Perry believed that there was nothing special or different about a Liechtenstein trust and was given no indication that the rights of beneficiaries under a Liechtenstein trust would be in any way different from those under any other trust. He clearly expected that he and his beneficiaries would be in a position to enforce the trustees' legal obligations and was plainly someone who did not shrink from engaging in legal proceedings.

121. Mr Perry's belief or assumption on this issue was falsified by the decision of the Liechtenstein Supreme Court Judgment. As a result of that decision it was clear that discretionary beneficiaries of Liechtenstein trusts have no material rights. None of this can have been known to Mr Perry when he established the Lake Cauma Trust and there was nothing to suggest that this feature of Liechtenstein law (said by the Plaintiffs to be "bizarre") was ever raised or discussed with him. Therefore, that in transferring the share of BH06 to the First Defendant as trustee of the Lake Cauma Trust, Mr Perry made a distinct mistake.

122. The expert evidence established that the effect of the Liechtenstein Supreme Court decision was that discretionary beneficiaries of Liechtenstein law trusts were in a more or less helpless position: they had no useful right to trust information, no right to seek the removal of the trustee, no right to require a trustee to act, to review a trustee's decisions, or prevent improper conduct of the trustee.

123. The Plaintiffs adduced expert evidence on the rights of discretionary beneficiaries under Liechtenstein law from Dr Lorenz. The Plaintiffs made the following submissions in relation to Liechtenstein law in reliance on Dr Lorenz's evidence:

(a). the Liechtenstein law of trusts is provided for in the Persons and Companies Act 1926 (***PGR***) as interpreted by the Liechtenstein courts.

(b). information rights are dealt with under Article 923 PGR. Pursuant to a decision of the Liechtenstein Supreme Court, discretionary beneficiaries have no enforceable rights to obtain information about the trust (the Plaintiffs note that in the Joint Expert Report it was common ground between the experts that in a recent precedent "*the Supreme Court held that discretionary beneficiaries have no statutory rights to obtain information about the trust*").

(c). challenges to proposed or actual administrative or dispositive decisions of trustees are regulated by Article 927/2 PGR. Pursuant to the Liechtenstein Supreme Court Decision "*discretionary beneficiaries have no standing to apply to the court for it to exercise its supervisory authority to block or prohibit the exercise of an administrative power by a trustee or order restitution after the power had been exercised*" Once again the Plaintiffs noted that in the Joint Expert Report, it was common ground that "*discretionary beneficiaries may not institute proceedings for the court to supervise the administration of a trust and validate or invalidate trustee actions (pursuant to Art. 927/2 PGR), and that they therefore, have no standing to object to the exercise of an administrative or dispositive power by a trustee, as of right*".

(d). the removal of a trustee for cause is regulated by Article 929/3 PGR. In Dr Lorenz's opinion under Liechtenstein law discretionary beneficiaries "*have no standing to apply to court for the removal of a trustee. They merely notify the court which may or may not then commence a corresponding [supervisory] proceeding*" (see paragraph 42 of Dr Lorenz's report). In the Joint Expert Report, it was common ground that although a discretionary beneficiary may file a notice under Article 929/3 PGR asking for the removal of a trustee for cause "*the filing of the notice does not as such confer standing on the notifier*".

(e). even if the Liechtenstein court did commence supervisory proceedings in response to a notice by a discretionary beneficiary, the discretionary beneficiary would not be "*directly affected*" by those proceedings and so would not have standing as a party in those proceedings.

(f). Mr Bruckschweiger suggested that a discretionary beneficiary could apply for the appointment of an auditor or a supervisory trustee but as Dr Lorenz points out at paragraph 11 of Dr Lorenz's Reply Report the relevant provisions of the PGR usually referred to as the law on trust enterprises (Treuunternehmensgesetz or ***TrUG***) are applicable to ordinary trusts (such as the Lake Cauma Trust) only to the extent that ordinary trust law contains a lacuna. Since there is no lacuna in respect of the manner in which proceedings may be instituted under Art 929/3 PGR, the provisions of the TrUG relied on by Mr Bruckschweiger are inapplicable.

(g). Dr Lorenz accepted that in principle a discretionary beneficiary could complain about the conduct of a trustee to a co-trustee or to a protector but noted that "*for as long as the underlying obligations of these officeholders cannot be enforced through meaningful remedies by the beneficiary these protections are lacking an essential component*". In the Joint Expert Report it was common ground that "*discretionary beneficiaries would have no direct means to enforce that duty*".

(h). Dr Lorenz accepted that in principle if a trustee has committed a crime then a discretionary beneficiary could make a criminal complaint but pointed out that a criminal complaint is "*not a remedy at all*". Even if a prosecutor could be persuaded to commence criminal proceedings (and it is not obvious how a discretionary beneficiary could obtain sufficient information to persuade a prosecutor to do so), since a discretionary beneficiary had no right to receive distributions from the trust it was unlikely that a discretionary beneficiary would be "*allowed to participate as a victim (with limited party rights)*" in any such criminal proceeding.

124. The Plaintiffs made the following submissions regarding Mr Perry's knowledge of Liechtenstein law:

(a). a striking feature of the evidence at trial was that there was no evidence that Mr Perry had ever received advice about the legal nature of a Liechtenstein discretionary trust from a qualified Liechtenstein lawyer.

(b). the direct evidence as to what Mr Perry knew about Liechtenstein discretionary trusts mainly derived from Mr Oehri but that evidence strongly indicated that Mr Perry believed that a Liechtenstein discretionary trust was, in substance, not materially different in its operation from a discretionary trust under English law.

(c). the following points emerged from Mr Oehri's evidence:

(i). the only advice which he knew that Mr Perry had received about the establishment of the Heritage Trust was from FFW.

(ii). FFW had asked for, and received, an English translation of the Liechtenstein trust law (which implied that they were not experts on Liechtenstein trust law).

(iii). FFW then concluded that a standard form trust deed precedent for an English discretionary trust was suitable and appropriate for use in relation to a Liechtenstein discretionary trust.

(iv). Mr Oehri's own assumption, which was likely to have been shared by Mr Perry since nothing appears to have been said at the meeting he attended with FFW to change Mr Oehri's view on the matter, was that English trusts lawyers would certainly know how a Liechtenstein discretionary trust would work.

(v). Mr Oehri's only recollection of any difference between English discretionary trusts and Liechtenstein discretionary trusts being discussed was that the settlor had greater influence under Liechtenstein law.

(vi). the assumption underlying Mr Oehri's evidence that he had urged Mr Perry to create a letter of wishes to avoid the trustees' decisions being subject to criticism and challenge after Mr Perry's death was that discretionary beneficiaries were capable of challenging administrative and dispositive decisions of trustees of Liechtenstein discretionary trusts.

(d). this evidence supported the Plaintiffs' case that: (i) Mr Perry believed or assumed that his family would be in a position to challenge the First Defendant's administrative and dispositive decisions through the Liechtenstein courts; and (ii) Mr Perry reasonably

assumed that the legal structure he was creating for the benefit of himself and his family was to all intents and purposes the same as an English law discretionary trust.

125. The Plaintiffs submitted that Mr Perry's words and conduct demonstrate that he always intended and believed that his wife and children would be able to have meaningful rights in respect of the trusts he had created. They rely on the following matters:

(a). during his lifetime Mr Perry did not consider that the First Defendant had any discretion with regard to investments and he made it clear that such decisions were simply to be conveyed to the First Defendant by the beneficiaries or the protector of the relevant trust and then obeyed without question. The email dated 23 October 2012 that Mr Perry dictated and was sent to the London solicitors acting for him in relation to the SOCA Proceedings demonstrated his position. The email read as follows:

> *"Concerning [the First Defendant's] statement, you should be aware of how the system works: [the First Defendant] do[oes] not deal out of their own initiative with investments. Their only initiative is for short time cash deposits. Decisions about investments in stock, bonds or commodities would usually be conveyed to [the First Defendant] by the beneficiaries of the trust or by the protector. What I want to clarify here is that LOPAG would not be aware of any intention to invest the money; they did not receive any instructions or guidelines due to the fact that there was a freezing order on the assets. Therefore, I believe that LOPAG could just confirm the fact that the money was not invested other than in short term deposits, and that they did not get any instructions to invest it. The intention to invest one way or another, and the reason why such instruction was not given could only be covered by my or by Tami's statement. Best, IIP"*

(b). Mr Perry specifically instructed the First Defendant to create '*separate trusts for each of the beneficiaries*' so that, as he put it in the Letter of Wishes, they could enjoy their own separate property without requiring the permission of the other beneficiaries.

(c). Mr Perry ordered that two companies (Naples and Solid BVI) should be transferred to the Fifth Defendant's trust since those companies were creditors of Solid Industrial, a company already owned by the Fifth Defendant, and it would benefit her to control both the creditor and debtor entities. That instruction was incoherent if Mr Perry had assumed that the beneficiaries would have had no enforceable rights.

126. The Plaintiffs' witnesses gave evidence as to their understanding of Mr Perry's intentions and state of mind as follows:

(a). the First Plaintiff said (in paragraph 24 of her Third Affidavit) that

> *"Whilst I was not involved in my husband's business activities I was aware that he was a shrewd and sensible man. He was someone who liked to be in control. Whilst he did listen to advisers I got the impression that he always made all the important decisions himself or in conjunction with [the Second Plaintiff] who had worked with him all her working life. I do not believe he would ever have transferred assets, especially very valuable assets, into a trust such as the Lake Cauma Trust if he had known that it would give no real rights to his family and would leave them in the hopeless position of having no rights to require that the trustees do their job properly."*

(b). the Second Plaintiff stated (at paras 38 and 39 of her Twelfth Affidavit):

> *"By the [Liechtenstein Supreme Court Judgment] the [Liechtenstein] court found that my mother and I were mere discretionary beneficiaries. As such we had no right, inter alia, to seek the removal of the trustee. This was part of Liechtenstein trust law under which discretionary beneficiaries had no meaningful rights against the trustee.*
>
> *My father had no idea of this peculiarity of Liechtenstein law. My father was an intelligent, sensible and practical man. He was anything but mercurial or prone to act capriciously. He was a successful lawyer and very knowledgeable about financial matters. He simply would not have put the enormous wealth he had created into trusts under which the beneficiaries had no enforceable rights."*

(c). Mr Greenspoon's evidence (in paragraphs 11, 13 and 14 of his First Affidavit) was as follows:

> *"11. During his life Mr Perry exercised control over all his assets, whether they were held directly by him or through the various trusts that he had settled. He trusted [the First Defendant] to carry out administrative functions but they had no discretion. Mr Perry has never and would have never permitted anyone else but his family members to deal with his assets and wealth. The role of the trustees was to carry out the wishes of Mr Perry for the benefit of members of the family in accordance with the instructions of Mr Perry, [the Second Plaintiff] and me. The trustees had no material role in the business management. They were purely signatories, receiving instructions and executing them. I always observed the execution.*
>
> *13. I now understand that, following the decision of the Supreme Court of Liechtenstein, which is discussed in [the Second Plaintiff's] affidavit, Mr Perry's family (as beneficiaries of the Lake Cauma Trust) has no rights to enforce the obligations of the trustee of the trust to respect the beneficiaries' interests. I see no way that Mr Perry would have agreed to confer any power upon the trustees. For him they were there to carry out his instructions. Mr Perry told me that if the family members wished to replace the trustee, this would be possible.*
>
> *14. By the time Mr Perry allegedly transferred the share in BH06 to the Lake Cauma Trust in 2013 I was no longer working with him. I therefore did not discuss this with him and did not know about it until after his death. It is my firm belief that Mr Perry would never have transferred all this wealth that he had accumulated in his life to strangers had he believed that they could ignore his immediate family members (his wife, daughters and grandchildren) and their wishes and instructions.*

Mr Perry had no other wish or thought but to provide for his wife, daughters and grandchildren and in no way would he give powers to displace this."

Was the mistake causative?

127. The Plaintiffs' argue that Mr Perry's mistake was of central importance to the transfer of the Share. They submit that it is inconceivable that Mr Perry would have created the Lake Cauma Trust and transferred the Share to the First Defendant as trustee of the Lake Cauma Trust had he known that none of his family, as beneficiaries of the trust, would ever be in a position to protect their interests under the trust or to enforce the trustees' obligations.

Was the mistake sufficiently grave to make it unconscionable on the part of the First Defendant to retain the property?

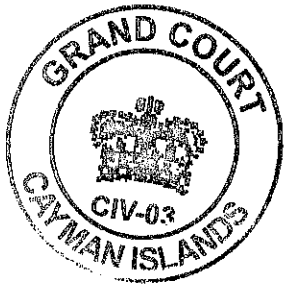
128 The Plaintiffs submit that it would be unconscionable for any beneficiary of the Lake Cauma Trust to assert his or her rights notwithstanding Mr Perry's mistake. The trust was plainly not what Mr Perry wanted and it was obvious that it will never provide the benefits and protections that he intended for his family. The trust was clearly intended to be for the sole benefit of Mr Perry's immediate family and it is plain, on the evidence, that the First and Ninth Defendants, together with the protector, will continue to use their positions to damage the interests of the Plaintiffs and the Second Plaintiff's children, comfortable in the knowledge that there is almost nothing any of them can do to prevent this

The Mistake Claim – the First Defendant's arguments

There was no mistake

129. The First Defendant submitted that the mistake relied upon by the Plaintiffs is properly to be characterised as a mistake of Liechtenstein law, namely that discretionary beneficiaries have no "meaningful", "enforceable" or "effective rights". To establish such a claim, the Plaintiffs must show not that Mr Perry failed to appreciate the rights of discretionary beneficiaries as a matter of Liechtenstein law (which would be mere inadvertence) but that he thought, wrongly, that discretionary beneficiaries did have "meaningful" rights under Liechtenstein law, which they do not in fact have.

130. The First Defendant submitted that the Mistake Claim must fail because:



(a). it was wrong to assert that discretionary beneficiaries have no "meaningful" rights under Liechtenstein law.

(b). even if correct, there was no evidence that Mr Perry was mistaken about the law of Liechtenstein or that he wished to give his beneficiaries (direct) control of the trusts. The evidence, in fact, indicates the exact opposite.

131. As regards the rights of the Plaintiffs and the other beneficiaries of the Lake Cauma Trust under Liechtenstein law, the First Defendant submitted as follows:

(a). the Liechtenstein law experts agreed that the rights of beneficiaries, discretionary or otherwise, are set out in the relevant trust deed and so can be determined by the settlor (although the Plaintiffs' expert, Dr Lorenz, appears to suggest that if an express right to information was granted in the trust deed, the courts would not enforce the right on the application of a discretionary beneficiary).

(b). the Liechtenstein law experts also agreed that discretionary beneficiaries had more limited rights than entitled beneficiaries. In particular, discretionary beneficiaries cannot apply under Article 927/2 PGR (which refers to entitled beneficiaries) and so do not have a right to seek an order from the court:

(i). requiring information to be provided about the Trust (assuming that there is no such right in the Trust Deed).

(ii). restraining a trustee from exercising an administrative or dispositive power.

(c). however, they also agreed that discretionary and entitled beneficiaries can apply to the Court under Article 929/3 PGR seeking the removal or admonishment of a trustee. An application under this section will oblige the Court to investigate the matter to see whether removal or admonishment was appropriate. According to Mr Bruckschweiger, if a discretionary beneficiary is "directly affected" by the dispute and the court's decision, they will be added as a party. However, whether this happens is, in some ways, irrelevant as the Court will be seized of the matter and duty bound to investigate. If there is wrongdoing by a trustee, the courts in Liechtenstein can and will take action.

(d). it was instructive to test whether the rights of a discretionary beneficiary would be materially different under Cayman Islands law. The proper reference point was a Cayman Islands STAR trust (introduced by the Special Trusts (Alternative Regime) Law 1997). This is the regime or structure in Cayman which bears the greatest similarity to the Lake Cauma Trust. Under a STAR trust the ability of a beneficiary to enforce their rights with regard to the administration of the trust was severely circumscribed. Under the STAR trust regime beneficiaries are expressly disentitled from applying to the Court to enforce their rights, because the trust is already under the independent control of a third party enforcer.

(e). accordingly, a discretionary beneficiary under a STAR trust is in a worse position than a discretionary beneficiary in Liechtenstein. The key to both such structures is the independent third party supervisor: the protector in Liechtenstein and the enforcer in Cayman. In the case of the Lake Cauma Trust, there was the further protection given by the appointment of the independent co-trustee, first the Third Defendant and now the Ninth Defendant.

(f). the premise that underlies the Mistake Claim is therefore wrong.

(g). this was illustrated by what happened in Liechtenstein in the present case. The Liechtenstein courts considered whether there were grounds to remove the First Defendant as trustee. The reason why they did not replace the First Defendant was simple: there had been no misconduct. It was not the result of the absence of standing on the part of the Plaintiffs.

132. The First Defendant submitted that there was a further difficulty for the Plaintiffs. This arose because the Liechtenstein law experts agreed that the Liechtenstein Supreme Court Judgment did not alter the law of Liechtenstein (see paragraph 10 of the joint report). Therefore:

(a). as the law had not changed, there were a number of possible states of mind Mr Perry had when establishing the Liechtenstein trusts and transferring property to them. First, Mr Perry knew about the rights of discretionary beneficiaries under Liechtenstein law; second, Mr Perry was not concerned about the rights of discretionary beneficiaries and third Mr Perry was advised incorrectly about the rights of discretionary beneficiaries.

(b). in any of these three situations the Mistake Claim fails. In the first two situations, there was no operative mistake. In the third situation, Mr Perry should have known about his rights (and so there was no operative mistake) and, at most, his estate had a claim against his former advisers.

133. In any event, the documents that have been discovered indicated that Mr Perry knew full well what he was doing. Mr Perry's primary motivation for establishing the trusts was not to ensure that the beneficiaries could control then but to protect his assets from the authorities (including the tax authorities). The establishment of the Heritage Trust appeared to have been motivated by a desire to avoid UK tax when Mr Perry became a non-domiciled resident in London in 2000 – this conclusion is supported by the advice from FFW dated 29 March 2000. The establishment of the Lake Cauma Trust also appeared to have been motivated by tax planning (succession planning structured in a tax efficient way). Mr Perry was taking tax advice from Professor Gliksberg and legal advice from the Israeli law firm Rozak (as I have noted above) and memoranda of the tax advice from Rozak had been disclosed. In addition, since the Israeli class action had not yet been settled, asset protection (the protection of his assets from the claims of creditors) must also have been in Mr Perry's mind when he decided to settle the Share into trust. The Second Plaintiff had accepted during her cross-examination that Mr Perry had been seeking to place assets in trust in order to *"preserve his property"*. The tax planning and asset protection objectives would both be promoted by Mr Perry ceding control over the Share.

134. Mr Perry also changed the terms of the trusts in order to deal with tax issues that subsequently arose. For example, the beneficiaries were expanded in 2013 to keep the class of discretionary beneficiaries wide given an anticipated change in Israeli tax law (as Mr Naeff explained in his evidence). Further, the rights of the discretionary beneficiaries under the trusts had been amended and changed over time, which suggested that Mr Perry had expressly considered and been satisfied with their rights. For example, the rights of beneficiaries to information was not the same under each trust deed. The First Defendant compared the position under the Damerino Trust Deed and the Lake Cauma Trust Deed. Whilst in both cases the trustees were required to keep records, the records were available to the beneficiaries in the early trusts but only the protector was entitled to see the information in the later trusts, including the Lake Cauma Trust. However, the beneficiaries remained protected, as there was an independent protector. As the Second Plaintiff explained in her evidence, the role of the protector was critical.

135. Accordingly, the structure put in place by Mr Perry was analogous to a STAR trust in the Cayman Islands. Far from being an unsuitable structure, this created controls designed to ensure that the settlor's wishes were protected. Mr Perry seemingly made a conscious decision to limit the rights of the beneficiaries under the trust deeds. As he was obtaining advice from a number of sources, it must be inferred that this was a deliberate decision. His choice of Liechtenstein as a jurisdiction was equally deliberate.

Any mistake was not causative

136. Mr Greenspoon's evidence during cross-examination demonstrated that Mr Perry was aware of and accepted the risk that the trustees might "*embezzle*" the funds (i.e. that by placing assets in a discretionary trust he would lose control of the assets). Mr Greenspoon's evidence was as follows:

> *Q* *And did you tell Mr Perry what your hunch was, Mr Greenspoon?*
>
> *A* *That he might not be -- that he might be in a position where the trustees would -- would embezzle, as they are now. I believe they are doing that.*
>
> .....
>
> *Q.* *And at the end of the day, did he take your advice and not put the assets in trust, or did he decide, notwithstanding your advice and your hunch, that he would do so?*
>
> *A.* *I think that he has placed less assets than he thought he should have in the first place.*

137. Mr Greenspoon had confirmed that Mr Perry did not take his advice. On his evidence, the very risk about which the Plaintiffs now complained had been identified and discussed with Mr Perry. He had decided to proceed in any event. In such circumstances, Mr Perry could not have regarded the need to control the trustees and protect the beneficiaries from misconduct by the trustees as important.

The Mistake Claim – discussion and decision

The issues

138. There are three main issues:

(a). did Mr Perry have the conscious belief or make the tacit assumption as alleged by the Plaintiffs?

(b). assuming that the Plaintiffs are correct that Mr Perry made at least a tacit assumption of the kind they describe, does the evidence of Liechtenstein law demonstrate that Mr Perry was mistaken?

(c). if Mr Perry was mistaken, was his mistake sufficient to entitle the Plaintiffs to relief in equity and an order setting aside the transfer of the Share?

A conscious belief or tacit assumption regarding rights to apply to the Liechtenstein court?

139. As I have noted, paragraph 21 of the Statement of Claim sets out the Plaintiffs' case. It states that:

> *"It is to be inferred that Mr Perry mistakenly had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma Trust would have effective rights as beneficiaries to apply to the court to enforce the trustee's obligations, including rights to apply to the court to supervise the administration of the trust; to obtain trust information; to apply to court to prevent action by the trustee in breach of trust; and to apply to the court to remove a trustee."*

140. As I have also noted, the Plaintiffs summed up their position by saying that Mr Perry: (a) believed that there was nothing special or different about a Liechtenstein trust and was given no indication that the rights of beneficiaries under a Liechtenstein trust would be in any way different from those under any other trust; (b) clearly expected that he and his beneficiaries would be in a position to enforce the trustees' legal obligations; and (c) was someone who did not shrink from engaging in legal proceedings.

141. The Plaintiffs essentially invite the Court to infer from the facts and circumstances established at trial that since Mr Perry intended to benefit his family members by settling the Share on the Lake Cauma Trust he must at least have assumed that they would have effective litigation remedies for enforcing the trustees' obligations. The reasoning appears to run as follows: Mr Perry's family members including the Plaintiffs were intended to benefit as discretionary beneficiaries under the Lake Cauma Trust; for the family to benefit, the trustees had to comply with the terms of the Lake Cauma Trust Deed; for compliance to be ensured, court orders requiring and ordering compliance must be available; Mr Perry had reviewed and approved the form of the Lake Cauma Trust Deed and the Liechtenstein trust law, and as a lawyer was aware

of the importance of litigation remedies to ensure compliance; Mr Perry therefore must have assumed that such remedies would be available and that his family would have standing to apply for them.

142. The tacit assumption which the Plaintiffs say that Mr Perry must be taken to have made related to the rights and remedies of discretionary beneficiaries under Liechtenstein law and in the Liechtenstein courts. The claim is that when Mr Perry created the Lake Cauma Trust and decided to transfer the Share to the trustees of the Lake Cauma Trust, he had in mind or considered important the possible need for litigation in Liechtenstein and at least tacitly assumed that relief would be available in the Liechtenstein courts on the application of the discretionary beneficiaries to enforce the terms of and obligations created by the Lake Cauma Trust.

143. The evidence on which the Plaintiffs rely is limited. They rely on the evidence of the discussions between Mr Perry, his English solicitors and the First Defendant at the time that the first Liechtenstein trust involving the First Defendant, the Heritage Trust, was established in 2000, the circumstances surrounding the creation, and the transfer of the Share to the First Defendant as trustee, of the Lake Cauma Trust and Mr Perry's conduct as it related to the role of the trustees and the beneficiaries.

The relevant evidence

144. The main evidence regarding what advice Mr Perry sought and obtained as to Liechtenstein law relates to the discussions that took place in 2000 at the time of the creation of the Heritage Trust. There is some evidence relating to an earlier period and as to the discussions at the time of the creation of the Lake Cauma Trust in 2013.

145. As regards the earlier period, in his trial affidavit Mr Oehri said that when he had first met Mr Perry in 1983 he became aware that Mr Perry "*already had a concrete idea about the role that Liechtenstein would play in the business that he was developing and he appeared to know a lot about Liechtenstein entities and the legal system of Liechtenstein.*" He said that it was common at that time for Israelis to use Liechtenstein entities. He noted that he was aware that Mr Perry had instructed Liechtenstein lawyers over the years and mentioned Adv. Marion Seeger who had advised Mr Perry on various matters but the only matters mentioned were advice in

connection with action taken against Mr Perry as a result of the tax and criminal investigations which had resulted in the freezing of bank accounts and accusations of money laundering. There was no evidence that Liechtenstein advice had been obtained with respect to the operation and law governing the discretionary trusts let alone with respect to enforcement and remedies available in the Liechtenstein court.

146. As regards the discussions in 2000:

(a). the evidence of the discussions in 2000 is sketchy and based on Mr Oehri's testimony (to be fair to Mr Oehri, the meetings and discussions to which he referred had taken place eighteen years before he swore his trial affidavit). There are no contemporaneous documents in evidence which record the discussions or the issues raised.

(b). there is no evidence that Mr Perry ever received advice from a qualified Liechtenstein lawyer about the legal nature of a Liechtenstein discretionary trust, the manner in which the rights and obligations created by such a trust would be enforced or the legal and litigation system in Liechtenstein. In fact, there is no evidence that Mr Perry ever sought advice on any issue of Liechtenstein law (substantive or procedural) from a qualified Liechtenstein lawyer. There is evidence from Mr Oehri that Mr Perry was given and wished to retain a copy of the English translation of the PGR and it is to be inferred that he read it. However, there is no evidence as to which provisions he read or which provisions, if any, he regarded as relevant or important. But the evidence does not show or suggest that FFW were asked any questions concerning the enforcement of rights and obligations of any parties concerned with a Liechtenstein trust.

(c). the evidence shows that there was some discussion with Mr Perry's English solicitors about the relationship between the settlor and trustee in a Liechtenstein discretionary trust and of the differences between an English trust and a Liechtenstein trust, but it is unclear as to precisely what was discussed and what Mr Perry asked, said or was told. While Mr Oehri remembers there being some discussion of the differences between the Liechtenstein and English law of trusts, he can only recall that the "*the focus was on how the trust would function*" and the differences identified related "*mainly [to the] the*

degree of influence that the settlor would have on the trust." He remembered that "*someone*" noted that a Liechtenstein trust would "*apparently*" give the settlor more influence over the running of the trust.

(d). Mr Oehri during his cross-examination also said that "*it was plausible*" that Mr Perry consulted other legal advisers who were qualified Liechtenstein lawyers but he did not know whether Mr Perry had done so and there is no evidence that he in fact did so.

(e). I note that even in Mr Perry's Second SOCA Witness Statement Mr Perry only mentioned in the context of his discussion of Liechtenstein tax planning FFW as his (principal) legal advisers.

147. As regards the discussions in 2013, according to Mr Naeff, by the time that Mr Perry had decided to create the Lake Cauma Trust, Mr Perry had already made up his mind to use a Liechtenstein discretionary trust. Mr Perry did not ask for or obtain advice from the First Defendant. Mr Naeff speculated that Mr Perry might have sought advice from others on the use of trusts governed by other laws and which jurisdiction was most appropriate but he had no knowledge as to whether he did so. There is therefore no evidence that Mr Perry sought or obtained any Liechtenstein law advice in 2013.

148. In my view, three issues arise:

(a). the significance and effect of there being no evidence of Mr Perry seeking or receiving legal advice from Liechtenstein qualified legal advisers on matters relating to the enforcement of rights in the Liechtenstein courts.

(b). whether, despite the absence of evidence of such advice being sought or obtained, the Court can infer that Mr Perry held the belief or made the tacit assumption pleaded by the Plaintiffs based on the primary facts established by the evidence regarding the discussions in 2000 concerning the relationship and a comparison between Liechtenstein and English trust law.

(c). whether, assuming that such an inference is not justified, the Court can nonetheless draw the pleaded inference based on other primary facts established by the evidence of Mr Perry's other conduct and beliefs.

The significance and effect of there being no evidence of advice on relevant issues of Liechtenstein law

149. It is common ground that an operative mistake must be distinguished from mere ignorance. In *Pitt v Holt* the Supreme Court (Lord Walker) said (at [108]) that "*mere ignorance even if causative, is insufficient.*" On this basis, an "*incorrect conscious belief*" or an "*incorrect tacit assumption*" can support relief on the ground of mistake but a state of ignorance will not, except in so far as the claimant's ignorance of some state of affairs "*leads to an [incorrect conscious] belief or [tacit] assumption which the law will recognise as a mistake*" (see *Pitt v Holt* at [105]) – that is, unless ignorance falsifies a conscious belief or tacit assumption on which the claimant acted. In the case of a tacit assumption, the claimant must have acted on the basis of a tacit assumption about some fact which was falsified by some other fact of which he was ignorant; or simply on the basis of an incorrect tacit assumption about a fact. This is to be contrasted with what has been described as mere causative ignorance. The claimant would not have acted as he did had he known of some fact of which he was ignorant; but when he acted he held no belief or assumption about that fact, conscious or tacit and no conscious belief or tacit assumption on which he acted was falsified by his ignorance of the relevant fact. It is to be noted that Lord Walker accepted 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.*'

150. In *Pitt v Holt* the provision of relevant legal advice was critical to the finding that Mrs Pitt had held the relevant belief or made the relevant assumption, namely that no tax liability would arise. It is instructive to consider the different approaches to the facts taken by the three courts which decided *Pitt v Holt*. As Lord Walker (see [108]) noted, the first instance judge (Robert Englehart QC, sitting as a deputy High Court judge) and the Court of Appeal took a different view of the facts. Mrs Pitt, acting on behalf of her husband, had executed a settlement of sums paid pursuant to a personal injury claim by Mr Pitt. Unknown to her, the settlement attracted substantial inheritance tax charges, which could easily have been avoided. The judge held that the settlement could not be set aside in equity for mistake, because there had been "in reality" no "mistake". Had someone told Mrs Pitt that substantial sums of inheritance tax would have been payable, she would not have entered into the settlement. However, Mrs Pitt had given no thought to the inheritance tax position, and having given no thought to it, she had made no "real mistake" about it. As Robert Englehart QC put it:

"It is not as if Mrs Pitt ever wrongly thought, for whatever reason, that inheritance tax would not be payable. She simply never thought about it at all. . . . [I]f someone does not apply his mind to a point at all, it is difficult to say that there has been some real mistake about the point."

151. The Court of Appeal took a different view, finding what was, in effect, an incorrect conscious belief, or active mistake. Mrs Pitt had been advised that there were no adverse tax implications arising from what was proposed. Her resulting general belief that there were no adverse tax consequences was false, because of the inheritance tax position. She had therefore made a mistake, even though neither she, nor any other relevant person, had ever applied their minds to the question whether, and if so how, inheritance tax might affect the transaction.

152. The precise analysis of Lord Walker in the Supreme Court is not absolutely clear (his conclusions are only briefly summarised in a short final paragraph of his judgment at paragraph [142]). He agreed that Mrs Pitt had made a mistake. But given that his Lordship also agreed that Mrs Pitt had been unaware of the tax implications it is unclear whether he was applying his own direction to lean in favour of drawing inferences in appropriate cases to infer from Mrs Pitt's ignorance that she had, on the evidence as a whole, made an incorrect conscious belief or whether he considered that she was to be taken to have tacitly assumed that the trust would have no adverse tax consequences.

153. Two other decisions are also of assistance. The first is *Freedman v Freedman* [2015] EWHC 1457 (Ch.) (a case which was not cited by either party but applies the principles and approach set out in the authorities which they did cite). Here a daughter had, on the advice of her father and her father's solicitor, executed a settlement of two houses, the second of which had been purchased with a loan from her father on the understanding that the loan would be repaid with proceeds from the sale of the first house. Subsequently, it was established that the transfer of assets had triggered a tax liability, overlooked by the solicitor, which would compromise the daughter's ability to repay her father's loan. The Inland Revenue argued that the daughter was merely ignorant of the fact that the settlement would have tax consequences. Proudman J disagreed, holding that an incorrect tacit assumption could be inferred from the daughter's ignorance:

"Ignorance mean[s] that the person simply did not think about the consequences of an action ... [The daughter's tacit] assumption is to be inferred because she proceeded on the basis of legal advice coupled with a belief that her father would not advise her to do something dangerous.

The second case is *Van der Merwe v Goldman* [2016] EWHC 790 (Ch.) (which was cited by the Plaintiffs). In order to mitigate a potential tax liability, a wife had transferred her interest in the joint family home to her husband, who had then settled the property in a life interest trust. That settlement gave rise to an inheritance tax charge of which the couple was unaware, as the charge arose as a result of legislative changes that took effect after they had taken advice. Morgan J held that both the husband and wife had made a mistake when they entered into the transfer and settlement. It had not been mere ignorance because their ignorance of the change in law affecting the tax treatment of their settlement had "*led them to a false belief or assumption that the creation of the settlement did not involve a chargeable transfer*".

154. In the present case, unlike in *Pitt v Holt* and the other cases to which I have referred, the pleaded belief or tacit assumption cannot be based on relevant legal advice and beliefs or assumptions derived from that advice. In *Pitt v Holt, Freedman v Freedman* and *Van der Merwe v Goldman* legal advice had been sought and given on the issue about which the mistake was made. The existence of that advice (that no tax was payable) was an important fact that allowed the inference to be drawn that in deciding to act the settlor had made an assumption about a liability to pay tax (that tax would not be payable) which then was falsified. Mrs Pitt had sought and received advice on the tax consequences of the settlement. The advice indicated that there would be no adverse tax consequences. The inheritance tax position had not been separately identified or considered but the advice received related to and could be understood as addressing the general question of the liability to tax resulting from the settlement. It was sufficient to allow the Court to conclude that Mrs. Pitt held the belief or made the tacit assumption that there would no tax liability of any kind and that such belief or assumption was rendered incorrect by the existence of an inheritance tax liability.

155. In this case, the Plaintiffs are unable to establish that Mr Perry must have believed or assumed that the discretionary beneficiaries would have effective remedies in the Liechtenstein courts based on legal advice received by Mr Perry. They cannot argue that Mr Perry had such a belief or made such an assumption because such a belief or assumption would be a consequence of or be derived from advice which related to Liechtenstein law and litigation remedies available to the discretionary beneficiaries. It cannot be said that Mr Perry sought or was given advice on the issue about which the alleged mistake was made. There is no evidence that (only Mr Oehri's speculation that Mr Perry might have) sought any advice on Liechtenstein law, on the rights and remedies in Liechtenstein courts of the settlor, protector or beneficiaries, on the ways in which beneficiaries could be protected or the particular position of discretionary

beneficiaries in Liechtenstein. There is no evidence of Mr Perry having received advice of the kind (relating to remedies or enforcement in Liechtenstein) that would support the inference that in deciding to effect the transfer Mr Perry had made an assumption about the level and type of protection available for the discretionary beneficiaries via litigation in Liechtenstein (the advice from Dr Gliksberg and the Rosak firm related only to tax matters). In the absence of such evidence, the basis for the pleaded belief or tacit assumption must be found elsewhere.

156. Mr Perry did meet with his English legal advisers to discuss the creation of the Heritage Trust as a Liechtenstein trust and the operation of the Liechtenstein trust law. However, as I have already explained, Mr Oehri's evidence indicates that the discussion was at a high level and focused on how the trust would function and operate in practice rather than the position, legal rights and litigation remedies of the beneficiaries. Had Mr Perry regarded these aspects to be important (or even relevant) to his decision to use Liechtenstein trusts (and ultimately to settle the Share on the Lake Cauma Trust) it would have been easy for him (at least) to ask questions about how rights and obligations were enforced in and the procedures and practice of the Liechtenstein courts. Indeed, it is to be expected that he would have sought specific (and probably written) advice on these points. On the evidence, this did not happen. Mr Perry, as the Plaintiffs' emphasise, was legally trained and a very experienced businessman. He would have understood that different jurisdictions have different court systems and approaches to litigation. He would have understood that Liechtenstein had a very different legal system and litigation culture from that of England (and Cayman). He would have understood that advice – at least on these issues from properly qualified (Liechtenstein) lawyers was needed. Had he been concerned about the need for Liechtenstein to follow, and had he relied on Liechtenstein following, English law and practice on these matters he would have known that this had to be checked and confirmed with suitably qualified counsel. High level discussions with FFW, who did not hold themselves out as qualified to advise on Liechtenstein law and practice, do not show that Mr Perry was thinking about or making assumptions as to these matters when deciding to use Liechtenstein trusts.

157. It is likely in my view, based on the limited evidence available, that Mr Perry's primary concerns during his meeting and discussions with FFW related first, to the tax consequences of the creation of and making of distributions from the Heritage Trust and secondly, to the operational aspects relating to the functioning of the trust. As the First Defendant submitted, FFW's primary role was to advise on the tax consequences of the creation of the Heritage Trust. For this purpose it was critical that Mr Perry and the First Plaintiff should divest

themselves of any interest in their UK assets before becoming non-domiciled UK residents. The creation and structuring of this trust and the Lake Cauma Trust and the decision to use Liechtenstein was driven by tax planning considerations. The operational aspects of the trust were important because what Mr Perry did consider to be highly material was his ability to exercise as settlor the kind of control which he regarded as important (to limit the discretion that could be exercised by the trustee) 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 the activities and decision making of the trustees (the protectors were either close family members or, in relation to the Lake Cauma Trust, the SPA, which replaced Dr Neupert and was managed by at least one close personal adviser). It is likely, in view of his legal qualifications, that he was aware not only that the Liechtenstein legal system was materially different from that of England but also that discretionary beneficiaries did or might not have the same rights as other beneficiaries and so might only have limited enforcement rights. He never thought it necessary to ask about or investigate this issue because he was satisfied that a Liechtenstein discretionary trust met his requirements and that implementation of the trust would ultimately be in the hands of trustees he trusted and ultimately overseen by the protector.

Did Mr Perry assume that rights of enforcement in Liechtenstein were the same as in England?

158. The Plaintiffs submitted that the absence of evidence of Mr Perry seeking or receiving legal advice from Liechtenstein qualified legal advisers on matters relating to the enforcement of rights in the Liechtenstein courts (whether the discretionary beneficiaries "*have effective rights as beneficiaries to apply to the court to enforce the trustee's obligations*") did not matter because the Court should infer that Mr Perry assumed that a discretionary beneficiary under a Liechtenstein trust would be in the same position as a discretionary beneficiary under an ordinary English law trust. He therefore did create, and effect transfers of property to, his Liechtenstein trusts on the assumption that his family members would be in the same position and have the same rights and litigation remedies as English law beneficiaries.

159. I do not consider that such an inference can be drawn based on the evidence of the discussions in 2000. The evidence does show, as I have noted, that there was a discussion about the differences between Liechtenstein and English trust law but it is wholly unclear precisely what was said and there is no evidence that FFW expressed the view that English and Liechtenstein trust law were similar either generally or as regards rights of enforcement by discretionary beneficiaries. The representatives from FFW were not qualified to express such a view and the

evidence filed in these proceedings – and indeed the Plaintiffs' experience in litigation in Liechtenstein which has resulted in the present proceedings – makes it plain that anyone with the requisite expertise could not have reached such a conclusion.

160. Mr Oehri's evidence indicates that the focus of the discussions with FFW was on how the trust would function rather than the legal rights and litigation remedies of the beneficiaries. I take this to be a reference to the operational aspects of trust management. For example, how the trustees would act, communicate and interact with Mr Perry and his advisers and how trust property would be managed. Mr Brownbill understood the importance of this evidence and asked Mr Oehri to explain further what he meant but Mr Oehri did and could not elaborate. He did say, as I have noted, when asked about the differences between Liechtenstein and English law that were discussed at the meeting, that the main point identified and considered was the "*degree of influence that the settlor would have on the trust.*" This supports the conclusion that the main issue which interested and concerned Mr Perry was his own position and rights as settlor and the relationship he would have with the trustees in the day to day management of trust property and trust business.

161. Nor is there any evidence that Mr Perry was aware of, considered or received advice concerning the rights of and litigation remedies available to discretionary beneficiaries under English law. This is not a simple matter. This is a technical and complex area of English trust law. An understanding of the scope of and limitations on such rights and remedies requires a knowledge of at least some of the details of the applicable law (including the case law). In the absence of evidence of advice being given to Mr Perry on this issue, or of a discussion of the rights and remedies available to discretionary beneficiaries under English law, or of Mr Perry being aware of such rights and remedies from previous advice or discussions, I do not consider that the Court can infer that he held any belief or made any tacit assumptions regarding the rights of and litigation remedies available to discretionary beneficiaries under English law.

Mr Perry's conduct and beliefs

162. I accept that the evidence shows that Mr Perry was in a general sense concerned to make provision after his death for his family and that such concern was in his mind at the time of the creation of the Lake Cauma Trust and the transfer of the Share to the First Defendant. It is clear that Mr Perry had succession planning in mind at the time that he came to establish the Lake Cauma Trust in May 2013 and had decided that it was necessary to structure his family's interests in such a way that they each had interests in separate trusts so that the disputes with

other family members could not interfere with the administration of their trust property. Succession planning had become a priority and Mr Perry's wishes and objectives were explained by him to the representatives of the First Defendant with whom he met in Tel Aviv on 19 March 2013. Clearly, it was also important that the arrangements to be made to achieve the desired succession planning also satisfied the requirements of efficient tax planning.

163. But the evidence does not demonstrate that Mr Perry, in considering how to implement his succession planning and to make provision after his death for his family involved him forming any views or making any tacit assumptions as to the nature, extent or effectiveness of the rights or standing of discretionary beneficiaries under Liechtenstein law (sufficient to establish that, as pleaded, Mr Perry had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma Trust would have "*effective rights as beneficiaries to apply to the court to enforce the trustee's obligations*"). The pleaded belief or assumption involved a degree of specificity – as it needed to do if the Plaintiffs were to show that the Liechtenstein Supreme Court Judgment itself resulted in the belief or assumption being proved to be wrong – but the evidence does not demonstrate that Mr Perry had turned his mind to or made assumptions about the enforceability of rights and obligations in proceedings in Liechtenstein. There was no "*distinct mistake*" as to the pleaded fact. A general concern to make provision for his family is insufficient. It does not follow from the fact that Mr Perry was concerned to ensure that his family members had interests in separate discretionary trusts (to protect family members from their siblings or mother) and that, for example, after his death the trust would be administered in accordance with his wishes and expectations so that his family, as discretionary beneficiaries, would be able to receive distributions of income and capital as he anticipated, that he formed and held a view or made assumptions about the (particular) remedies available to the discretionary beneficiaries in the Liechtenstein courts in the event of a dispute with the trustee. He could have been satisfied that the trusts would be properly administered and his family suitably protected for other reasons. The lack of evidence showing that Mr Perry raised questions and sought advice concerning litigation remedies in Liechtenstein strongly suggests that he did not regard the availability of such remedies, let alone remedies of a particular type (which were in accordance with those provided under English law), as important or relevant and that satisfactory protection was in his mind available for other reasons. The evidence suggests (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. As the Second Plaintiff confirmed

during her cross-examination when she stated that "*If everything was smooth and working according to [Mr Perry's] plan, we all the time have .. control over the trust, all the time the protector was one of the family...*". The significance and intended role of the protector was also confirmed by Mr Greenspoon's evidence (who said that he had been appointed protector, initially of the Heritage Trust, to "*safeguard the interests of the family members and replace the trustee if the need arose*"). Mr Perry therefore did not need to and did not focus on (or pay attention to) and therefore did not hold any belief or make any tacit assumption with respect to either (a) the way in which rights and obligations would be enforced by litigation in Liechtenstein or (b) the separate position of the discretionary beneficiaries. If, as I consider is likely, Mr Perry did place reliance on the rights and self-help powers of the protector he was right to do so. As Mr Bruckschweiger pointed out (in a part of his evidence not challenged by Dr Lorenz), the protector was given significant powers to control and remove the trustees and was able to do so without recourse to the Liechtenstein court (see Mr Bruckschweiger's First Report at paragraphs 29-34):

> "*31. In the present instance, as is commonly the case in Liechtenstein trusts, the Protector under the Lake Cauma Trust has significant powers available to him to enable him to take effective action in the face of [concerns regarding wrongdoing or improper or inadequate administration by the trustees].*
>
> *32. In particular the Trustees' powers in respect of a number of significant matters are constrained by the fact that they are exercisable only with prior written consent of the appointed Protector. Powers which are so constrained include powers to: distribute capital, add or remove beneficiaries, manage assets of the trust settlement and to transfer the trust fund or the trust income to trustees of another trust.*
>
> *33. If the Protector seeks the removal or replacement of a trustee in the light of potential wrongdoing, it is unnecessary for him or her to do so by recourse to the Court: he or she is empowered to do so by virtue of his or her status as protector (clause S.8.1 of the Lake Cauma Trust [Deed].*"

164. The Plaintiffs also relied on the evidence that Mr Perry considered that the First Defendant had no discretion with regard to investment and other important decisions, and that Mr Perry had directed that Naples and Solid BVI be transferred to the Fifth Defendant's trust as demonstrating that he believed or assumed that the discretionary beneficiaries would have had enforceable rights. The Plaintiffs argued that Mr Perry intended his family members to have ultimate control of the trusts and protection of the trust property, and so must have at least assumed they such control would be matched by litigation remedies. However, I do not consider that such a belief or conduct is sufficient to allow the Court to infer that Mr Perry held the pleaded belief or assumption. It does not follow from the fact that Mr Perry believed that the First Defendant could and should not exercise an independent discretion with respect to

important trust decisions that he also believed or assumed that the discretionary beneficiaries could enforce the trustee's duties by proceedings in Liechtenstein to which they would be parties (i.e. in the same way as discretionary beneficiaries of an English trust can do so). He could, and in my view probably did, as I have said, assume that the trustee could be adequately controlled by the protector without the need for litigation. The role and position of the protector was spelled out in the trust deeds, including the Lake Cauma Trust Deed, which Mr Perry had read and it was clear that the protector had to be consulted on and consent to key decisions and that, ultimately, the trustee could be removed by the protector. Nor does Mr Perry's practice of giving or procuring the giving of instructions to the trustee and of regarding the trustee role as administrative mean that he must also have believed or assumed that his family members themselves would after his death have the right directly to enforce the trustee's duties and the execution of the trust (let alone be able to do it in the Liechtenstein court in a manner similar to that available under English law and procedure). He is likely to have appreciated that in order to achieve the tax treatment he desired and that was critical, the Liechtenstein discretionary trust regime established its own, distinctive, balanced governance arrangement which gave the protector a key role (in the absence of provisions in the trust deed giving the settlor's spouse or family consent rights after his death) and discretionary beneficiaries limited rights and powers.

The First Defendant's additional arguments

165. The First Defendant argued that the Mistake Claim must also fail because, as the Liechtenstein law experts had agreed, the Liechtenstein Supreme Court Judgment had not altered the law of Liechtenstein. This would be a good point if the Plaintiffs' claim was based on a mistake of law arising because the decisions to create the Lake Cauma Trust and to transfer the Share had been based on a view of Liechtenstein law which the Liechtenstein Supreme Court Judgment had held to be wrong. However, the Plaintiffs did not argue that Mr Perry's mistake arose because of an understanding or assumption about Liechtenstein law derived from and based on an understanding of the law as expressed in cases before which was falsified by the Supreme Court Judgment. The alleged mistake arose by reason of an ill-informed and erroneous view (which was arguably the result of carelessness in not obtaining advice from a Liechtenstein lawyer) of Liechtenstein law which turned out to be wrong from the beginning (and not only wrong from the time of the Liechtenstein Supreme Court Judgment). As *Pitt v Holt* made clear, relief for mistake is available even where the mistake is the result of carelessness.

166. The First Defendant also argued that the true complaint made by the Plaintiffs, as contained in the Plaintiffs' evidence in support of the Mistake Claim (some of which was inconsistent with the pleaded claim), was that the Liechtenstein court had, in the Liechtenstein Supreme Court Judgment, failed to provide an adequate remedy for and had ignored the First Defendant's wrongdoing. The assets of the Lake Cauma Trust were in the hands of dishonest trustees and the Liechtenstein court has failed to take the action which the Plaintiffs consider necessary for their protection. That may or may not have been the motivation behind the Plaintiffs' commencement of the proceedings in this Court (and the Plaintiffs have been candid about the fact that they felt the need to bring these proceedings because of what they claim to be the inadequacies of Liechtenstein law and procedure); however these allegations did not undermine or preclude the Court from adjudicating on the Mistake Claim as pleaded in the Statement of Claim.

Conclusions on the Plaintiffs' submissions with respect to Mr Perry's belief/tacit assumption

167. In my view, the conscious belief or tacit assumption alleged by the Plaintiffs (that the beneficiaries of the Lake Cauma Trust would have effective rights as beneficiaries to apply to the Liechtenstein court to enforce the trustee's obligations) 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 the First Defendant 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.

168. In reaching my conclusions, I have taken into account Lord Walker's admonition that "*the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.*" In the Statement of Claim, as I have noted, the Plaintiffs relied on an inference to be drawn from the primary facts. They state that "*It is to be inferred that Mr Perry mistakenly had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma Trust would have effective rights as beneficiaries to apply to the court to enforce the trustee's obligations.*"

However, for the reasons I have given, I do not consider that the primary facts permit or justify such an inference to be drawn.

If Mr Perry did believe or tacitly assume that his family as discretionary beneficiaries would have effective litigation remedies in Liechtenstein law, does the evidence of Liechtenstein law demonstrate that Mr Perry was mistaken?

169. As I have noted, the Plaintiffs assert that Mr Perry mistakenly had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma Trust would have effective rights as beneficiaries to apply to the Liechtenstein court to enforce the trustee's obligations and rely on two main grounds to establish Mr Perry's state of mind – first, that Mr Perry believed or assumed that the rights of discretionary beneficiaries in Liechtenstein were the same as in England and secondly, that since Mr Perry believed or assumed that his family would benefit as beneficiaries and ultimately be able to exercise control over decision making with respect to the trust assets (eventually their own separate trust assets), he must have at least assumed that the discretionary beneficiaries would have adequate litigation remedies in order to enforce the trustee's duties and their wishes.

170. I have found, as set out above, that the evidence does not allow 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. It is therefore technically unnecessary for me to consider the Liechtenstein law evidence and the question of whether, had Mr Perry formed a belief or made an assumption about the remedies available to his family members in Liechtenstein, he was in fact wrong. However, in view of the extensive evidence of and debate concerning Liechtenstein law and procedure, I will set out my views on this further issue.

171. If, contrary to my findings set out above, Mr Perry did believe or assume that a discretionary beneficiary under a Liechtenstein trust would be in *exactly* the same position as a discretionary beneficiary under an ordinary English law trust, then I accept that he would have been mistaken. The evidence demonstrates that the rights and litigation remedies of discretionary beneficiaries in proceedings in Liechtenstein are not identical to those of discretionary beneficiaries in proceedings in England.

172. But what would be the position if, contrary to my findings, Mr Perry had turned his mind to or made assumptions about litigation remedies and had believed or assumed that the rights and remedies of discretionary beneficiaries in Liechtenstein were "*effective*"? The answer depends on what Mr Perry is to be understood as having meant by "*effective.*" And whether, in light of that, the evidence of Liechtenstein law demonstrates that he was mistaken.

173. In the Statement of Claim the Plaintiffs do not provide a full explanation of what Mr Perry is said to have meant by the term. Instead they provide examples of which litigation remedies would, as a minimum, need to be available in order to satisfy the requirement of effectiveness, without limiting the remedies covered by the effectiveness requirement to those listed. Paragraph 21 of the Statement of Claim, as I have already noted, is in the following terms:

> *"It is to be inferred that Mr Perry mistakenly had a conscious belief or made a tacit assumption that the beneficiaries of the Lake Cauma Trust would have effective rights as beneficiaries to apply to the court to enforce the trustee's obligations, including rights to apply to the court to supervise the administration of the trust; to obtain trust information; to apply to court to prevent action by the trustee in breach of trust; and to apply to the court to remove a trustee."*
>
> [underlining added]

174. Accordingly, the Plaintiffs' case as pleaded involves the claim that Mr Perry's belief or assumption comprised a particular understanding of effectiveness, namely one which included the rights and remedies listed in paragraph 21. They do not contend, in their pleading at least, that Mr Perry's belief or assumption as to the effectiveness of the rights and remedies available in Liechtenstein could have been wrong even if that belief or assumption did not include all or some of the listed remedies, although at times in their submissions (and in the positions taken in the evidence filed in support of their claims) it appeared as though the Plaintiffs were arguing that the remedies available to discretionary beneficiaries in Liechtenstein law were so limited and their position so weak that a belief or assumption to the effect that they were adequately protected would also have been mistaken (the Plaintiffs had submitted that as a result of the Liechtenstein Supreme Court Judgment, discretionary beneficiaries have no material rights and are left in a helpless position).

175. In my view, even if Mr Perry had turned his mind to how the obligations and terms of the Lake Cauma Trust would be enforced in the Liechtenstein court by *inter alia* the discretionary beneficiaries and had believed or assumed that the remedies available would be sufficient to give them "*effective rights*", it does not follow that the Court can without more (and in the

absence of a finding that Mr Perry believed or assumed Liechtenstein law and procedure to be the same as English law and procedure) infer that he also believed or assumed that the remedies would include the listed remedies or that without them the beneficiaries would not have rights which could be treated as "effective." Nor does it follow that, having regard to the position of discretionary beneficiaries and their rights and remedies under Liechtenstein law, they are to be treated as having rights which are not effective.

176. If Mr Perry had formed a (general) view or made an assumption that his family needed to and would have access to the Liechtenstein court for protection, it would not follow that he had in mind a particular set of remedies or rights. Such a general view of effective remedies would, in the absence of evidence as to precisely what was contemplated, in my view connote an ability to bring complaints and claims before the Liechtenstein court in a manner that would or at least could result, if the complaints and claims were well founded, in an adequate remedy being granted. An adequate remedy would be one which provided for relief that prevented the continuation of or compensation for the breach of duty complained of or an order which resulted in an adjustment to the administration of the trust in a manner that provided for the trust to be properly administered (and thereby provided for suitable protection for the discretionary beneficiaries). In my view, the expert evidence shows that Liechtenstein law, both substantive and procedural, provides remedies which satisfy the requirement of effectiveness as so understood.

177. The Plaintiffs complained in particular about (a) the inability of discretionary beneficiaries to apply under Article 927/2 PGR to seek an order from the Court restraining a trustee from exercising an administrative or dispositive power; (b) the inability of discretionary beneficiaries to apply under Article 923 PGR (or Article 68 of the TrUG) for an order requiring information to be provided about the trust; (c) the inability of discretionary beneficiaries to apply for the removal of a trustee for cause under Article 929/3 PGR; (d) discretionary beneficiaries' limited standing and participation in supervisory proceedings commenced by the Liechtenstein court. The Plaintiffs claimed that (in particular as a result of the Liechtenstein Supreme Court Judgment) discretionary beneficiaries of Liechtenstein law trusts were in a more or less helpless position: they had no useful right to trust information, to seek the removal of the trustee, to require a trustee to act, to review a trustee's decisions, or to prevent improper conduct of the trustee.

178. But it seems to me that the evidence of Liechtenstein law makes it clear that this goes too far:

(a). the expert evidence, as tested during cross-examination, confirmed that there are significant differences between the rights and remedies available, and the procedural rules applicable, to proceedings brought by or relating to, discretionary beneficiaries under Liechtenstein and English law.

(b). in particular discretionary beneficiaries cannot make an application and thereby automatically be a party to proceedings for relief under Article 927/2 PGR and Article 923 PGR mentioned above. It was accepted by Mr Bruckschweiger that a discretionary beneficiary was also unable to seek injunctive or interim relief against a trustee under Article 927(2).

(c). but they do have access to the Liechtenstein court via the *ex officio* or supervisory proceedings under Article 929 PGR. The court has wide powers under this jurisdiction including the power to replace the trustee or appoint a co-trustee on a temporary or permanent basis.

(d). the Plaintiffs noted that Article 929(3) was the sole provision under the PGR which allowed a discretionary beneficiary to seek the trustee's removal and argued that the protection provided by and rights given to discretionary beneficiaries in *ex officio* or supervisory proceedings under Article 929 PGR were extremely limited. The Plaintiffs relied in particular on the following: (i) the jurisdiction can only be invoked and relief granted if the court itself decides to exercise its powers, either *sua sponte* or following receipt of a notice by a person with standing to give one; (ii) the giving of a notice did not give the notifier standing to participate in the proceeding and thereby have the right to receive copies of documents filed with the court, to be given notice of any hearings, to be informed of a decision made by the court to take no action or to lodge an appeal; and (iii) while a person who was "*directly affected*" could and should be joined as a party and therefore would have such rights, based on Dr Lorenz's opinion, a discretionary beneficiary would not (even when notifying the court of grounds justifying the removal of the trustee) be treated as being directly affected and in fact the Plaintiffs had not been treated as directly affected parties in the Ex Officio Ruling (delivered in the supervisory proceedings initiated by the Plaintiffs in Liechtenstein). Therefore a discretionary beneficiary was entirely reliant on the court to initiate and properly conduct the process and had very limited or no rights to intervene or influence the proceedings.

(e). Mr Bruckschweiger, however, in reliance on the provisions in Liechtenstein's civil procedure rules that require the court to join a person whose rights are directly affected by the prospective ruling, opined that at least in certain circumstances the court in an Article 929/3 PGR proceeding would join a discretionary beneficiary as a party because they would be treated as being a person directly affected. In his opinion, the test was whether the action (of the trustee or others) complained of entered into the legal sphere of the discretionary beneficiary. This would, for example, be the case where a trustee had or was proposing to make an improper distribution of trust property. While he accepted that there was authority which held that a request for the removal (and a change) of the trustee did not directly affect the position of a discretionary beneficiary, in his opinion a discretionary beneficiary would be entitled to be joined as a party in a case where a trustee was proposing to act in breach of duty in a manner that would damage the discretionary beneficiary's (prospective) rights.

(f). Mr Bruckschweiger relied on a statement made by the Supreme Court in the Liechtenstein Supreme Court Judgment (at cons. 9.15.7 at the end) in the following terms:

> *".... an example [of] a [different case would be as follows]: the trustee intends to do an act in breach of his duties to the detriment of the discretionary beneficiary. The discretionary beneficiary then files a notice, which might result in the admonishment of the trustee pursuant to Article 929/3 PGR which in turn might cause the trustee to abstain from such act. In such a proceeding the discretionary beneficiary would be affected in his private rights individually and would therefore be joined as a party."*
>
> [underlining added]

(g). Mr Bruckschweiger considered that this statement was part of the *ratio* of the decision but that even if, as Dr Lorenz contended, it was only *obiter* it would nonetheless be given significant weight and followed by lower courts. In any event, the view expressed by the Supreme Court was right. Furthermore, it was open to a discretionary beneficiary, when notifying the court of the relevant circumstances giving rise to the alleged breach of trust, to invite the court to admonish (and not remove) the trustee and thereby ensure (or make it likely) that the case would not be characterised as one relating to the removal of the trustee.

(h). Dr Lorenz considered that the Supreme Court dictum was in any event not good law. He considered that it was inconsistent for the court to hold on the one hand that a

discretionary beneficiary did not have a sufficient interest to have standing to apply under Article 927/2 PGR but was nonetheless directly affected by a ruling to be made by the court in the exercise of its supervisory jurisdiction (he considered that Mr Bruckschweiger had incorrectly opined that whether a person was directly affected depended on whether the acts complained of directly affected his interests whereas it was the effect of the ruling to be made by the court that had to be considered).

(i). Dr Lorenz also argued that Mr Bruckschweiger's view was inconsistent with the decision in the Ex Officio Ruling, in which the court had decided that the Plaintiffs should not be joined as parties to the supervisory proceeding. Mr Bruckschweiger was challenged about this during his cross-examination in which Mr Brownbill quoted the relevant passage from the Ex Officio Ruling as follows:

> *"In the light of the above, the question of whether the applicants, due to the tax residence problem, are or are not currently beneficiaries did not need to be further clarified, because, in the view of the court, they have at any rate the capacity of parties concerned within the meaning of Article 929 Paragraph 3 of the Personal and Corporate Law, being potential beneficiaries. It was in this capacity that they were also heard, in the context of the collection of materials, which does not mean, however, that they acquire the capacity of parties to the proceedings, since an individual or entity acquires such a capacity—as the Supreme Court of Justice explains in the judgment cited—only if the individual or entity is directly affected. Through the appointment of a new protector or the confirmation of a trustee, the legal position of the beneficiaries is not, however, directly interfered with. The capacity of party to the proceedings is thus acquired only by the protector whose removal is sought and the trustee whose removal is sought, since they are the ones who are directly affected."*
>
> [underlining added]

(j). the exchange between Mr Brownbill and Mr Bruckschweiger was rather confused and did not conclude with a clear response but I understood Mr Bruckschweiger to be of the view that the magistrate's decision was unsurprising since the Plaintiffs had sought the removal of the First Defendant as trustee and therefore the principle established by the case law to the effect that a beneficiary is not directly affected by the removal or replacement of the trustee applied.

(k). I note that the magistrate confirmed that even though the Plaintiffs had not been joined as parties they nonetheless had a sufficient interest to justify them being heard on some issues (the "*collection of materials*").

(l). Mr Bruckschweiger also considered that discretionary beneficiaries had the right to rely on and use the powers set out in paragraphs 154 and 161 of the TrUG to apply for the appointment of a supervisory trust officer (referred to by Mr Bruckschweiger as a supervisory office) or official auditors. The TrUG applied to trusts other than trust enterprises by supplementing the statutory rules governing ordinary trusts where the TruG power or provision is not limited in its application to business activities (Mr Bruckschweiger in Mr Bruckschweiger's Reply Report says that Article 910/5 PGR states that "*the rules on the trust enterprises apply on a supplementary basis to the rules as to Liechtenstein trusts, insofar as deviations do not result from the fact that a trust enterprise may carry on business activities*"). Mr Bruckschweiger cites a Court of Appeal decision as supporting the right to apply for the appointment of a supervisory trust officer in the case of an ordinary trust. Dr Lorenz said that he had agreed with this view before the Liechtenstein Supreme Court decision was delivered. In his view, the TruG provisions only apply where there is a lacuna in the ordinary trusts law. The Liechtenstein Supreme Court decision holds that a discretionary beneficiary cannot apply for the appointment of co-trustees and similar measures under Article 927/2 PGR and this construction and legal rule must equally apply to applications under paragraphs 154 and 161 of the TruG. In addition, there is no lacuna to be filled in relation to the exercise of the court's supervisory jurisdiction under Article 929(3) PRG and so no room for the TruG provisions to operate. Mr Bruckschweiger rejected this view on the basis that the TruG jurisdiction and powers operate independently (they are "*stand-alone measures*") and are not directly affected by qualifications or limitations to rights arising under for example Article 927/2 PGR.

(m). during his cross-examination, Dr Lorenz accepted that the Liechtenstein court has an obligation under its supervisory powers to exercise proper control over the existence and administration of the trust property and that if there were credible and specific allegations supported by credible evidence that something was wrong the court would have a duty to step in. He accepted that the court would act judicially. In addition, he accepted that the Ex Officio Ruling demonstrated that Article 929 could and did provide an effective remedy where the court was provided with information which gave it good reason to step in (without the need for a formal finding of wrongdoing). In that decision, the court demonstrated a serious concern with proper trust governance and acted so as to ensure that it was maintained (it was satisfied that proper trust governance was ensured because of the appointment of a second trustee and a neutral protector).

(n). Mr Bruckschweiger also considered that discretionary beneficiaries could be given a right to information in the trust deed. Even though beneficiaries had no *statutory* rights to obtain information about the trust, they could be given a contractual right in the trust instrument. In Mr Bruckschweiger's opinion, such a right could be enforced by the discretionary beneficiaries by way of an action (a specific complaint) outside and without the need to rely on the PGR (and under a different procedural framework). Dr Lorenz expressed doubts as to whether discretionary beneficiaries could be given enforceable rights to information which they did not otherwise have and the information sought would therefore not relate to enforceable property rights and interests in the trust assets. However, during his cross-examination he accepted that the position was not clear or settled (he said that he did not wish to be "*too dogmatic about [his doubts]*").

(o). Mr Bruckschweiger had also noted that the rights of the discretionary beneficiaries had in fact been addressed in the trust deeds and he supported the First Defendant's argument that this strongly suggested that Mr Perry, to the extent he considered the mechanisms for enforcing these rights, was not relying on enforcement rights under the PGR. As noted above, a comparison of the Damerino Trust deed and the Lake Cauma Trust Deed showed that while the records which the trustee was required to maintain were required to be made available to the beneficiaries in the former only the protector was entitled to see the information in the latter. This suggested that Mr Perry did not consider that for the purpose of the Lake Cauma Trust the beneficiaries needed to have their own direct rights to information. Mr Bruckschweiger accepted during his cross-examination that it would be more difficult to draw these inferences as to Mr Perry's state of mind to the extent that it was established that Mr Perry had been given and appeared to have accepted without detailed review standard form documents drafted by his legal advisers.

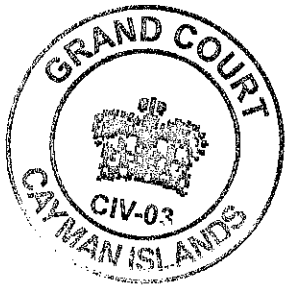
(p). as regards the disagreements between the expert evidence of Mr Bruckschweiger and Dr Lorenz, I prefer and would rely on the evidence of Mr Bruckschweiger. I found his evidence to be clear and cogent and generally persuasive. In particular, I found persuasive his opinion, soundly based on the statements set out above from the Liechtenstein Supreme Court Judgment (which are specific and clear, whether part of the ratio or only dicta), that in a case where the issue for the court in supervisory proceedings 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. In addition, his explanation as to the basis of the decision of the magistrate in the Ex Officio Ruling not to treat the Plaintiffs as parties was also convincing. The fact that the Plaintiffs were allowed, in that case, to be heard for certain purposes, even when not formally parties, supported the view that discretionary beneficiaries would not be completely shut out and ignored by the court. I also prefer Mr Bruckschweiger's view as to the availability of the powers set out in paragraphs 154 and 161 of the TrUG. This is based on direct Court of Appeal authority rather than Dr Lorenz's rather complex inferences and deductions based on the decision on different statutory provisions in the Liechtenstein Supreme Court Judgment.

(q). it seems to me, even recognising that there are these disagreements between the experts that reveal that some aspects of relevant Liechtenstein law remains unsettled, that the Liechtenstein law evidence demonstrates that while discretionary beneficiaries are not able to apply and commence, and do not have the right to be joined as a party to, normal *inter partes* proceedings, the Liechtenstein court's supervisory proceedings jurisdiction provides them with access to the Liechtenstein court and real and material protections. The absence of such direct rights is a significant weakness in the remedies available to discretionary beneficiaries but it does not result in discretionary beneficiaries being without remedies or, to use the Plaintiffs' phrase, in a more or less helpless position. The rights and remedies available to discretionary beneficiaries can and should in my view be regarded as effective and meaningful. As the First Defendant submitted, once notified of credible and specific allegations supported by credible evidence that something was wrong, the Liechtenstein court will be seized of the matter and duty bound to investigate. The evidence indicates that the court will act judicially and properly so that if there is wrongdoing by a trustee, the courts in Liechtenstein can and will take action. Furthermore it is at least likely that discretionary beneficiaries can to apply under paragraphs 154 and 161 of the TrUG for the appointment of a supervisory trust officer or official auditors.

(r). in addition, it is at least likely that discretionary beneficiaries can be given direct rights in the trust deed to receive information relating to the administration of the trust and trust assets which are enforceable in civil proceedings outside the PGR. Once again I found Mr Bruckschweiger's view more persuasive and to be preferred to Dr Lorenz's doubts.

(s). Mr Bruckschweiger's views of the inferences to be drawn as to Mr Perry's wishes and state of mind from the comparison between the terms in the Damerino Trust deed and the



Lake Cauma Trust Deed relating to the information rights of beneficiaries do not represent opinions on matters of Liechtenstein law and to that extent are inadmissible. But they do reflect my own views and conclusions. The existence of such terms strongly suggest that Mr Perry was not concerned to give his family direct information rights in relation to the Lake Cauma trust and was content to rely on the rights given to the protector to ensure that his family were protected. It does not sit well in the Plaintiffs' mouth to say in this context that since the Lake Cauma Trust deed was based on a standard form document provided by Mr Perry's legal advisers he cannot be taken to have focussed on or chosen to include the relevant provisions when in other contexts they assert that Mr Perry was a qualified lawyer and experienced businessman who was astute to ensure that his family had effective rights and were fully protected.

(t). the fact that other jurisdictions have statutory regimes which make provision for discretionary beneficiaries to have limited rights but for protectors to have strong rights, such as is the case in this jurisdiction with the STAR trust regime, supports the conclusion that such arrangements can be and often are regarded as acceptable by settlors, as providing effective rights and remedies and consistent with international norms. In my view the Plaintiffs have without justification attempted to characterise the Liechtenstein system as being beyond such norms and providing wholly inadequate protection and litigation remedies for discretionary beneficiaries. The Liechtenstein system is distinctive and different from some others but this should not have been surprising to Mr Perry. It does not follow from the mere existence of differences in substantive and procedural law that one system is to be regarded as providing effective and the other as providing ineffective remedies. Liechtenstein was the system that Mr Perry deliberately selected as the jurisdiction to govern the Lake Cauma Trust, and other trusts, and in the absence of evidence that he formed and held particular beliefs or assumptions as to its operation that were wrong must be taken to have accepted that the trusts and rights of his family members would be governed in accordance with its rules and procedures.

Was there a causative mistake that was sufficiently grave so as to make it unconscionable on the part of the First Defendant to retain the property?

179. The First Defendant argues, as I have explained, that Mr Greenspoon's evidence demonstrated that Mr Perry was aware of and accepted the risk that the trustees might "*embezzle*" the funds (i.e. that by placing assets in a discretionary trust he would lose control of the assets). Mr

Greenspoon acknowledged during his cross-examination that he had been concerned, either before or after the creation of the Heritage Trust, about the risk arising from giving control of assets to a trustee in a discretionary trust and had told Mr Perry of this concern. Mr Perry had been warned that there was a risk of the trustees acting improperly and that the lack of control would result in problems. Mr Greenspoon confirmed that Mr Perry had nonetheless proceeded to settle assets on the discretionary trusts although he might have reduced the value and amount of assets concerned.

180. While this evidence shows that Mr Perry considered that the use of the Liechtenstein discretionary trusts was important and that he 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, it does not demonstrate that Mr Perry accepted that his family members as discretionary beneficiaries would be without remedies in the Liechtenstein courts, which is the Plaintiffs' pleaded case.

The Israeli Matrimonial Property Claim

The Plaintiffs' case

181. In the Statement of Claim, the basis of the Israeli Matrimonial Property Claim was explained by reference to six core propositions:

(a). the First Plaintiff claims a proprietary interest in the Share pursuant to the law of Israel governing the proprietary effects of marriage.

(b). as a matter of Cayman Islands private international law, Israeli law governs the question of whether the First Plaintiff had such an interest and its terms and effects (because the proprietary effects of marriage are governed by the law of the matrimonial domicile which, in relation to Mr Perry and the First Plaintiff, was Israel as they were both domiciled there at the time of the marriage).

(c). under Israeli law, the First Plaintiff was a joint owner of the Share (and had an equal share in it) because she and Mr Perry married in community of property pursuant to which all property acquired during the marriage is the joint property of both spouses and each has an equal share in it.

(d). the Share could therefore only be disposed of with her consent.

(e). the First Plaintiff did not consent to the transfer of the Share to the First Defendant.

(f). as a result, Mr Perry was not entitled to make the transfer and the First Plaintiff is entitled to have the transfer set aside.

182. The relevant paragraphs in the Statement of Claim are as follows:

> *"16. The proprietary effects of marriage are governed by the law of the matrimonial domicile which, in relation to [the First Plaintiff] and Mr Perry, was Israel as they were both domiciled there at the time of the marriage. Under Israeli law, the property relations of spouses are governed by the law of their domicile at the time of their marriage. Accordingly, Israeli law governs [the First Plaintiff's] rights in this case.*
>
> *17. Under Israeli law, [the First Plaintiff] and Mr Perry married in community of property pursuant to which (i) all property acquired during the marriage is the joint property of both spouses and each has an equal share in it and (ii) such property cannot be disposed of by either spouse without the consent of the other.*
>
> *18. [The First Plaintiff] did not consent to the transfer of the share in BH06 to [the First Defendant] as trustee of the Lake Cauma Trust. It follows that Mr Perry was not entitled to make that transfer.*
>
> *19. As a result [the First Plaintiff] is entitled to have the said transfer set aside and consequently she has a proprietary claim to the share in BH06 and all property derived from that share (including but not limited to the Dividends and any other dividends declared by BH06), or the traceable proceeds of such property. [The First Plaintiff] is also entitled to an account of [the First Defendant's] and Fiduciana's dealings with the share in BH06, including all property derived from that share (including the Dividends and any other dividends declared by BH06), or the traceable proceeds of such property, and the payment of any sum found to be due on the taking of the account."*

183. As regards the law to be applied to determine the First Plaintiff's rights and claim, the Plaintiffs submitted that the applicable rule of private international law is set out at Rule 165 of Dicey, Morris & Collins (15th ed.):

> *"In the absence of a contract or settlement, the rights obtained by the husband and wife in each other's movable property as a result of the marriage, whether that property is possessed at the time of the marriage or acquired afterwards, are determined by the law of the matrimonial domicile. Where, at the time of the marriage, both parties are domiciled in the same country, the matrimonial domicile is (in the absence of special circumstances) that country."*

184. This rule was approved by this Court as representing the law of the Cayman Islands in *Miller v Gianne* [2007] CILR 18.

185. Mr Perry and the First Plaintiff were domiciled (as a matter of Cayman private international law) in Israel at the time of their marriage in 1964. They had both been taken to Israel by their parents and become Israeli citizens. They had lived and studied in Israel and at the time of their marriage worked there. This was the place with which both the First Plaintiff and Mr Perry, and thereby their marriage, had the closest connection.

186. Mr Perry and the First Plaintiff remained domiciled in Israel at all relevant times. They were domiciled there (as a matter of Cayman law) when Mr Perry transferred the Share to the First Defendant in May 2013 and the transfer was registered and became effective in October 2013.

187. In paragraph 32 of the First Plaintiff's Third Affidavit she stated as follows:

> "*11. In the early 1990s my daughter Tami was studying law in the United Kingdom just outside London. Israel and I bought an apartment at Chesterfield House, South Audley Street in London and began to spend more time there visiting Tami. I really liked London, and throughout the 1990s Israel and I spent quite a lot of time there, travelling frequently between London and Israel.*
>
> *12. However, in 1999 we moved to London instead and lived in the Chesterfield House apartment. We had planned to do this for a long time. From then, we spent at least six months of the year in London, [and] understand that we were classified as non-domiciled residents. Whilst I was resident in London during this period we kept the apartment in Tel Aviv and continued to travel frequently between the two places. In 2000 we bought 39 and 41 South Street in Mayfair. This was a big project and it was not ready for habitation until 2004. I was very involved in the interior design of the property. At the time I gave no thought to how the property was acquired. Since my husband's death I have learned that the properties were put into the name of a company called Mallett Ford. I knew nothing of this at the time.....*
>
> *13. Whilst I loved London and spent a lot of time there, I always regarded Israel as my home. My father had died in 1998 and my mother was living in Tel Aviv on her own. She died in 2016 when she was 92 years old. After my father died I spent a lot of time looking after her. I have one brother, Oscar, who I am very close to, and all my closest friends lived in Israel. I never regarded London as my permanent home.....*
>
> *32. I have been told that in their Defence to this claim the [First Defendant alleges] that I instigated legal proceedings against my husband in 1999. This is completely untrue. In 1999 we moved to London together and in 2000 purchased the South Street property which was a big project for us together. We moved a selection of our belongings, including artwork and furniture, from the apartment in Tel Aviv to London. I would never have agreed to this if we were contemplating divorce. We were living as a happily married couple. My husband and I were never involved in legal proceedings against each other and never entered into a settlement agreement or arrangement of any nature concerning our matrimonial rights.*
>
> [underlining added]

188. The First Plaintiff also referred in the First Plaintiff's Third Affidavit (at [31]), in a passage quoted above, to Mr Perry's extra-marital affair that she discovered around July 1998.

189. The Plaintiffs relied on the expert evidence as to Israeli law of Professor Halperin-Kaddari. The Plaintiffs submitted that her conclusions could be summarised as follows:

(a). marriages celebrated in Israel before 1974 fall under the Israeli community property rule (***CPR***). Under the CPR spouses, regardless of their circumstances, enjoy joint ownership of all marital assets, whether business or domestic. Those rights are proprietary in nature. Where assets are held in the name of one of the spouses, the titled spouse holds the assets as fiduciary for the non-titled spouse and must act in good faith and refrain from engaging in any economic transaction that may diminish or jeopardise the other spouse's interests.

(b). the CPR is a peremptory norm and is practically irrefutable. It was not open to spouses to deal with their property, save under exceptional circumstances, other than in accordance with the CPR unless the spouses had entered into an express written agreement. Such an agreement had to show clearly that the spouse giving up her rights under the CPR fully understood what she was doing. Furthermore, the agreement had to be approved by the court.

(c). the burden of proof lies with the party contending that the CPR did not apply and that burden was a heavy one.

(d). where the titled spouse disposed of marital assets subject to the CPR without the consent of the other spouse and in breach of his fiduciary obligations, whether acting fraudulently or otherwise, the disposal was void and would be set aside by the Israeli court.

The First Defendant's case

190. In its written closing submissions (at [156]), the First Defendant submitted that the First Plaintiff was unable to rely on any matrimonial rights under Israeli law to set aside the transfer of the Share because of one or more of the following five points (the First Defendant argued that if any of these points was accepted, the Israeli Matrimonial Property Claim failed):

(a). Mr Perry and the First Plaintiff moved to London with the intention of moving their marital domicile and of having their property relations regulated in accordance with English law (the ***English Law Matrimonial Rights Agreement Point***).

(b). there was an agreement to divide the matrimonial assets entered into between 1998 and 2000 which was performed at least in part (the ***Agreement to Have Separate Property Point***).

(c). the First Plaintiff expressly or implicitly consented to the transfer of the assets (including the Share) into trust (the ***Consent Point***).

(d). the First Plaintiff expressly or impliedly assented to the separate ownership of business assets. In any event, as a business asset, Mr Perry had power to deal with the Share (and BH06) as he saw fit in circumstances where no critical event had occurred (the ***Business Asset Point***).

(e). the First Plaintiff was estopped from asserting any matrimonial rights she may have had or alternatively was to be treated as having waived any such rights (the ***Estoppel and Waiver Point***).

191. The relevant sub-paragraphs (of paragraph 60) in the First Defendant's Amended Defence and Counterclaim are as follows:

> *"(1) For the reasons set out by Mr Perry...in the Letter of Wishes.....there was no community of property at all and Mr Perry and [the First Plaintiff] held assets separately and operated a regime of property separation.*
>
> *(2). Further or alternatively, even if there was (for a period of time) community of property over some of Mr Perry's assets, there was no community over the share in BH06 which formed part of Mr Perry's business or commercial interests.....the Share formed no part of the assets to which the community of property principle may apply, as crystallised upon Mr Perry's death.*
>
> *(3). In any event, the Share was transferred in 2013, at which time [the First Plaintiff] had no rights to the Share in any event.....*
>
> *(4). Further, the transfer of the share in BH06 was intended to, already did and would further (absent the present proceedings) benefit both [the First Plaintiff] and her and Mr Perry's family. As such, the nature of that transfer is such that it cannot be reversed.*
>
> *(5). Further or in the alternative, there was implied consent by [the First Plaintiff] for the transfer of the assets into trust both because the assets were protected from any adverse liability that may have been incurred by Mr Perry and also because the structures were*

highly tax efficient. Had the assets not been placed in trust, on Mr Perry's death, potentially substantial tax liabilities may have accrued in various jurisdictions that would have substantially reduced the value of Mr Perry's estate.

(6). The [First Defendant relies] on the fact that the Plaintiffs' stated intention is to settle the assets in a different trust structure if the claim succeeds and not for the assets to be held by the Plaintiffs personally as prima facie evidence that the decision to settle the assets on trust was beneficial to [the First Plaintiff] and her family and did not run contrary to her interests under the community of property principle.

(7). In the further alternative, [the First Plaintiff] consented to the transactions, expressly or implicitly because:

(a). She knew that Mr Perry's assets (including [the South Street Property]) were being settled on Trusts and so were no longer personally owned by Mr Perry;
(b) She delegated authority to Mr Perry to deal with the assets either expressly or by taking no interest in the same.

(8) Further, in 2000 [the First Plaintiff] and Mr Perry moved to London, which became their primary residence. The [First Defendant understands] from [the First Plaintiff's] pleadings...that from this date, Mr Perry and [the First Plaintiff] ceased to be domiciled in Israel. Mr Perry only returned to Israel for the purposes of standing trial and serving his prison sentence. Their conduct was consistent with an understanding that after this date the applicable law so as to determine their property relations was the law of England and Wales and not Israel."

192. It can be seen that in the First Defendant's Amended Defence and Counterclaim it relies on some additional grounds, beyond those set out in paragraph 156 of its written closing submissions. In particular, the First Defendant's Amended Defence and Counterclaim asserts (in sub-paragraph (1)), based on the Letter of Wishes, that the CPR never applied to Mr Perry and the First Plaintiff's matrimonial property. From the beginning of their marriage "*there was no community of property at all and Mr Perry and [the First Plaintiff] held assets separately and operated a regime of property separation.*" However, Mr Fenwick at the outset of his oral closing submissions made it clear that his client's case was set out in the written closing submissions and I therefore take it that reliance was only being placed on the arguments set out therein.

The English Law Matrimonial Rights Agreement Point

193. The First Defendant argued that the First Plaintiff did not have rights in the Share under the CPR at the time of its transfer in 2013 because she and Mr Perry had previously agreed that their rights as spouses to matrimonial property were to be determined in accordance with English law. This agreement was made, expressly or impliedly, at the time that Mr Perry and the First Plaintiff moved to London in or around 1999-2000. The First Defendant accepted that the alleged agreement was not put in writing but argued that it was nonetheless enforceable, both as a matter of Israeli and English law. As Mr Fenwick put the point during his oral closing

submissions, there was a decision by Mr Perry and the First Plaintiff to abide by the law of England and Wales after they had decided that England (London) would become the centre of their lives.

194. The First Defendant submitted that Israeli law - in particular, section 15 of the Spouses (Property Relations) Law 1973 (***PRL***) - permitted a couple who had married in Israel (whose matrimonial property rights were therefore initially subject to Israeli law) but who had moved their domicile (meaning the centre of their lives) to England, to enter, after making the move or taking the decision to move, into an agreement (binding under English law even if only evidenced by conduct or words) to give up their Israeli-governed matrimonial property rights, in return for matrimonial property rights granted and governed by English law.

195. The First Defendant relied on:

(a) the evidence of Professor Shifman to argue that an unwritten and implied agreement was effective as a matter of Israeli law. Professor Shifman argued that the leading authority of the Israeli Supreme Court on the meaning of section 15 of the PRL (*Nafisi v Nafisi* CFH 1558/94, 50(3) PD 573 (1996) (***Nafisi***)) should be understood as treating as valid implied agreements that were not in writing but based on inferences made by reference to the spouses' conduct; and

(b). the evidence relating to the conduct of the First Plaintiff and Mr Perry and the reasons for their move to London in 1999-2000. The First Defendant accepted that there was no express written agreement or oral evidence of an express agreement.

196. Professor Shifman's evidence on this issue can be summarised as follows:

(a). section 15 of the PRL governed the issue of what law governed property relations between spouses. Section 15 of the PRL provides:

> *"Private International Law*
>
> '*Property relations between spouses shall be governed by the law of their domicile at the time of the solemnisation of the marriage: Provided that they may by agreement determine and vary such relations in accordance with the law of their domicile at the time of making the agreement."*
>
> [underlining added]

(b). an agreement in writing which had been approved by the Israel court was needed for certain purposes under the PRL. Sections 1 and 2 of the PRL provided as follows:

> *"1. An agreement between spouses regulating property relations between them (hereinafter referred to as a 'property agreement') or any variation of such an agreement shall be in writing.*
>
> *2(a) A property agreement and any variation thereof requires confirmation by the District Court..."*
>
> [underlining added]

(c). however, an agreement to determine or vary property relations made in accordance with the law of a new domicile, as referred to and permitted by section 15, was not a "*property agreement*" for the purpose of sections 1 and 2. The words "*in accordance with the law of the domicile*" in section 15 refer primarily to the formalities of forming an agreement (i.e. it introduces a requirement for compliance with the law of contractual formation in the country of domicile); it does not require compliance with other statutory provisions governing agreements relating to marriages (such as the PRL in Israel). So long as there was an agreement that was a binding agreement in the jurisdiction of the domicile to change property relations (by regulating them in accordance with the foreign law), this will be effective.

(d). thus, where spouses who married in Israel had moved the centre of their life to another jurisdiction and then entered into an agreement valid in accordance with the law of that jurisdiction to determine or vary their matrimonial property rights, that agreement was valid under Israeli law. The agreement did not need to be in writing and approved by the Israeli court. An agreement implied by words or conduct would be sufficient. Professor Shifman argued that this analysis was in accordance with the decision of the majority of justices in *Nafisi*.

(e). in *Nafisi* the Supreme Court held that a couple who had immigrated to Israel from Iran (where they had been married) had, by reason of their move to Israel, validly agreed, pursuant to a general understanding between them, that their matrimonial property rights would be governed by Israeli law, even though there was no written agreement to that effect which had been approved by the Israeli Court. President Barak, with whom a majority of the justices agreed, summarised his conclusions as follows (in paragraph 6 of his judgment):

> *"In conclusion, upon arrival in Israel, spouses married abroad prior to the entry into force of the Property Relations Law who, when in Israel, satisfy the conditions for community property, are deemed [to be] [as] agreeing to maintain a community property regime in Israel. This agreement takes precedence over the application of conflict-of-laws rules, and establishes the regime for the division of their property. That regime applies to property acquired after their marriage but before their arrival in Israel, as well as to property acquired in Israel after the marriage."*
>
> [underlining added]

(f). accordingly, spouses were entitled to agree between themselves that a law different from the law of the place of their residence at the time of their marriage should govern their matrimonial property relations. This was so even if the agreement concerned did not meet the formal requirements of a "*property agreement*" within the meaning of that term under the PRL. The Supreme Court had held, in *Nafisi*, that the spouses would be treated as having agreed, without the need for any formality, to become subject to Israeli law (the CPR) simply by reason of their immigration to Israel and living as spouses there. The same analysis applied to spouses who immigrated to England and Wales (by making it the centre of their lives) and lived as spouses there with a view to their matrimonial relations being subject to local law.

(g). Professor Shifman disagreed with Professor Halperin-Kaddari's opinion as to the effect of the decision in *Nafisi* on the present case. She, as I explain further below, considered that *Nafisi* should be given a narrow interpretation and application, such that it applied only to couples who married in a country other than Israel, "*under a non-egalitarian matrimonial property regime*" (paragraph 24 of Professor Halperin-Kaddari's First Report). She relied on the Israeli Supreme Court in C.A 7687/04 *Sasson v. Sasson*, 59(5) 596 (2006) (***Sasson***). In Professor Shifman's opinion, the judgment in *Nafisi* was of general application and did not fall to be interpreted narrowly. The Supreme Court in *Sasson* did not hold that *Nafisi* should be given a narrow interpretation, and instead expressly and deliberately left open the question of whether the ruling should be limited to circumstances in which the parties were married abroad. As Chief Justice Beinish stated in *Sasson* (at [12]): "*this question does not fall to be decided in this case.*" While there was some academic debate as to the extent to which *Nafisi* should be given a narrow interpretation, until the Supreme Court ruled otherwise there could be no proper basis for giving it the narrow interpretation contended for by Professor Halperin-Kaddari. Furthermore, he considered that the cases on which Professor Halperin-Kaddari had relied (at paragraph 26 of Professor Halperin- Kaddari's First Report) did not deal with the question of whether or not a formal, court-approved property agreement was required, so as to effect a change of law under section 15.

(h). in re-examination, Professor Shifman was given three hypothetical examples in order to test his analysis of when conduct (being the steps taken by the spouses to move from one jurisdiction to another, which constituted a new domicile), would be sufficient to establish an agreement that their matrimonial property relations should become subject to the law of the jurisdiction of their new domicile. They were as follows:

(i). where a couple had moved from Israel to the Alps for medical reasons.

(ii). where a couple who had moved away from Israel to the USA, as a result of a disagreement with one of the defining characteristics of Israeli politics.

(iii). where a couple who moved to another country due to concerns over interference by the Israeli authorities in their tax and business affairs.

(i). Professor Shifman responded as follows to each example:

(i). the first example involved the mere removal to another country and that would not be enough. Where the reason for the move was the need for medical treatment it did not mean or follow that the spouses wanted to take upon themselves the values of the other society.

(ii). the second example involved a conscious decision to abandon the values of Israel and to join another society with a different set of values. Where these were the reasons for the move, the change of residence would be sufficient evidence of an agreement to have all aspects of the marital relationship, including property relations, become subject to the law of the new domicile.

(iii). in the third example, tax considerations alone would be insufficient. But, if "*the other country becomes really the centre of life of the couple*" then it was to be inferred that "*the new society should decide all the matrimonial aspects from this time thereafter*" and there would, once again, be sufficient evidence of an agreement to have all aspects of the marital relationship, including property relations, become subject to the law of the new domicile.

The First Defendant submitted that the present case was similar to the third example.

197. During his oral closing submissions, Mr Fenwick reviewed and quoted at length from the judgments in *Nafisi*. He explained that the majority of the Justices approved the judgment of President Barak, which therefore set out the binding decision of the court. He submitted that President Barak had rejected the argument that in order for the spouses to agree that their matrimonial property rights were to be those arising under Israeli law they needed to enter into a property agreement as defined in and complying with the PRL. He referred to President Barak's reasons for doing so in paragraph 3 of his judgment. This is in the following terms:

> *"The next step in my thinking is this: anything that the parties can agree to expressly, they can agree to impliedly. There is no requirement that the agreement be in written or any other form. All that is required is that it be an agreement between the parties (sec. 23 of the Contract (General Part) Law). Two arguments can be raised against this step. The first is that one might say that the agreement between the parties deprives one of them, or both of them, of rights that they had under the applicable law in the absence of the agreement. In view of the nature of the agreement, it is appropriate that it be made expressly and in writing. This argument fails. Every agreement comprises some change in the normative relationship between the parties, and in the absence of an express provision requiring a special form, the agreement of the parties suffices to achieve that normative change. The second argument is that the [PRL] requires that a property agreement be in writing (sec. 1), and must be confirmed by a judicial instance (sec. 2). This argument is incorrect. The requirements of writing and of confirmation by the court concern a "property agreement" as defined by the Property Relations Law, whereas we are not at all concerned with a "property agreement". After all, cases in which the conflictual law is decided in accordance with the general conflictual principles, and not by the [PRL], are not governed by the [PRL] and the provisions of secs. 1 and 2 thereof. That is the situation, inter alia, in all those cases in which the [PRL] infringes rights vested in one of the spouses prior to the enactment of the Law (in 1973) (see the Azugi case [1]). In those cases for which the conflictual law is decided in accordance with the provisions of sec. 15 of the [PRL] - that is, in regard to property acquired after the enactment of the [PRL]by spouses married before its enactment – that provision itself establishes that the parties may determine their own normative regime "by agreement". Here I must take exception to the approach of my colleague Justice Mazza that an "agreement" for the purposes of sec. 15 of the [PRL] means a "property agreement". In this matter, I agree with the approach of Justice Elon in the Azugi case [1], according to which: the term "agreement" in sec. 15 has its general meaning, and need not be in writing – as required under sec. 1 in regard to a property agreement – rather, any agreement whatsoever, whether in writing or parol, whether express or implied, can serve to establish the property relations between the spouses, as long as the agreement is in accordance with the law of their domicile at the time of its making (ibid., p. 14).*
>
> *Two reasons ground my position. First, from a linguistic perspective, the [PRL] clearly distinguishes between "agreement" (addressed by sec. 15) and "property agreement" (defined in sec. 1). Justice Elon correctly pointed out that "the second clause of sec. 15 states 'agreement', and not 'property agreement'" (ibid.). Second, in terms of the legislative purpose, this interpretation yields a just and proper result. Indeed, my colleague Justice Mazza himself noted that his conclusion "is not a desirable result". It infringes the equality of women (cf. the Bavli case [18]). It is at odds with the autonomous will of the parties. As opposed to this, my interpretation realizes the fundamental conceptions of Israeli society in regard to the autonomy of personal will and the equality of the sexes. These views are presumed to underlie the purpose of the [PRL](see: CA 524/88, 525/88 "Pri Ha'emek" – Cooperative Agricultural Assoc. & 30 others v. Sedeh Yaakov – Moshav Ovdim of the Po'el Hamizrachi for Cooperative Agricultural*

Settlement et al. [26] p. 561). Indeed, equality "is the soul of our entire constitutional regime" (HCJ 98/69 Bergman v. Minister of Finance [27] per Landau, J.). We presume that it is the purpose of every law to advance and preserve this principle. In the judgment under review in this further hearing, my colleague Justice Mazza was of the opinion that this approach devoids sec. 15 of the Property Relations Law of all meaning. I am not of that opinion. It suffices to recall all those cases in which parties immigrated to Israel, and a dispute then arose in such a manner that the community property rule did not apply."

[underlining added]

198. Mr Fenwick submitted that it was plain that, as Professor Shifman had opined, President Barak had held that in order to satisfy section 15 of the PRL (and for there to be a binding agreement to determine or vary property relations) *any* binding agreement, including an agreement implied by words or conduct, was sufficient. Section 15 of the PRL did not require a "property agreement" as defined by sections 1 and 2 of the PRL.

199. As regards the factual evidence in this case, supporting the existence of an agreement that there would be a change in the spouses' property relations and that their matrimonial property rights would be determined in accordance with English law, the First Defendant argued as follows:

(a). the reason for the move to London in 1999 (acknowledged and referred to by the First Plaintiff in her trial affidavit) was connected to the Israeli Settlement Agreement. Mr Perry needed to move his tax residence away from Israel and he wanted to cut his links with Israel to bring to an end the action by the Israeli tax authorities to make claims against him and interfere with his business. His move facilitated and was part of the arrangements needed to achieve these objectives, even though the move occurred before the Israeli Settlement Agreement was entered into (on 17 May 2001) and before Mr Perry became tax resident in the UK (which the First Defendant submitted occurred at the earliest on 6 April 2000).

(b). the move gave Mr Perry and the First Plaintiff a reason to change the law that governed their financial affairs – primarily but not limited to tax. There would be clear benefits that would flow from having their matrimonial property rights determined according to English, rather than Israeli, law. If Israeli law continued to apply after the move to England, it would be necessary to have certain types of agreement (property agreements, discussed further below) approved by the Israeli court (and comply with the requirements for making disclosure on such applications). It was readily to be inferred, the First Defendant submitted, that this would have been unwelcome to Mr Perry and a reason for

having the matrimonial property rights of Mr Perry and the First Plaintiff regulated by English law.

(c). the First Defendant also relied on the FFW October Letter. It submitted that it was clear, from the account of Mr Perry's intentions and motives as described in the FFW October Letter, that Mr Perry and the First Plaintiff had turned their backs on Israel. They had a long-term intention to live in the UK, at least until the age of 75 or prior ill health, and then to move to France. They had contemplated being based in either the US, UK or France but not Israel. Their centre of life had shifted in 1999, or shortly thereafter, from Israel to the UK. These circumstances were strong evidence of an implied intention to adopt English rules with respect to their property.

(d). furthermore the First Plaintiff's evidence in the SOCA Proceedings (in particular in LP's Second SOCA Witness Statement of 18 November 2010) was clear evidence that by the date of that affidavit the First Plaintiff had given up her rights under the CPR. One reason why that had occurred was because the First Plaintiff and Mr Perry had agreed that following their arrival in England their matrimonial property rights were to be determined and governed by applicable English law. Another reason, in the alternative, was that Mr Perry and the First Plaintiff had by then agreed to divide their matrimonial assets. I deal with this second reason below in my discussion of the Agreement to Have Separate Property Point. Mr Fenwick submitted that in the First Plaintiff's evidence, in the SOCA Proceedings, she had identified certain assets in Israel as her own property and some assets as being jointly owned with Mr Perry. Had the First Plaintiff believed that she had a property right to Mr Perry's other assets including his business assets she was under an obligation (and is likely to have been advised) to disclose such a right or claim. Mr Greenspoon, as an Israeli lawyer, was advising her in relation to her evidence in the SOCA Proceedings and would have been aware of the existence and significance of the CPR. Mr Fenwick relied on the denial, or absence, of any claim to an interest in the Share in the First Plaintiff's evidence in the SOCA Proceedings as clear evidence that the First Plaintiff had agreed or accepted, by November 2010, that she had no such interest.

(e). Mr Fenwick, in his oral closing submissions, referred to there being a number of pointers (as summarised above) which suggested that Mr Perry and the First Plaintiff had agreed a change in their matrimonial property relations and said that it would be sufficient if this conclusion was implied from the rest of their decision making process.

(f). the Court was invited to accept that Mr Perry and the First Plaintiff expressly or implicitly agreed that any marital property rights would be governed by the law of England and Wales and not by the law of Israel when they moved to London in 1999 or 2000. If there was an agreement that the marital law would be changed to English law, any question of proprietary rights arising as a matter of Israeli law must fail, including in respect of agreements entered into before the move but executed and/or affirmed after the move.

200. The Plaintiffs argued, based on Professor Halperin-Kaddari's evidence that no such agreement had been made and that if it had been made it would have needed to be in writing and approved by the Israeli court in order to be enforceable. Professor Halperin-Kaddari's opinion was as follows:

(a). section 15 of the PRL permitted spouses to alter the terms on which they held their property, pursuant to an agreement entered into according to the laws of a later domicile (domicile, meaning for this purpose, the centre of the couple's life).

(b). where the relevant later domicile was in Israel the CPR dictated that any such agreement must be a 'property agreement' under sections 1 and 2 of the PRL which must be in writing and approved by the Israeli court.

(c). any agreement that affected the parties' future rights and interests upon termination of their marital relations by reason of either divorce or death was a 'property agreement' for the purposes of sections 1 and 2 of the PRL. The alleged agreement under which the First Plaintiff was supposed to have agreed to give up her rights under the CPR and acquired such rights as were available to a spouse under English law would therefore be a property agreement. The formal requirements (of writing and validation) applied regardless of the nature of the proposed change in the spouses' rights, and whether such a change would damage the interests of either spouse.

(d). Professor Halperin-Kaddari summed up her position on this issue in the Israeli Law Joint Report as follows:

> '2. *The Israeli law's position under section 15 of the PRL, which applies to the Perrys (as to all married couples, including those married prior to 1974), is that property*

relations are governed by the law of the country in which the couple resided when married. Section 15 of the PRL follows the immutability concept. Thus, even if the Perrys became residents of the UK, this would have no effect over the law governing their property relations. Change of that law could only be made by an agreement. The mere fact of moving does not amount to such an agreement.

3. *To prove that spouses agreed that a law of a country than Israel governs their property relations, one must demonstrate that they entered into a 'property agreement' in the sense of the PRL, in line with sections 1 and 2 of that law, namely a written, signed, and court-approved agreement."*

(e). Professor Halperin-Kaddari disagreed with Professor Shifman's opinion that the majority decision in *Nafisi* was authority for the proposition that an agreement to regulate the spouses' property relationship by reference to a different legal system (and thereby to change the law governing that relationship) did not need to meet the formal requirements of a property agreement. In Professor Halperin-Kaddari's opinion, the ratio of the decision in *Nafisi* was limited and only applied to the effect of the CPR on couples immigrating to Israel (it was an Iranian couple in *Nafisi*). *Nafisi* dealt with a point of purely domestic law, not a conflict of law issue, and so decided nothing that detracted from the requirements for formalities in sections 1 and 2 of the PRL. *Nafisi* was authority for the proposition that couples immigrating to Israel who satisfy the conditions for community property were deemed to agree to maintain a community of property regime. The case concerned the presumption in favour of applicability of the CPR to the marriages of incoming couples and nothing more.

(f). Professor Halperin-Kaddari argued that: (i) the majority was not using section 15 of the PRL to decide the case; (ii) the implied agreement that the majority employed was strictly that which was imposed by the CPR and could not be interpreted as referring to any other implied agreement; (iii) the court explicitly rejected the contention that a mere decision to immigrate to another country changed the law governing property relations; and (iv) the facts of the present case were distinguishable from *Nafisi* (and all the other cases related to section 15) since this case involved emigration from and not immigration to Israel.

(g). Professor Halperin-Kaddari argued that paragraph 6 of the judgment of President Barak in *Nafisi* (quoted above) demonstrated that the court's reasoning was limited to the effect of the CPR on couples immigrating to Israel. She also argued that paragraph 2 of the judgment of President Barak showed that his decision did not rest on questions of choice of law rules at all (I also quote paragraph 1 to which reference is made in paragraph 2):

'1. *The facts of the present case "activate" several legal systems and several property relations regimes. The parties married (in 1944) in Iran. At the time, they were subject to the Iranian property relations regime. The husband visited Israel (in 1979) and purchased a store, which was registered in his name. At that time, the Spouses (Property Relations) Law (hereinafter: the Property Relations Law) was in force. The question is whether that store is subject to Iranian law (as the law of the domicile at the time of the solemnization of the marriage), or the Israeli community property rule (as the law to which Iranian law points by renvoi, or as the law of the place where the store is located, or as the lex fori). The spouses immigrated to Israel (in 1983). Subsequent to their immigration to Israel, the husband opened two bank accounts in his name, in which he deposited money that he had brought with him from Iran. The question is whether that money is subject to Iranian law (as the law of the domicile at the time of the solemnization of the marriage), or whether it is subject to the Israeli community property rule (as the law to which Iranian law points by renvoi, or as the lex fori, or as the law of current domicile). Answering those conflictual questions, and others, raises the question of the scope of incidence of the Property Relations Law over the store and the bank accounts. In regard to the bank accounts, we can assume that they were opened with the husband's money, which he brought from Iran, But the accounts were opened in Israel after the enactment of the Property Relations Law. A question also arises as to the scope of rights vested under the foreign law, which the Property Relations Law does not infringe (in accordance with the interpretation given in the Azugi case [1])*

2. *All these questions – some of which were addressed in the comprehensive opinion of my colleagues Justice Mirza (in his opinion in the judgment that is the subject of this Further Hearing) and Justice Goldberg (in this further hearing) – can be left for consideration at another time. The reason for this is that whatever the choice-of-law rule may be in regard to property relations between spouses married abroad prior to the enactment of the Property Relations Law, it is a dispositive law. It applies in the absence of an agreement between the parties."*

[underlining added]

(h). Professor Halperin-Kaddari also argued that Justice Goldberg's judgment was inconsistent with Professor Shifman's opinion that "*a change in the place of the couple's residence is likely to be considered by an Israeli court to amount to an agreement that the applicable law governing the couple's matrimonial property relations has changed to the law of the new place of residence.*" At paragraph of 22 of his judgment, Justice Goldberg said the following:

> *'...it would be improper to hold that an agreement of spouses to community property in regard to assets that belonged to one of the spouses is inherent in the very transfer of the couple's residence to Israel, just as it would be improper to hold that spouses who uproot from Israel to a country in which property separation prevails, thereby agree to the application of property separation even to property acquired in Israel'*

(i). Professor Halperin-Kaddari argued that the judgments of the different Justices in *Nafisi* were based on the premise that a permissive approach towards the final clause of section 15 of the PRL (to the effect that the term 'agreement' means any agreement) can only be applied in cases which result in promoting gender justice and providing rights, and not in infringing on vested rights and reducing women's rights. Furthermore throughout *Nafisi*, and in the literature that discussed it, the holding was and has always been presented as being referable to the specific facts and context, being the move to Israel by couples who were not residents of Israel when they married. There had never been a case in which the *Nafisi* holding was applied to couples who married in Israel but left and moved to another country. Subsequent case law recognised that it was at least arguable that *Nafisi* should be interpreted narrowly so that it only applies one-way. As (then) Chief Justice Beinish said in *Sasson* at p. 611:

> *"[t]he judgments cited above concerned circumstances different from those before us. The said judgments addressed the matters of spouses who married prior to the entry into force of the Property Relations Law, where the domicile at the time of the marriage was in a foreign country; the main dispute addressed in those judgments concerned the question of the application of the community property presumption to property relations between spouses after their immigration to Israel. In view of that, there is a question as to whether the interpretive approach adopted in those judgments, according to which the final clause of sec. 15 of the Law treats of a "regular" agreement, actually applies to the circumstances of the matter before us. As will be explained below, this question does not require an answer in the present case."*
>
> [underlining added]

(j). Professor Halperin-Kaddari also referred to the analysis of Professor Sylvia Fassberg in her book *Private International Law* (Nevo, 2013) where she said:

> *"At the same time, in light of the position of the legislator, in the absence of an explicit agreement, any implied agreement should be interpreted with caution in order to determine whether the couple in question wished that the new arrangement would apply only to property purchased after the agreement was made, or whether they truly wanted it to apply also to property purchased before the agreement was made. This interpretive work will be extremely difficult to carry out when dealing with an implied agreement.*
>
> *The manner in which Section 15 was interpreted in the Nafisi case cancels it, and the final judgment implies that in contrast to the provisions of this Section, in order to maintain the property relations arrangement which was in force at the couple's place of residence at the time of marriage, an explicit agreement must be made, and that if this is not the case, any change of the place of residence may be interpreted as the application of the new legal system to all the property, including any property accumulated in the past. The only case in which the previous condition may be preserved, is when a formal agreement was made between the spouses in accordance with the laws of their place of residence at the time of marriage, and this agreement is interpreted as applying to all the property accumulated by the spouse during their entire marriage.*

Whether this is now the law in Israel or whether this final judgement can be reduced to its basic facts, it seems that it expresses a clear preference towards the new law when this new law is Israeli law, or perhaps a clear preference to the new law when this law stipulates community. This value-based preference to a regime of community finds its expression in most final judgements, and explicitly in the final judgement issued by Justice Cheshin..."

[underlining added]

201. In their written closing submissions the Plaintiffs argued that the evidence showed that Mr Perry did not sever his connections with Israel. There could be no doubt, they submitted, that notwithstanding Mr Perry's acquisition of resident non-domiciled status in the UK he felt a deep and continuing connection to the State of Israel for the whole of his life. That was demonstrated by the fact that Mr Perry returned to Israel to stand trial and, after his conviction, voluntarily returned to Israel to serve his sentence even though he had been able to travel to London and had been advised that he could avoid extradition if he remained in the UK.

The Agreement to Have Separate Property Point

202. The First Defendant also submitted that Mr Perry and the First Plaintiff reached and entered into a binding agreement to divide their assets so that each would have separate rights to their own assets. There would be no joint interest under the CPR. Such an agreement did not need to be in writing and approved by the Israeli court. An implied agreement would be sufficient.

203. The applicable Israeli law was set out in Professor Shifman's evidence as follows:

(a). the authorities were clear that: (i) an agreement which was realised (executed) during the lifetime of the spouses, prior to a divorce, and which did not deal with the future division of assets upon divorce or death; and (ii) an agreement which applied only to certain of the spouses' assets, while leaving various other assets outside its scope, was not considered to be a "matrimonial property agreement" under sections 1 and 2 of the PRL. Such agreements were therefore not required to meet the formal requirements of sections 1 and 2 in order to be valid.

(b). the authorities distinguished 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 in

the present. Professor Shifman relied on the following extract from the judgment of Vice President Ben-Porat in the Supreme Court (sitting as the Court of Civil Appeals) in *Shai v. Shai*, (1985, C.A. 169/83 P.D. 39(3) 776, 782) (***Shai***), that:

> *"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....*

(c). Professor Shifman argued that the Supreme Court relied on such an analysis in *Anonymous v. Anonymous BAM* (2010, A.F.A. 5142/10) (***BAM***). In that case, the court held that an agreement that did not cover the entirety of the spousal assets was not a matrimonial property agreement, and that taking steps to realise (execute and implement the terms of) an agreement during the lifetime of a marriage served as evidence that the agreement was not intended to govern property relations after divorce or death and was not a matrimonial property agreement requiring the approval of the court. In *The Estate of the deceased Moshe Shamir v. Yael Dolev (Shamir)* (C.A. 7388/97, P.D. 53(1) 596, 607-8) the Supreme Court said:

> *"As to the property relations law, I am not convinced that this law applies in this case. From the filings of the District Court, it follows that active steps were taken in the practical implementation in the arrangement regarding the division of property many years before the death of the deceased. It follows that we are not concerned with an arrangement in contemplation of a marriage dissolution which the law of 1973 is concerned with."*

(d). Professor Shifman argued these cases overruled that part of the decision in *Shai* (a case involving a couple who had married after 1974 and who were therefore subject to the statutory regime under the PRL) that held that an agreement that deals with only part of the matrimonial property would be treated as a "*property agreement*."

(e). Professor Shifman was extensively cross-examined on this issue by Mr Brownbill. He maintained the view that there "*was a great difference between a concrete transaction made in the present and an attempt to regulate the future matrimonial regime of the parties.*" He also referred to the distinction between "*a transaction that has immediate results [which was a normal transaction]...and an agreement that is going to modify or change the matrimonial regime of balancing resources at the time of divorce or death.*" During his cross-examination he referred to the judgment in *BAM* in which it was said

that "*the distinction between agreements that look forward to separation and "ordinary" economic agreements runs as a common thread through the case law of this court*".

(f). furthermore, certain authorities had taken the view that, even where an agreement had not been approved by the court, the agreement should still be considered valid and upheld, as would be any regular agreement. The PRL did not state that a failure to comply with the formality requirements in sections 1 and 2 would result in the agreement being unenforceable. Indeed, the consequences of such a failure were not set out in the PRL or anywhere else. Professor Shifman relied on the following remarks of Chief Justice Shamgar in *Avidor v. Avidor* (C.A. 486/87 P.D. 42(3) 499 at [6(b)]) (***Avidor***):

> "*If court approval were completely lacking, then we would not have before us a "matrimonial property agreement", as defined in the Matrimonial Property Law, but that does not mean that we do not have before us an agreement at all. There is a valid agreement, but it is not a "matrimonial property agreement"*".

The result (as shown by ***Koch v Koch*** (C.A. 359/85, P.D. 39(3) 421, 422) was that court approval gave the agreement an elevated status which entitled the parties to rely on certain statutory rights, such as the right to specific relief (for example under sections 11 and 12 of the PRL). An approved marital property agreement could confer on the surviving spouse a right to the entirety of the parties' assets if so stipulated and thereby avoid the prohibition against succession agreements (i.e. agreements about asset allocation after death other than a will) as provided in section 8 of the Succession Law 1965. While an agreement that was not approved by the court could not circumvent the Succession Law, it was still binding on the parties for other purposes.

(g). during his cross-examination, Professor Shifman was pressed to cite an authority in which the Israeli court had held that an unwritten property agreement was enforceable. He did not do so. The following exchange with Mr Brownbill took place on this issue:

"THE PROFESSOR	*As I tried to explain in my report the case law said...that even an agreement that did not meet the formal requirements it means that it is not a property agreement. It doesn't mean that it is not an agreement at all. It is still a valid agreement. It is not a formal agreement. It is not a property agreement but it is a normal agreement. This is one point to be emphasised according to the case law. The other point in this regard is that the law of estoppel, which is a subsection of the duty to act in good faith, might preclude a party from relying upon formal considerations when he himself took benefits out of the agreement. So there are two points here, two different points.*

MR BROWNBILL	*Well would you agree that the courts will only enforce such agreements in certain circumstances....I put it to you that it will only do so when the agreement is in writing.*
THE PROFESSOR	*Not at all."*

204. The First Defendant argued that the agreement was made before, and subsequently affirmed and acted upon after, Mr Perry and the First Plaintiff had left Israel (the property and asset transfers to the First Plaintiff in 2001 were evidence of such affirmation) and that there was sufficient evidence supporting the existence of such an agreement, specifically:

(a). first there was the clear evidence of an agreement from the Fifth Defendant. The Fifth Defendant recalled being told about such an agreement by Mr Perry. She was very clear during cross-examination that they had "*separated their property*". She was unable to recall precisely when she was told about this (which was unsurprising given the passage of time) but she believed that it was in the early 2000s. However, she clearly remembered the discussion that took place in Montefiore Street and recalled that Mr Perry had mentioned that three properties were either to be held in the First Plaintiff's sole name or transferred to her. The First Defendant relied on the following evidence given in response to a request for clarification by me of a question put to the Fifth Defendant during her cross-examination:

"JUSTICE SEGAL:	*I think you are being asked, though, to give as much detail as you can about what your father told you, so what words did your father use, or what did your father tell you?*
ANSWER:	*I cannot remember the exact words and it will be in Hebrew, and if I will translate it to English, I may not translate it exactly. It's ... I mean, the most important point for me during this discussion was the idea that my father is going to settle all of his -- his part of the assets under a trust. I didn't pay so much attention to the exact word concerning his understanding with [the First Plaintiff].*
JUSTICE SEGAL:	*But your view from that conversation was that he had made a decision to take that action?*
ANSWER.	*Of course, once he could, because at this point in time, [a] substantial amount of his assets was frozen by the Swiss prosecutor."*

Mr Fenwick submitted that she was a credible witness. The Plaintiffs have challenged the Fifth Defendant's credibility and criticised the way in which she had delivered her

evidence during her cross-examination. She was criticised for being unnaturally slow, seeking to obfuscate, being callous and giving evidence that was contrived rather than based on a genuine recollection of events. The First Defendant rejected these criticisms and invited the Court to accept the Fifth Defendant's evidence.

(b). secondly, there was the evidence of Mr Perry in the Letter of Wishes. This clearly stated that Mr Perry and the First Plaintiff had agreed to a divorce and asset separation. He was specific about the terms of the asset separation. He had stated that the First Plaintiff was to receive all assets in Israel plus DM 50 million, to be paid once collected from the German pension programme, of which an advance payment of DM 1 million had been made. The Letter of Wishes had been drafted when Mr Perry was about to undergo a life threatening operation and was anticipating that he may well die. It was a death-bed statement and should be given considerable weight as a result. The Plaintiffs' argument that the statements should not be taken at face value, and their explanation as to why Mr Perry had made them, were to be rejected. It was simply not credible that Mr Perry, in the circumstances in which he came to dictate the Letter of Wishes, would have deliberately and so clearly misstated the position on such an important topic.

(c). thirdly, the First Defendant relied on the evidence of Mr Oehri (in his trial affidavit and oral evidence). Mr Oehri said in his trial affidavit (see paragraph 23) that Mr Perry had mentioned the separation agreement to him and gave further details about this in his evidence:

> *"QUESTION. The subsequent reference, over the page, that "she has her assets and I have mine", and then the statement that [the First Plaintiff] has received "enough"; the word "enough" in your affidavit is quoted, in inverted commas, in quotes. Is that intentional?*
>
> *ANSWER.*
> *(Interpreted): He stated at that conversation that the foundation should be formed to pay money into it and that he had already given her or was going to give her real estate in Israel and that then it would be enough."*

Despite being challenged about this, Mr Oehri did not change his evidence.

(d). fourthly, the First Plaintiff's evidence in the SOCA Proceedings, which I have already summarised, was clear and powerful evidence (given under oath) that she had agreed, by that time, that she had no rights to the Share. It was only consistent with an agreement for separate property rights having been made and should be a basis for inferring the

existence of such an agreement. The First Defendant submitted that the correspondence from Asserson demonstrated that the First Plaintiff had received advice on the SOCA Proceedings and the preparation of her evidence so that it was clear that she was fully aware of the need to take care when deciding what to disclose and the consequences of misstating the position. The First Defendant further submitted that these documents suggest that the First Plaintiff was either mistaken or dishonest when she gave evidence during her cross-examination and said that she had never spoken to Trevor Asserson, the partner in Asserson, or that although Mr Asserson had come to her house and met her she had no business with him. Instead, the First Defendant suggests that she gave direct instructions to Asserson and had turned her mind to the issues raised in the SOCA Proceedings.

(e). fifthly, there was evidence that the property transfers and payments referred to by Mr Perry had in fact been made to the First Plaintiff. This was evidence of the existence and part-performance of the agreement:

(i). first, the First Plaintiff accepted that at some time after 1997 the property in Recanati Street, Tel Aviv (***the Recanati Street Property***) had been transferred from Mr Perry and her joint names into her name alone and that the family home in Pinkas Street, Tel Aviv (the ***Pinkas Street Property***) had been purchased in her name alone (she also gave evidence that a house at 32 Tura Street, Jerusalem had been transferred into her name in 2001). Her evidence was that this had been done for tax planning purposes on the advice of Professor Gliksberg. She had exhibited a copy of a letter dated 11 February 2019 from Professor Gliksberg, which, in her witness statement dated 11 February 2019, she had said "*explained his advice*" (this witness statement was filed in response to interrogatories served by the First Defendant). Professor Gliksberg's letter was a short summary of his recollection. He said that:

> *"3. Starting from 1999, the late Israel Perry wished to sever his tax residency in Israel and transfer it to the United Kingdom (as a United Kingdom resident non-domiciled).*
>
> *4. As part of the tax advice given to Israel Perry, I recommended to him to sever the majority of his attachments and connections to the State of Israel, including transferring his businesses and/or assets in Israel to the members of his family: his two daughters and his wife.*

5. *This was customary tax advice in such circumstances, since under Israeli law, the question of residency is examined among other things on the basis of the totality of the person's connections to the State of Israel."*

(ii). the First Defendant argued that Professor Gliksberg's letter was of limited evidential value since he had retained no documents. The First Defendant also submitted that the evidence of the Second Plaintiff (in cross-examination) and Mr Greenspoon was that Professor Gliksberg's advice had recommended transfers to the Second Plaintiff and Fifth Defendant rather than the First Plaintiff. There was no tax advice recommending transfers to the First Plaintiff. Accordingly, the transfers to her could not be explained as being for tax planning purposes. The only credible explanation was that they were pursuant to the separation agreement, for which the First Defendant contended.

(iii). the First Plaintiff had admitted (in her 11 February 2019 witness statement) that she had received DM 1 million from Mr Perry in 1998. She said as follows:

"d. Separately, I understand, from [The Second Plaintiff], that [Mr Perry] paid other funds (totalling DM500,000) into an account in my name with Migros Bank, in 1998. I recall that this account had been in the name of my mother and [Mr Perry] had asked me to have my mother transfer the account into my name. The funds being paid into the account were not intended for me or for my benefit and, for this reason, I did not pay very much attention to them. I dealt with them only as [Mr Perry] requested. The funds were subsequently paid away on [Mr Perry's] instructions (that is, on his instructions to me which I would have passed on to the bank) but I have no recollection of who they were paid to. I did not know why [Mr Perry] did this in this way; he asked me to help him and I was happy to do so.

e. At around the same time I understand, from [the Second Plaintiff], that a further sum of DM 500,000 was paid to something called Codex. I have no knowledge of this, at all."

(iv). the First Defendant submitted that the First Plaintiff's explanation of the reasons for and status of these payments was incredible. During his cross-examination, Mr Greenspoon gave evidence that none of the funds were available to the First Plaintiff. They were being used by Mr Perry to purchase artwork (he had said that Mr Perry was purchasing two paintings and that the First Plaintiff was "*merely a vehicle through which money was transferred*"). However, this explanation was wholly unconvincing. First, why were only two out of the many payments made by Mr Perry to purchase art channelled through the First Plaintiff's accounts and why was there no evidence to indicate that the paintings purchased were not her property? Secondly, the evidence of Mr Oehri showed that the funds were

probably paid to an entity (Codex) for the benefit of and to be paid to the First Plaintiff. Codex was a company involved in establishing and acting for a foundation (the Teios Foundation) that had been set up for the benefit of the First Plaintiff and the payment to Codex was intended for the Teios Foundation and the First Plaintiff. In his trial affidavit, Mr Oehri said that:

> *"I was generally aware that [Mr Perry] and [the First Plaintiff] had a difficult relationship, although I was never privy to many details. In or around 1998, I understood from [Mr Greenspoon] that there were tensions between [Mr Perry] and [the First Plaintiff]. [Mr Perry] asked me to acquire two Liechtenstein Foundations, one for him and one for [the First Plaintiff], and arrange for a separate trust company (not Lopag) that could handle [the First Plaintiff's] foundation. [Mr Perry] purchased the Schinel Foundation. [The First Plaintiff's] foundation was called the Teios L.T.P. Foundation and I exhibit a draft of the Foundation by-laws..."*

(v). the First Defendant said that this account was supported by two important items of evidence that had emerged during the trial. First, during his cross-examination, Mr Oehri had confirmed that the company he had instructed be set up was Codex and that he believed, based on documents he had previously seen and reviewed that the payments to Codex were routed through a Panamanian company (subsequently re-domiciled to Liechtenstein) called Hector and were for the First Plaintiff's benefit. Secondly, Mr Greenspoon, during re-examination, had admitted that he and the First Plaintiff had, in fact, had a meeting with Codex in Vaduz and been involved in setting up a trust for her. He had said that this had happened in 1996 but the First Defendant submitted that this was likely to be an error and that he was referring to a meeting that took place in 1998.

205. The Plaintiffs submitted that any asset separation agreement needed to be in writing and approved by the Israeli court (as a property agreement for the purposes of sections 1 and 2 of the PRL). There was no written agreement and therefore the First Plaintiff retained her rights under the CPR. Even if the law permitted such an agreement to be enforced when not in writing and court-approved, the evidence did not establish that the First Plaintiff and Mr Perry had ever agreed to separate their assets or that the First Plaintiff had given up her rights under the CPR.

206. Professor Halperin-Kaddari's opinion is that any agreement that affects the parties' interests in the future when their relations terminate either by divorce or death is a *'property agreement'* for the purposes of sections 1 and 2 of the PRL and so must comply with the formalities required by those sections:

(a). Professor Halperin-Kaddari emphasised the strictness with which the requirements for writing, full understanding and validation are enforced by the Israeli court. In Professor Halperin-Kaddari's First Report, she said that:

> *"26. Israeli case law has consistently applied these provisions in a very strict manner, insisting on proof of an express agreement between the spouses, signed by them, reflecting full understanding and awareness of the parties as to the meaning of the agreement. These provisions have unequivocally been applied also to couples who married prior to 1974...*
>
> *27. Along the years, Israeli courts consistently refused to enforce property agreements, even in cases in which there were written agreements ratified by courts, in cases where the courts were convinced that there was no full understanding on the part of one of the spouses as to his or her renunciation of rights".*

(b). Professor Halperin-Kaddari also argued that on the very rare occasions on which the Israeli court had upheld property agreements which had not been validated previously by the court, there had been an express written agreement and substantial detrimental reliance sufficient to found an estoppel by the spouse seeking relief.

(c). Professor Halperin-Kaddari disagreed with Professor Shifman's view on the effect of the judgment in *Shai*. In her opinion, *Shai* decided that whether or not an agreement is a '*property agreement*' for the purposes of the PRL depended simply on the purpose of the agreement. If the agreement foresees a different division of the matrimonial estate, on death or divorce, it will be a property agreement whether or not it relates to all the marital property or just individual assets. In her opinion, the asset separation agreement relied on by the First Defendant and the Fifth Defendant, had such an agreement been made, was made for such a purpose and would be a "*property agreement*" for the purpose of sections 1 and 2 of the PRL. Since it had not been reduced to writing and approved by the Israeli court, it was unenforceable.

(d). she did not accept that an agreement which failed to satisfy the formality requirements of sections 1 and 2 of the PRL could still be enforced. In her opinion, Israeli courts had only enforced agreements which were in writing but unapproved by the court. Accordingly, in the present case the cases were of no assistance to the First Defendant. She rejected the argument that the *Avidor* case was authority for the proposition that an unapproved agreement was treated as valid and binding. She regarded the *Avidor* case as one involving an agreement that had in fact been presented to the court for approval. The

issue had been that the court had used the wrong procedure and employed the wrong method of ratification instead of giving its approval in accordance with the procedure set out in the regulations under the PRL. The court, in Professor Halperin-Kaddari's view, had treated this as equivalent to approval under the PRL.

207. As regards the factual evidence relied on by the First Defendant, the Plaintiffs said that:

(a). the First Plaintiff's clear and unequivocal evidence was that there was no such agreement. Her evidence was supported by the contemporaneous documents and by the undisputed facts about the relationship between her and Mr Perry after the time when she discovered that Mr Perry had engaged in an extra-marital affair in around July 1998.

(b). there was no dispute that both before and after 1998 (before Mr Perry was sent to prison) she and Mr Perry travelled extensively around the world together and attended auctions where they bought jewellery together.

(c). when Mr Perry established the Heritage Trust he named her as a beneficiary which was completely inconsistent with him believing that the First Plaintiff's property should be treated as separate from his own or that they had entered into a property separation agreement less than two years beforehand.

(d). in the years that followed 1998 the First Plaintiff and Mr Perry acquired the South Street Property as a London home to share together.

(e). the First Plaintiff and Mr Perry also acquired the villa at La Treille which was held through Cote d'Azur LLC also for them to enjoy together.

(f). in the period immediately after the alleged property separation agreement, the First Plaintiff and Mr Perry worked together to renovate their recently acquired New York apartment.

(g). the First Plaintiff and Mr Perry maintained at least three joint bank accounts.

(h). Mr Perry bought a yacht to share with the First Plaintiff which he named "Hililly".

(i). Mr Perry continued to provide for all of the First Plaintiff's material needs throughout the remainder of their marriage which was completely inconsistent with any regime of a property separation.

(j). after over fifty years of marriage, the First Plaintiff nursed Mr Perry through his final illness with no nursing assistance. As she explained under cross-examination "*He was very ill. He was at home. He didn't want a nurse. He just wanted me to feed him and attend to everything*".

(k). the establishment of the Schinel Foundation did not support Mr Oehri's evidence that it was to be used as a structure to hold his property separately from the First Plaintiff. It was apparent from the by-laws of that Foundation that the First Plaintiff was named as a beneficiary of that entity for the period after Mr Perry's death. The Schinel Foundation was established on 17 September 1998. If the First Plaintiff and Mr Perry had truly agreed to separate their assets in or around July 1998 it was implausible that Mr Perry would have caused the First Plaintiff to be named as a beneficiary of that Foundation after his death.

(l). Mr Oehri was not a credible witness and the Court should reject his evidence that the purported Teios Foundation ever existed or, if it did exist, that any substantial sums were ever paid to it.

(m). the Fifth Defendant's evidence that Mr Perry told her that there had been a "*matrimonial settlement*" was unreliable and should be rejected, not least because she inexplicably failed to mention these matters when she responded to the substance of the claim in the context of the proprietary injunction made by this Court.

(n). as regards the documents indicating that payments were made to accounts in the First Plaintiff's name for her benefit in 1998, Mr Greenspoon gave unchallenged evidence than none of that money was ever available for her but was instead being used by Mr Perry to purchase artwork. The First Plaintiff was a mere conduit for that money and was never intended to benefit from it. Mr Oehri's evidence to the contrary should be rejected. Mr Greenspoon had also given evidence that Mr Perry had never told him about a separation agreement ("*I can also confirm that at no point did [Mr Perry] ever suggest that he and [the First Plaintiff] had agreed to have separate property or that the Israeli*

properties were to be transferred to [the First Plaintiff] as part of a marital agreement.").

(o). moreover, Mr Greenspoon's account of the nature of the transactions is corroborated by Mr Naeff's evidence of Mr Perry's business practices of seeking to transfer large sums of money to off-shore accounts to purchase art.

(p). the transfers of Israeli property by Mr Perry to the First Plaintiff, the Second Plaintiff and the Fifth Defendant in the period from 1999 onwards were also fully consistent with Mr Perry resolving his tax issues in Israel and do not support any suggestion that there was a property separation agreement.

(q). the only (slender) evidence to support the suggestion that there was ever even a verbal property separation agreement were Mr Perry's statements in the Letter of Wishes. However, these were readily explicable by Mr Perry's desire to encourage the First Plaintiff to agree to the scheme, set out in the Letter of Wishes, in order to promote family harmony. His statements were not correct but were no doubt made for the very best of reasons. In any event, as an Israeli qualified lawyer Mr Perry would surely have known that the Israeli CPR could not be displaced so easily.

(r). in her trial affidavit, the First Plaintiff had commented on her response to the Letter of Wishes. She said (in paragraph 31) that she had been *"very surprised by what [Mr Perry] said in the Letter of Wishes regarding [their] marital difficulties many years before."*

(s). in her trial affidavit, the Second Plaintiff gave the following evidence:

> *"I see that my father states in the Letter of Wishes that they "agreed" to divorce each other. I can only imagine that he said this to try to avoid any disagreements between the family members after his death as to the division of property, bearing in mind my mother's matrimonial rights. But it is quite clear from what he told me that they only ever discussed this in the broadest terms. I have no doubt that if there had been any kind of formal agreement my father would have put it in writing. Further, my father and I were incredibly close and he was in contact with me frequently during this difficult period and discussed it with me. If he had reached a formal agreement with my mother I have absolutely no doubt that he would have told me about it before any agreement was made.*
>
> *The contents of the Letter of Wishes did create some rifts between the family. My mother was aware that under Israeli matrimonial law she and my father had married in community of property and that as a result she had a claim against the trustees. Further,*

my mother did not understand what it meant for property to be held upon trust and expected to receive a share of the estate outright...."

(t). during her cross-examination, the Second Plaintiff was asked about the Letter of Wishes:

"ANSWER	*..... everything that my father said in [the Letter of Wishes] for me looked like the bible. My father, although never separated from my mother, never ever need[ed] an agreement with her,....his intention was a good intention – that none of us will have [a] fight or will be able to deprive any other from a right. That's what [why] he wrote it....*
QUESTION	*...your father believed that there had been an agreement for the separation of assets which is why he put it into the [Letter of Wishes]. That's true; you knew that, didn't you?*
ANSWER:	*I knew later on when I read it. I knew that my father wrote it. He wrote it and what can I tell you, in order to keep, to keep our rights, also my right and [the Fifth Defendant's] right, that we would not have any....that my mother and us will not have any dispute over property. There was never any separation between my parents, and if there was separation, so why [did the First Defendant] want all the time to leverage on my mother to sign an agreement?"*

(u). during his oral closing submissions, Mr Brownbill summarised his submissions on this point as follows:

"MR BROWNBILL:	*In our submission, the statement made by Mr Perry in the [Letter of Wishes] [regarding the First Plaintiff and Mr Perry having agreed to an asset separation] is simply wrong, Both [the Second Plaintiff] and Mr Wolnerman give evidence that the reason Mr Perry made these statements was, even though they were incorrect, it was done with the best of intentions in the hope of promoting family harmony.*
JUSTICE SEGAL	*In terrorem, I suppose? An in terrorem way of achieving family harmony was it, by imposing a degree of threat to [the First [Plaintiff].....*
MR BROWNBILL:	*In our submission that would be a little harsh. It was Mr Perry's way of indicating that this was how he wanted his assets to be dealt with. He made it very clear that he did not want [the First Plaintiff] to lose out in any way, but he just wanted to achieve certain particular outcomes."*

The Consent Point

208. The First Defendant relied on the First Plaintiff's express or implied consent to the transfer of the Share. It formulated its legal argument in a number of different ways.

209. The First Defendant argued that, as a matter of Israeli law, it was sufficient if: (a) there had been a bilateral agreement (implied from words or conduct) between the First Plaintiff and Mr Perry to permit Mr Perry to transfer the Share; (b) the First Plaintiff had given her unilateral consent to (or given up and waived any right to object to) Mr Perry transferring the Share; or (c) the First Plaintiff had authorised Mr Perry (or delegated to Mr Perry the power) to transfer the Share. In each case, there was no need for a "*property agreement*" or for any formality.

210. The First Defendant submitted that the First Plaintiff knew all about the trusts created by Mr Perry, including the Lake Cauma Trust, and therefore consented (expressly or impliedly) to Mr Perry settling his assets on trust, including the Share. She had either agreed or consented to Mr Perry dealing with the family's assets for tax or estate planning purposes and authorised him to transfer such assets into trust for this purpose.

211. The First Defendant relied on Professor Shifman's opinion that the First Plaintiff could give up her right to object to the transfer of the Share to the First Defendant and her rights in the Share without the need for a "*property agreement*" or other formality.

212. To the extent that there was an agreement between the First Plaintiff and Mr Perry to permit the transfer to proceed, Professor Shifman considered that a "*property agreement*" was not required. An agreement which: (a) was implemented during the marriage, well in advance of death or divorce; or (b) did not relate to all of the spouses' marital assets, was not a "*property agreement*".

213. Professor Shifman said as follows in Professor Shifman's First Report:

> *"114. The authorities are thus clear that (i) agreements realised during the lifetime of the partners, prior to a divorce, and which do not deal with the future division of assets upon divorce or death and (ii) agreements which apply only to certain of the partners' assets, while leaving various other assets outside its scope, are not considered, under Israeli law, to be a "matrimonial property agreement" under sections 1 to 2 of the MPL 1973, and so are not required to meet the formal requirements thereunder in order to be valid.*
>
> *115. The analysis in these last authorities gains further support by analogy with the sections of the [PRL] which govern the asset balancing regime. Section 5(a) (3) of the [PRL] 1973 states that the asset balancing regime does not apply to assets in respect of which the couple "agreed in writing that they would not balance their value". Thus, even under the asset-balancing regime it is possible to exclude specific assets from the balancing exercise through the use of a written agreement - which agreement is importantly not subject to any requirement that it be approved by the Court (H.C. 10605/02 Gamliel v. Great Rabbinical Court, P.D. 58(2) 529 (2003)). A similar rule will apply, a fortiori, to those to whom the asset balancing regime prescribed by law does not apply."*

214. Professor Shifman relied on *BAM* (5142/10) in which it was held that an agreement that did not cover the entirety of the spousal assets was not a "*property agreement*", and that the taking of steps to realise (implement) an agreement during the lifetime of a marriage served as evidence that the agreement was not intended to govern property relations after divorce or death (see [6] of the judgment). He also relied on the decision in *Estate of the deceased Moshe Shamir v. Yael Dolev* (CA. 7388/97, P.D. 53(1) 596, 607-8), where the Supreme Court said:

> "*As to the property relations law, I am not convinced that this law applies in this case. From the filings of the District Court, it follows that active steps were taken in the practical implementation in the arrangement regarding the division of property many years before the death of the deceased. It follows that we are not concerned with an arrangement in contemplation of a marriage dissolution which the law of 1973 is concerned with.*"

215. Even if the First Plaintiff had only given her unilateral consent to Mr Perry transferring the family's assets to trustees or authorised Mr Perry to make such transfers, which would be effective without the need for any formality or court approval, the consent to or authority to effect the transfer of the Share, short of an agreement, was not a "*property agreement.*" The First Defendant argued that Professor Shifman's evidence was that one spouse could unilaterally consent to, or authorise the transfer of, a matrimonial asset without the need for a "property agreement" or any other formality. During his cross-examination, Professor Shifman confirmed that before a party could give up (waive) their rights under the CPR, they had to be aware of "*what was going on.*" However, detailed knowledge was not required, awareness meant understanding the situation, this included knowing and understanding what the relevant transaction was.

216. In its closing submissions, the First Defendant also argued that the experts had agreed that implied and informal consent could be effective. Professor Halperin-Kaddari had accepted that the consent of one spouse to a transaction entered into by the other could effectively be implied by conduct, assuming that there was the requisite knowledge and awareness. During her cross-examination, Professor Halperin-Kaddari said that "*In theory consent can be implied, depending on the weight of the evidence. However, consent must require knowledge. So to prove consent, one must obviously first cross the threshold of knowledge and awareness*".

217. The First Defendant relied on the following factual evidence to show that the First Plaintiff had agreed, by her conduct, with Mr Perry that the Share could be transferred as Mr Perry considered appropriate, or had given her consent to transfers made by Mr Perry at his discretion as part of his management of all assets for tax avoidance or estate management purposes:

(a). the documentary evidence showed clearly that the First Plaintiff knew how Mr Perry's assets were held. In LP's First SOCA Witness Statement, the First Plaintiff (as set out above) noted that some of the items referred to in the WFO were expressed to be held by the Heritage Trust and said that "*I do not know whether this is accurate. I am a beneficiary of the Heritage Trust but do not control it*". In LP's Second SOCA Witness Statement she had confirmed (also as set out above) that she was "*a discretionary beneficiary of the Heritage Trust, a Liechtenstein based trust....*" In her third SOCA witness statement, she had made no mention of having an interest in the South Street Property (or any other UK real estate). The First Defendant submits that the only fair reading of these statements is that the First Plaintiff knew about the Heritage Trust and knew that the South Street property was held in trust.

(b). there were other documents which showed that the First Plaintiff was aware of the trusts. For example:

(i). the First Plaintiff signed an application to the Home Office for an extension of her visa on 1 September 2006 in which she stated: "*The leasehold interest of my house is owned by an overseas trust of which I am the primary beneficiary. I have a licence to occupy the property.*"

(ii). she signed the request for a distribution from the Heritage Trust in the sum of EUR80 million on 29 August 2012. The First Defendant noted and relied on an answer dealing with this given by the First Plaintiff during her cross-examination:

> *"Q I have already asked you about South Street.....I'm asking you about a further 80 million euros.*
>
> *A. If I signed something, then I must have known something about what was happening, but I didn't know what was happening with the -- with that sum of money."*

(iii) the First Plaintiff made numerous requests for payments and received substantial sums from the trusts (as set out in the evidence of Mr Naeff).

218. The First Defendant submitted that the First Plaintiff's explanation, namely, that she would sign anything she was given without examination, was inconsistent with the evidence that showed that she received advice on and was involved in discussions about the documents she was asked to sign and therefore considered them carefully.

The First Plaintiff, during her cross-examination, said:

> *"ANSWER I'm really sorry to say, but if my husband gave me something to sign, I would sign it and I would not examine or verify the contents.*
>
> *QUESTION So is it your evidence that you were prepared to sign and say you were a beneficiary of the Heritage Trust without asking what the Heritage Trust was?*
>
> *ANSWER That would seem reasonable."*

219. However:

(a). on 7 March 2010 (when Mr Perry was in prison), Yael Johnson (an associate at Asserson) sent an email to the First Plaintiff in which she stated: "*Further to our meeting today I attach a draft statement of assets. It is based upon our two meetings with you and also on a statement of assets which was lodged for Mr Perry. I would ask that you please check that it is accurate. There are a few queries in the statement which Celia might know the answers to so I am also copying this to her.*"

(b). on 24 March 2010, Ms Johnson emailed Mr Greenspoon stating: "*Further to our discussion today I attach a further draft of Mrs Perry's witness statement. I have added an additional paragraph as a catch-all of assets which derive from Mrs Perry's parents. There are a number of queries indicated in bold. I am not sure if these were addressed when [the First Plaintiff] previously agreed the content. I would be grateful if you could pass the statement on to her for her comments and/or approval.*"

(c). Mr Greenspoon forwarded this email to the First Plaintiff later the same day. He said (in the translation made during the First Plaintiff's evidence): "*Hi Lilly, Attached here is your new statement. They did not include Tora in it (because it was transferred from you) and it also does not include Reconmati 10 as it could be said that it is connected with the apartment from your parents. Please sign before your trip and leave it for me at home. I will ask Haim to pick it up. Thanks and have a good trip.*"

220. The First Defendant submitted that the First Plaintiff must have known that assets were being held in trusts and other structures. She expressly stated that she knew about the Trusts to SOCA and must therefore have known all about the other transfers. The closest that the First Plaintiff came to admitting this in the course of her evidence was during the following exchange:

"QUESTION *BGA and BGF were owned by BGO (Overseas)....a corporation registered in Liechtenstein, and owned by the Heritage Trust, the beneficiaries of which included and continue to include [the First Plaintiff]but not now M Perry." You knew all that in 2010, did you not?*

ANSWER *I knew that there were companies. From the point of view of what was happening, from a legal point of view, what was happening with them, or in regard to them, I knew nothing."*

221. The Plaintiffs argued that there was a conflict between the opinions of Professor Halperin-Kaddari and Professor Shifman as to what was required for there to be an effective consent to give up or a waive rights under the CPR. They submitted that Professor Halperin-Kaddari's evidence was to be preferred to that of Professor Shifman. The correct analysis of the applicable Israeli law was that CPR rights can only be lost or waived unilaterally by means of an agreement complying with the requirements of articles 1-2 PRL, save in exceptional circumstances. The evidence in the present case did not establish that the First Plaintiff agreed to give up her CPR rights when the Share was transferred to the First Defendant (let alone signed a property agreement) nor was the requirements for a valid unilateral consent or waiver satisfied.

222. The Plaintiffs submissions on the applicable Israel law can be summarised as follows:

(a). in Professor Halperin-Kaddari's First Report (at [50]) she said that:

> *"The Israeli courts have been consistent in rejecting any claims of general waiver of rights under the community property rule. In particular, all attempts to argue that delay in raising such claims of property rights, or that a course of conduct that refrains from mentioning such rights, all these attest to waiver or loss of those rights – have been categorically rejected. As summarised by Justice Goldberg in the Nafisi case: 'Proper social policy is that prior to the legal recognition of the power of a depriving contract to create changes within the spouses' rights, any doubt as to their true will must be lifted. Limiting the freedom of form, and particularly the freedom of contract, guarantees that the spouse whose rights may have been deprived, was aware of the contract's nature and consequences"*

(b). Professor Halperin-Kaddari considers that Professor Shifman's analysis is too wide. In the Israeli Law Joint Report (when commenting on issues 13 and 14), she explained that in her opinion there was only limited scope for defences based on waiver, estoppel or lack of good faith. She said as follows:

> *"General doctrines of estoppel have in very few cases led the courts to prevent a spouse from realising rights under the CPR. All those cases involved circumstances of very long*

delays (where claims under the CPR were raised, sometimes by heirs); or circumstances where the non-titled spouse seeking reversal of the transfer had in fact known and was aware of the transfer at the time...'

In very brief summary, it is only in very rare cases that Courts accept arguments of waiver. Courts routinely emphasized the need to ensure full and clear understanding as the renunciation of rights, which must be reflected in writing, in line with the formal requirements of sections 1-2 of the PRL as explained above, and the written agreement must be detailed with express details of the nature of the waiver."

(c). in Professor Halperin-Kaddari's Reply Report (at [53]), before giving her detailed reasons for concluding that none of the authorities relied upon by Professor Shifman supported his view, Professor Halperin-Kaddari stated that:

".....general doctrines of bona fides, estoppel or waiver have in very few cases led the courts to prevent a spouse from realizing rights under the CPR. These are limited to instances where the agreements have been performed or partially performed by the spouse seeking to challenge the agreements, or where that spouse has acknowledged accepted [sic] the agreement over many years (see, e.g., Rodan v Rodan CA 151/85 39(3) PD 186 (1985))."

(d). Professor Halperin-Kaddari also rejected Professor Shifman's view that waivers of rights can be implied, stating in the Israeli Law Joint Report (on issue 14):

"I disagree with Professor Shifman's comments above. Again, the authorities presented by Professor Shifman in support of his statement are no longer good law in respect of the points on which he wishes to rely. Contemporary case law, as clearly reflected in lower courts where most such litigation is being handled, is consistent with insisting on an express and clear waiver in writing."

(e). Professor Shifman's evidence was that waivers of rights and estoppels would be available upon a straightforward application of the general law of waiver and estoppel. In contrast, Professor Halperin-Kaddari emphasised the protective CPR context and said that waivers or estoppels would arise only in the most extreme of circumstances. All the cases where such findings were made had involved express written agreements that were relied upon over a period of time and only delay of very many years would be capable of disentitling a wife to a remedy.

223. The Plaintiffs submitted that the Consent Point failed on the facts for the following reasons:

(a). the Court must consider separately the question of whether the First Plaintiff had any actual knowledge about the transfer of the Share to the First Defendant in October 2013 and whether she consented to that transfer.

(b). it was not sufficient as a matter of Israeli law for the First Defendant to establish that the First Plaintiff might have consented to the transfer if she had been asked. The critical point was that she was never asked, she did not consent to, and she never knew about the transfer of the Share to the First Defendant until after Mr Perry's death.

(c). no party had been able to produce any documentary evidence that the First Plaintiff ever knew or consented to that particular transfer.

(d). Mr Naeff and Mr Oehri speculated as to whether the First Plaintiff might have been able to overhear their discussions with Mr Perry in Tel Aviv in 2013. However, both confirmed that she did not participate in any meetings and that such business meetings were conducted in English and there was no challenge to the First Plaintiff's evidence that she struggles to understand legal terminology in English (and quite probably in Hebrew too). Their evidence therefore provided no basis for the assertion that she knew about the transfer.

(e). the only witness who suggested that the First Plaintiff was aware was the Fifth Defendant who had been estranged from her mother for many years and who was plainly willing to say and do anything to hurt her mother. The Fifth Defendant was not in any position to give evidence as to the First Plaintiff's state of knowledge on this issue.

The Business Asset Point

224. The First Defendant submitted that Mr Perry had been able to transfer the Share to the First Defendant without the consent of the First Plaintiff since, as a matter of Israeli law, it was a business asset, and in the absence of a critical event, business assets were freely transferable.

225. Three issues arose. First, was the Share to be characterised as a business asset? Secondly, when did the right of the spouse, who owned the business asset, to transfer it terminate (whether because of the nature of the transfer or the state of the marriage)? Thirdly, was the transfer of the Share in the present case prohibited?

226. The First Defendant's position was as follows:

(a). the Share was to be characterised as a business asset. The Plaintiffs were wrong to argue that passive investments which were not traded were not business assets.

(b). in order to decide whether there had been a critical event, the court must consider whether the event complained of led to a dramatic crisis in the life of the couple. What was relevant was not just the economic effects of the relevant event but also its effect on the spouses' relationship and life. It was therefore important to have regard to the immediate reaction of the other spouse, and to see whether a severe crisis occurred between the couple as a result of the economic decision taken by the owner of the property.

(c). the transfer of the Share to the First Defendant was not prohibited. There had been no critical event in this case. Assets were placed in trust for the benefit for the family; they were not liquidated or transferred in bad faith. There was no rift or serious crisis between Mr Perry and the First Plaintiff. The transaction was for their joint benefit. The reality was that in the context of this married couple, the transfer of the share in BH06 into trust was entirely in keeping with the consent which the First Plaintiff gave to Mr Perry to arrange assets in the manner he saw fit. The transfer was not undertaken in bad faith and could not be equated to an extraordinary economic event, akin to a liquidation of assets.

227. The First Defendant relied on the evidence of Professor Shifman, which can be summarised as follows:

(a). he considered that while the CPR presumption applied to business assets (commercial or non-familial assets) its application differed in a number of ways from its application to familial assets:

(b). the presumption was likely to apply with less force, or was more easily rebutted, when a court considered business assets.

(c). the nature of a spouse's right in an asset may vary according to the nature of the asset.

(d). the existence of a harmonious relationship was a particularly important consideration in determining whether the presumption applied to business assets.

(e). in respect of a familial asset, the non-registered spouse was entitled to demand the exercise of her rights and require that her consent to dealings be obtained at any time. In respect of a business asset, no such consent was required until a critical event in the lifetime of the marriage had occurred. Until that time, the registered spouse did not need the consent of the other spouse to deal with a business asset and the rights of the other spouse remained akin to a floating charge over the property.

(f). in *Shalem v Twenco* (C.A. 8791/00, a decision of the Israeli Supreme Court) -President Barak drew a clear distinction between the treatment of familial and non-familial assets, in setting out the critical event principle. Professor Shifman referred to paragraph 33 of President Barak's judgment:

> *"The premise for considering the effect of the construction of joint ownership in private law is that there is a presumption of joint ownership between the spouses, i.e., that they have a sound relationship and unite their efforts. When this condition is satisfied, we should distinguish purely family assets, and especially the residential apartment, from the other assets. With regard to purely family assets, the joint ownership crystallizes when the conditions of having a sound relationship and uniting efforts are satisfied. With regard to all the other rights and liabilities (apart from the purely family assets), the joint ownership crystallizes 'on a critical date ' in the marriage. From these dates onward, the joint ownership construction is implemented in private law."*

(g). it was important to understand that the question of a critical event was not only an economic one, but may well be (or indeed usually is) connected to the question of a crisis between the spouses and therefore the immediate reaction of the other spouse was important. This perspective was reflected in *Shalem* where President Barak said that the approach he adopted:

> *"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. As a rule, the sharing rule, according to this approach, is expressed mainly when a dramatic event occurs, such as when the marriage reaches a crisis."*

(h). Professor Shifman also relied on the following passage from the judgment of President Barak in *Shalem*:

> *"The joint ownership of rights rule has been applied to all of the spouses' assets. Thus it is not limited solely to 'family' assets (such as the residential apartment, furniture, household chattels and the family car). It also applies to social rights such as severance pay, pension rights, savings in managers' life insurance policies and the like (CA 841187 Ron v. Ron). It also includes business assets (see Bricker v. Bricker; CA 122183 Basi/ian v. Basi/ian, at*

pp. 294 and 297; CA 370187 Estate of Madjer v. Estate of Madjer, at p. 101; CA 25 C1/16/25 2280191 Abulofv. Abulof, at pp. 600-601; Bavli v. Great Rabbinical Court, at pp. 228-229). The joint ownership of business assets also applies when the husband does not include his wife in his businesses and does not even tell her about them (see Basi/ian v. Basi/ian, at p. 298, Estate of Giller v. Giller, at pp. 495-496; CA 724183 Bar-Natan v. Bar-Natan). Sometimes it also includes assets from before the marriage or assets that were given to or inherited by one of the spouses after the marriage (see CA 4151199 Brill v. Brill, at pp.715-717; CA 1880195 Durham v. Durham, at p. 877; Hadari v. Hadari, at p. 704; Yaakobi v. Yaakobi, at p. 579; CA 633/71 Mastof v. Estate of Mastof, at p. 571; Abulof v. Abulof, at pp. 602-603). The joint ownership rule may be general, limited or restricted. It is general when it applies to all the assets. It is limited when it applies to a certain type of assets, such as assets that were acquired in the course of the marriage, and it excludes assets from before the marriage. It is restricted when it applies only to one or more specific assets, such as the family home (J. Weisman, Law of Property: Ownership and Concurrent Ownership (1997), at p. 197)."

[underlining added]

(i). he considered that on a fair reading of the authorities the rights arising under the CPR were "*somewhat sui generis in nature*". Whilst in the past, some cases had referred to these rights as quasi-proprietary rights, other cases referred to them as obligatory or sui generis rights, namely mixed rights that represent a combination of obligatory attributes and proprietary attributes.

(j). an important factor behind the courts' reluctance to go so far as to declare the rights arising under the CPR as being proprietary in nature lies in the fact that, in various decisions, the Supreme Court had held that those rights were not binding on third parties. Those decisions would be difficult to reconcile with the rights being proprietary in nature. Further, categorising these rights as proprietary rights would be very difficult to reconcile with the line of cases (to which he referred in paragraphs [89] - [96] of Professor Shifman's First Report) which held that the rights in the assets can be general and non-specific, and which show that the courts have often preferred to effect a distribution of value, rather than a division in kind.

(k). in *Shalem v Twenco*, President Barak did not stress that the nature of a spouse's rights are proprietary in respect of every asset. While he undoubtedly indicated that the rights are proprietary in nature, where familial assets were concerned, the position was different in relation to business assets. President Barak stated that the distinction between the nature of rights accrued in respect of familial assets (proprietary) and the rights accrued in respect of commercial assets was a question for private law and the entitled spouse became the owner of assets or rights. At no point did President Barak stress that these rights were proprietary. At [29] he said:

"According to the intermediate approach, the joint ownership of all the rights and liabilities (with the exception of the family assets) constitutes a deferred joint ownership, which crystallizes only on a 'critical date.' There is no immediate acquisition of the rights of one spouse by the other spouse. The joint ownership rule, according to the intermediate approach, does not mean a joint ownership that is immediate and complete and relates specifically to each individual asset throughout the marriage. . . . Indeed, the crystallization of the joint ownership and its severance occur at one time when the critical event occurs. On this date private law is activated, and by virtue thereof the second spouse becomes the owner of assets or rights, as applicable. "

(l). Professor Shifman disagreed with Professor Halperin-Kaddari's opinion that the Share could not be a business asset because BH06 was a holding company whose shares had never been traded. Professor Halperin-Kaddari took the view that, while the case law did not establish a clear position, passive investments which were not traded should not be characterised as business assets. She said the following in Professor Halperin-Kaddari's Reply Report:

"While there is no specific authority to directly address the definition of business assets, generally speaking the case law has dealt with two types of business assets: small family businesses (e.g. small retail store next to the family home), and larger commercial operations. The point that both types of businesses have in common is that they are actively traded, with the titled spouse needing to have power to engage in transactions on a day-to-day basis. ....The asset which was the centre of the case at hand, the share in BH06, is a share in a holding company which I understand was never traded. Therefore, it, cannot be described as a business asset in the sense which Chief Justice Barak was considering.....Consequently, the rationale of allowing for smooth conduct of business for the titled spouse, which was at the basis of Barak's deferred proprietary rights theory does not apply here at all.'

(m). Professor Shifman had addressed this issue during his cross-examination. When asked to affirm that the principle underlying President Barak's reasoning on business assets in *Shalem* was the need to protect commercial efficiency, and that this should be read into the definition of business assets, Professor Shifman was clear and rejected this approach. He said:

"But I have read the case as a whole. Justice Barak mentioned not only – as I already said -- not only the need to protect commercial efficiency, but also the need to preserve the autonomy of the registered owner of the property"

When it was put to him that "*it's not just the family home [that is] to be included in what [President Barak] refers to as family assets; he includes all of these other investment-like assets as well*", Professor Shifman said that family assets are defined in *Shalem* as including the "*residential apartment, furniture, household chattels and the family car*" and rejected the proposition that there was an intermediate category for family investments.

(n). in order to decide whether there had been a critical event, the Court must consider whether the event complained of led to a dramatic crisis in the life of the couple. As he said during his cross-examination "*So it is not only an economic question; it is a part of the daily life between the spouses.*" It was, he said, "*extremely important to examine the immediate reaction of the other spouse, and to see whether a severe crisis occurred between the couple as a result of the economic decision taken by the owner of the property*".

(o). the court must assess the effect of the relevant event from both an objective and subjective perspective. He said during his cross-examination that "*In general, it is a combination of these two factors, but the subjective element might be decisive, in my opinion*" (this was consistent with his view as to the importance of the other spouse's reaction to the economic activity).

(p). Professor Shifman did not accept that a transfer of a very substantial asset of the family for no consideration could be a critical event. He said that "*There are many examples that no consideration in the normal sense is given, but there is -- or economic motivation for the transaction, or a human, a justified human motivation is apparent; all of these are within the domain, within the autonomy of the registered owner of the property.*"

(q). Professor Shifman did not accept that the judgment in *R.C v A.C.* (Be'er Sheva District Court, case 26944-10-17) (***RC v AC***) was an example of a case in which the court had held that a critical event occurred solely because the husband had liquidated the shareholding of a family company (by transferring the shares to two of the eleven of the couple's children without the wife's knowledge). This case was authority for Professor Shifman's opinion that a critical event was determined by looking at all the circumstances of the case and examining objectively the economic effects of the event and subjectively the reaction and opinion of the spouses. Professor Shifman argued that the underlying reasoning was set out in the judgment of Justice Levin at [46]. Justice Levin said that the transfer of the shares to the two children could not "*be considered as an act in the normal course of business*" but was "*a dramatic event in two aspects:*"

> *"In one aspect – the transfer of the entirety [all] of the shares constitutes the "elimination" ["liquidation"] of A's business. It removes the primary asset, nurtured over decades, that served as the spouses' main source of income [constituted the source of*

livelihood of the couple] from the spousal property. It removes [precludes] a primary resource from the framework of community [out of the common] property.

In the second aspect - the transfer of the shares is a dramatic event, because it alters the situation that had existed [changes a status which prevailed] for decades, in which all of the couple's children were involved [included] in the business. The transfer of the shares only to the son and daughter, expresses a clear preference for two of the children over the other children. It should be noted that in R's testimony her desire for all of the children to take part in the family enterprise is clear [apparent]."

[using the translation of Avinoam Sharon with the different wording contained in the First Defendant's Closing Submissions in square brackets]

228. The Plaintiffs' position on the Business Assets Point can be summarised as follows.

(a). it was not right to say that the titled spouse may deal with business property, including by transferring it to third parties, in the period before a critical date without any reference to the non-titled spouse. In that period the non-titled spouse (the First Plaintiff) holds deferred proprietary rights with respect to assets that are actively traded as part of a business and the titled spouse is subject to fiduciary duties with regard to the management of and dealings with the business property.

(b). any agreement that affected the spouses' interests in the future when their relations terminate either by divorce or death was a property agreement and must comply with the PRL. A transfer of a significant asset (such as the Share) for less than full consideration during the course of the marriage will affect the spouses' interests on divorce or death. Accordingly, the formalities for such a transfer will need to comply with articles 1 and 2 of the PRL.

(c). the settlement of a significant proportion of the Perry family wealth into trust without a property agreement would be a critical event.

(d). even if it was not correct that transfer of the Share required a property agreement, the First Plaintiff's failure to object to the transfer would be of no effect unless she had clear knowledge, awareness and understanding of the transaction and time to decide what to do. In the present case she did not.

229. As regards the position under Israel law, Professor Halperin-Kaddari's evidence can be summarised as follows:

(a). she disagreed strongly with Professor Shifman's analysis. In Professor Halperin-Kaddari's Reply Report (at [45-46]) she noted that President Barak suggested a distinction between family and business assets, not by reference to the nature of the rights but the point in time at which the proprietary rights crystallise. According to this analysis, until the critical date, the non-titled spouse holds deferred proprietary rights with respect to assets that were actively traded as part of a business.

(b). Professor Halperin-Kaddari set out a detailed analysis as to why she took the view that Professor Shifman's reliance on *Shalem* did not provide a proper basis to contend that transfers of assets prejudicing an untitled spouse's interests should be upheld:

(i). the Share should be regarded as a family or intermediate asset for these purposes in line with the analysis of President Barak in *Shalem*.

(ii). the proprietary rights of a non-titled spouse crystallise before the transfer in breach of her rights.

(iii). President Barak's analysis did not change the nature of the proprietary rights of the non-titled spouse, it only addressed the question of the timing and manner of their realisation.

(iv). Israeli law on company charges supports the position that the non-titled spouse maintains her proprietary rights throughout the marriage on a floating charge analogy.

(c). Professor Halperin-Kaddari considered that, on the proper construction of President Barak's opinion, a transfer of a significant asset to the control of a third party for less than full consideration must constitute a 'critical date' with the result that the non-titled spouse's proprietary rights in the property crystallise prior to the transfer. If it were otherwise, a non-titled spouse could never assert her rights in such assets. This was in accordance with the decision in *RC v AC*. The district court held that the husband had no authority to make the transfer and unequivocally defined the transfer as a critical event, holding that the rights of the wife crystallised prior to the transfer.

(d). Professor Halperin-Kaddari also considered that:

(i). a transfer of business assets for consideration that makes perfect economic sense in the regular conduct of business would not necessarily be an infringement of a spouse's proprietary interest. This does not derogate in any way from the spouse's proprietary rights and is subject to the titled spouse's fiduciary duties towards the non-titled spouse.

(ii). in appropriate circumstances the wife will be deemed to have accorded the husband the power to conduct regular business life for the sake of the welfare of the whole family or the spouses.

(iii). it was clear that rights in business property were rights in rem.

(iv). investments of a substantial proportion of the spouse's assets needed the express consent of the spouse and an implied agreement was insufficient. The investment of the entire assets of the family for whatever purpose would require a property agreement. If by placing assets in trust, the spouses lose control over the asset, that would be deviating from the CPR and require a property agreement.

(v). any settlement of a significant proportion of the Perry family wealth into trust without a property agreement would be a critical event.

(vi). the lack of objection of a spouse to a transfer of property (not requiring a property agreement) in breach of her proprietary rights would be of no effect unless she had clear knowledge, awareness and understanding of the transaction and time to decide what to do. A confirmation by the wife in a document that she was aware of the trust and did not claim ownership rights over the trust assets would not be sufficient to satisfy the requirement for writing.

The Waiver and Estoppel Issue

230. The First Defendant submitted that when a spouse had a reasonable opportunity to act so as to claim a share of an asset, but did not do so, and in the meantime ownership of the property has been transferred to a third party, that spouse should be treated as having waived his or her rights under the CPR. Indeed, a spouse who enjoys a right to the sharing regime, "*is also entitled to choose not to realise it, and to waive it...*": *Miriam Yahalom v. Amelioration Tax*

Administration, Haifa P.D. (C.A. 5774/91 48(3) 372). Where it can be demonstrated that a spouse knew about a relevant transfer of assets (here, the establishment of a trust and the transfer of assets including the Share into trust), but did not assert her rights upon becoming aware of the transfer, she could be seen as having waived her rights in those assets, if she first brings her claim only after a significant passage of time and only after the assets have been vested in third parties.

231. According to Professor Shifman, despite Professor Halperin-Kaddari's attempt to water down the doctrine, if a spouse knew about a transaction, or gave her consent, expressly or impliedly, to a transaction, that spouse could later be held to have waived her rights in challenging that transaction under the CPR, or may be held to be estopped from challenging that transaction, particularly if there had been a delay by the spouse in challenging the transaction despite his or her knowledge. The Plaintiffs' attempt to suggest that the wife's consent to a transaction must be recorded in writing before she can be found to be estopped from relying on it was therefore wrong.

232. In Professor Shifman's opinion:

(a). a waiver can arise where a spouse was aware of a transaction and later affirms it, or gives his or her consent to the transaction.

(b). detailed knowledge of the transaction is not required if a spouse wants to get details, he or she has the right to ask for details of the transaction.

(c). as regards delay, if one spouse had a reasonable opportunity to act to implement the alleged sharing in property and failed to do so, then that spouse could be treated as if he or she had chosen to waive his/her rights.

233. In Professor Shifman's First Report, he set out his conclusion as follows:

> *"125. The bona fides principle is a key tenet of Israeli law and has been applied in many Supreme Court decisions. For instance, in C.A. 2643/97 Ganz v British & Colonial p.d. 57 (2) 385, the Supreme Court said that the principle of bona fides is one of the general doctrines that applies in all legal domains. The court stated that: "according to this principle, any right-holder (in the broad sense) should exercise his right in good faith ... it is a "royal" principle ... that it prescribes objective criteria of a correct behaviour in all interpersonal relationships". This principle also applies to spousal relations, see RCA 8256/99 Anonymous v Anonymous p.d. 58(2) 213. See also generally Narkis, The Principle*

of Bona Fides in Israeli Law (2018). One element of this principle is that an individual cannot contradict his or her own actions, in particular in different legal proceedings, see CA 1662/99 Haim v Haim PD 56 (6) 295, at 341.

126. Israeli law recognises the doctrines of waiver and estoppel, which may apply in certain circumstances to prevent a party from claiming on any rights under community property.

127. In the leading case C.A. 2483/14, the Supreme Court recognised that the doctrine of estoppel was derived from English law. The Court held that estoppel and waiver may be viewed as part of the principle of bona fides, and stated that:

> *"The principle of estoppel by representation and the principle of delay, reflect considerations of equity and fairness. As is well known, those principles were adopted by Israeli law from English law and today they are routed in the principle of bona fides, which is a supreme principle of Israeli law."*

128. The time which has passed before the wife in the present case first raised her arguments would likely arise as a very real issue, if this matter is to be determined in accordance with Israeli law. In accordance with the principle of good faith established by Israeli law — the possibility of an estoppel or a waiver arising is a very real one.....

131. Where it can be demonstrated that a spouse knew about a relevant transfer of assets (here, the establishment of a trust and the transfer of assets into it), but did not assert her rights upon becoming aware of the transfer, she can be seen as having waived her rights in those assets, if she first brings her claim only after a significant passage of time and only after the assets vested in third parties.....

134. It follows that, should it be established that the wife in the present case knowingly enjoyed the fruits of the trust in question, such facts are capable of establishing the following:

(i) an agreement [as] to the manner in which the assets were managed;
(ii). a waiver of any claim for asset sharing;
(iii). an estoppel against claims seeking to challenge the validity of the transfer in question."

[underlining added]

234. Professor Shifman did not accept Professor Halperin-Kaddari's view that there is a general rule that a waiver between spouses must be recorded in writing in line with the formal requirements of sections 1 and 2 PRL. In his view, a waiver can be implied from and in the circumstances of the case (as is the case with implied consent). He referred to the case of *Miriam Yahalom v. Amelioration Tax Administration*, Haifa P.D. 48(3) 372 in support of the proposition that, if the spouse had a reasonable opportunity to act before the implementation of the alleged sharing in property and failed to do so, then that spouse should be treated as if he or she had chosen to waive his/her rights. In *Yahalom* the court held that in a peaceful marriage the spouse was not expected to raise any action for community property while the other spouse was alive. On the other hand, when the life of the couple suffers from disharmony, or where the couple dispute the very existence of property rights, a failure by the wife to raise or to implement her rights

may be treated as a waiver. *Yahalom* was also authority for the proposition that when the status of the rights of a third party could be affected, a spouse who failed to act on his rights may be seen to have waived those rights insofar as they affect the transaction with the third party. Professor Shifman also referred to *Fischler v. Schein,* (C.A. 4696/90, Nevo, 26.07.94). In that case, the court ruled that a waiver could apply in the event that the spouse had a reasonable opportunity to bring a claim for the existence of asset sharing and nonetheless refrained from doing so. However, the court added that in the specific circumstances of *Fischler*, the wife had died when her husband was still alive, and their shared life was conducted peacefully. Therefore, she did not have any reason to sue for the presumption of sharing during her lifetime (her children sued for it many years later). In light of this, it could not be said that the wife had a reasonable opportunity to bring a claim for the existence of asset sharing and refrained from doing so.

235. In circumstances in which a spouse is later seeking to enforce his or her rights when he or she has outlived the other, and where there was not a peaceful life between the spouses, a court may find that the surviving spouse has waived those rights.

236. Professor Halperin-Kaddari's opinions on this issue were dealt with in and together with her analysis of the Consent Issue. I have summarised her views in paragraph 222 above. She emphasised the protective CPR context and said that waivers or estoppels would arise only in the most extreme of circumstances. All the cases where such findings were made had involved express written agreements that were relied upon over a period of time and only a delay of very many years would be capable of disentitling a wife to a remedy.

Discussion and analysis

Context – the CPR and the PRL

237. The starting point for an analysis of the Israeli Matrimonial Property Claim is the nature of the common law CPR and its relationship with the statutory resource balancing regime that was introduced by the PRL in 1973 (it applied to couples who married from 1974 onwards).

238. As both experts explained, the CPR is a right and principle created by case law (with the earliest cases going back to 1964). The scope and operation of the CPR remains in some respects in the process of being developed and defined. It is clear though, that the CPR and the

resource-balancing regime differ in significant respects. One issue that has arisen in these proceedings is whether the rules regulating contracting out of the CPR have developed, after the enactment of the PRL, so as to be stricter and less flexible than the statutory provisions permitting contracting out under the PRL.

239. The experts agree that the CPR continues to apply to couples who were married in Israel prior to 1974. Section 14 of the PRL makes it clear that sections 3-10 of the PRL (which set out the main terms of the resource-balancing regime) apply only to those married after 1974. However, some provisions of the PRL do apply to the CPR. Because sections 1 and 2 of the PRL are not referred to in section 14, they are treated as applicable to the CPR (Judge Rubenstein in *BAM* (5142/10) confirms that couples who were married before 1974 are required to satisfy the requisite formalities when entering into a "*property agreement*"). Section 15 of the PRL is also not one of the provisions that section 14 says only apply to those who married after 1974. The experts agreed that section 15 of the PRL applied to pre-1974 marriages (based on the Supreme Court judgments in *Azugi* (CA 2/77) and *Nafisi*).

240. Accordingly, the common law rules governing the CPR apply to pre-1974 marriages subject to some of the statutory rules that govern the resource balancing regime for post-1974 marriages. Section 15 of the PRL is one of those statutory rules. It refers to and defines the term "*property agreement*" which is to be applied both to marriages governed by the CPR and the resource balancing regime. It is therefore important to understand the meaning of "*property agreement*" and how the concept operates in the resource balancing regime. The resource balancing regime is part of a separate and self-contained statutory scheme for regulating the distribution of matrimonial property on the termination of the marriage. The statutory scheme deals explicitly with how spouses can avoid becoming subject to resource balancing and how, if resource-balancing applies, they can remove particular assets from the resource balancing regime.

241. As was explained by Judge Chayut in *Gamliel v. Great Rabbinical Court* (HC 10605/02, PD 58(2) 529 (2003)), the PRL operates on the following basis:

(a). if the parties have entered into a "*property agreement*" covering the required subject matter and as defined in section 1 of the PRL, and if the formality requirements set out in section 2 (that the agreement is in writing and approved by the court) have been satisfied, that agreement governs the distribution of their matrimonial property (and the property relations between them). If there is no such "*property agreement*", then the statutory

resource-balancing regime applies. Section 3(a) of the PRL states that where the parties have not made a "*property agreement*" they are regarded as having agreed to a resource balancing arrangement. Therefore, the existence of a "*property agreement*" as defined in section 1 of the PRL and satisfying the formality requirements set out in section 2 allows the spouses to contract out completely from the resource balancing regime (and this is no doubt the reason why there is a need for what I would call a strong formalities rule, namely both that the agreement is in writing and approved by the court).

(b). in addition, the spouses can agree to remove particular assets from the resource balancing regime but there is a different and weaker formalities rule with respect to this. Section 5(a) (3) of the PRL states that when resource balancing applies, on termination of the marriage, each spouse is entitled to half of their aggregate property. However, there is a carve-out from the property subject to resource balancing. The parties may agree in writing that the value of particular property is not to be balanced between them. Such an agreement is not a "*property agreement*" and therefore does not need to satisfy the formality requirements set out in section 2 of the PRL. Accordingly, where there is resource balancing under the PRL the spouses only need a written agreement in order to arrange for a different and separate distribution with respect to particular assets. What is required in order to contract out of the CPR is less clear and has been the subject of a serious disagreement between the experts.

242. The result is that when the PRL (sections 1 and 2) came into force, certain formality requirements were established for agreements to contract out completely, and agreements to remove particular assets, from the resource balancing regime. Such formality requirements were also applied to pre-1974 marriages governed by the CPR. In addition, another provision of the statutory regime (section 15 of the PRL) was made applicable to the CPR. It made reference to an agreement pursuant to which the parties could choose the law to apply to their property relations. Section 15 of the PRL is headed "*Private International Law*" and establishes the choice of law rule applicable to property relations between spouses. It was obviously intended to ensure that this choice of law rule would apply to all marriages, both pre and post 1974 marriages, and so it was necessary to make the section applicable to marriages governed by the CPR. There are two sub-rules. First, property relations between spouses are governed by the law of their domicile at the time of their marriage. Secondly, property relations between spouses may be governed by a different law, and therefore different from the rights created by that law, if they reach an agreement to regulate (by, to use the language of section 15 of the

PRL, "*[determining] and [varying] [their]*" rights under and as established by the law of their domicile at the time of their marriage) their relations *"in accordance with the law of their domicile at the time of making the agreement"*. This must mean that the agreement must provide for property relations to be determined by and to be those provided for under a different legal system and jurisdiction, since the purpose of the second sub-rule is clearly to allow the spouses to select another legal system to apply to and regulate their property relations. But there is no clear statement as to the type of agreement which is required or permitted or whether the agreement needs to satisfy the formality requirements in section 1 and 2. There is also an ambiguity in the language of section 15 of the PRL (a matter of construction). It is not clear whether the choice of law rule applies only to the law governing the spouses' property relations (allowing them to agree to apply the relevant foreign law of their new domicile) or whether it also applies to the law governing the formation and validity of the agreement (so that validity and formalities are also governed by the relevant foreign law of their new domicile at the time the agreement is made).

The English Law Matrimonial Rights Agreement Point

243. There are two key issues:

(a). does an agreement to determine or vary the spouses' property relations need to be in writing and approved by the Israeli court as a property agreement, in circumstances where: (i) the spouses' relations were subject to and governed by Israeli law prior to the agreement coming into force; (ii) the agreement is made when the spouses are domiciled in England and Wales; and (iii) the agreement provides that their property relations be in accordance with and governed by English law. This is an Israeli law question.

(b). if such an agreement does not need to be in writing and approved by the Israeli court, does the evidence show that the First Plaintiff and Mr Perry agreed to determine their Israel law matrimonial property rights and substitute for such rights those rights granted by English law. This is an English law question. It appears that the alleged agreement was made in London and was probably intended to be governed by English law for that reason and because of their close connection with England. The First Defendant claims that: (i) such an agreement was made, as evidenced by or to be inferred from, the conduct of Mr Perry and the First Plaintiff shortly before and after their move to London and (ii) the agreement provided for English Law to govern their marital property rights.

However, the parties proceeded on the basis that English and Cayman law were the same on the issue of contract formation.

244. As regards the first issue:

(a). in my view the evidence of Professor Shifman and Professor Halperin-Kaddari demonstrates that there is no Israeli authority directly on point. This is confirmed by the judgment of Chief Justice Beinish in *Sasson*. There is no decision as to whether a couple who married in Israel but then re-domiciled to another jurisdiction (by moving the centre of their lives there) may agree to have their matrimonial property rights regulated by the law of the new jurisdiction without a written agreement approved by the Israeli court (a property agreement). *Nafisi* is a case that deals with the position of a couple who married in a foreign country and then emigrated to Israel and the *ratio*, as Professor Halperin-Kaddari argued, is that such a couple will be treated as having agreed ("*opted in*" in Professor Halperin-Kaddari's phrase) to be bound by the Israeli CPR.

(b). I prefer (and accept) Professor Shifman's opinion that the reasoning of President Barak, in his judgment in *Nafisi,* is at least consistent with and probably also supports the conclusion that section 15 of the PRL does not require an agreement to be in writing, to determine or vary property relations when the spouses are domiciled in a foreign jurisdiction.

(c). the key passages in paragraph 3 of President Barak's judgment appear me to me to be as follows:

> *"The second argument is that the [PRL] requires that a property agreement be in writing (sec. 1), and must be confirmed by a judicial instance (sec. 2). This argument is incorrect. The requirements of writing and of confirmation by the court concern a "property agreement" as defined by the Property Relations Law, whereas we are not at all concerned with a "property agreement"……Here I must take exception to the approach of my colleague Justice Mazza that an "agreement" for the purposes of sec. 15 of the [PRL] means a "property agreement". In this matter, I agree with the approach of Justice Elon in the Azugi case [1], according to which: the term "agreement" in sec. 15 has its general meaning, and need not be in writing – as required under sec. 1 in regard to a property agreement – rather, any agreement whatsoever, whether in writing or parol, whether express or implied, can serve to establish the property relations between the spouses, as long as the agreement is in accordance with the law of their domicile at the time of its making (ibid., p. 14).*
>
> *Two reasons ground my position. First, from a linguistic perspective, the [PRL] clearly distinguishes between "agreement" (addressed by sec. 15) and "property agreement" (defined in sec. 1). Justice Elon correctly pointed out that "the second clause of sec. 15*

states 'agreement', and not 'property agreement'" (ibid.). Second, in terms of the legislative purpose, this interpretation yields a just and proper result. Indeed, my colleague Justice Mazza himself noted that his conclusion "is not a desirable result". It infringes the equality of women (cf. the Bavli case [18]). It is at odds with the autonomous will of the parties. As opposed to this, my interpretation realizes the fundamental conceptions of Israeli society in regard to the autonomy of personal will and the equality of the sexes. These views are presumed to underlie the purpose of the [PRL].... Indeed, equality "is the soul of our entire constitutional regime" (HCJ 98/69 Bergman v. Minister of Finance [27] per Landau, J.). We presume that it is the purpose of every law to advance and preserve this principle. In the judgment under review in this further hearing, my colleague Justice Mazza was of the opinion that this approach devoids sec. 15 of the Property Relations Law of all meaning. I am not of that opinion."

[underlining added]

(d). This passage from President Barak's judgment makes clear that:

(i). President Barak is addressing the question of whether an *"agreement"* for the purposes of section 15 of the PRL means a *"property agreement"*.

(ii). President Barak agrees that the term "agreement" in section 15 of the PRL has its general meaning, and need not be in writing (as required under section 1 of the PRL with regards to a property agreement). He says in unequivocal and unqualified terms, that appear to apply generally, that any agreement whatsoever, whether in writing or established by parol evidence, whether express or implied, can serve to establish the property relations between the spouses, as long as the agreement is in accordance with the law of their domicile at the time of its making.

(iii). he gives two reasons for this view. The first is the construction point, (the reasoning from the "*linguistic perspective*" – as to the proper interpretation and effect of section 15 of the PRL). The second is the statutory purpose point (one of the legislative purposes of section 15 of the PRL is to respect party autonomy, in particular the autonomy of women). Both reasons support the conclusion that *"agreement"* for the purposes of section 15 never means a *"property agreement"*, whether the property relations being determined or varied are governed and in accordance with Israeli Law or some other legal system and whether the spouses have moved their domicile to or from Israel.

(e). Professor Shifman argued that President Barak's majority judgment in *Nafisi* was of general application. I prefer and accept his opinion on this point. In my view, as I have explained above, the passages quoted above support that conclusion.

(f). such a conclusion appears to me to fit with the relevant history and the relationship between the CPR and the PRL described above. Section 15 of the PRL is a choice of law provision. The proviso (which allows for the disapplication of the law of the domicile at the time of the marriage) operates within a limited ambit – there has to have been a change of domicile by the spouses before an agreement of the kind referred to above can be effective. That change of domicile provides the justification for allowing the spouses to regulate their marital relations in accordance with a new and different legal system. This means, as it seems to me, that section 15 of the PRL has a different subject matter and field of operation from the provisions in the PRL relating to a general contracting out of the resource balancing regime, where complete contracting out requires a property agreement as defined and justifies the need for a strong formalities rule. In addition, the drafting of section 15 (although not without ambiguity as I have explained) strongly suggests, by referring to the "time of making the agreement" and linking the making of the agreement to the new domicile, the law of the new domicile should also apply to contract formation (the "*making of the agreement*"). In a case where there has been a change of domicile, where the spouses have agreed to determine or vary the rights they previously held and to regulate their property relations by reference to the law applicable in the place of their domicile at the time the agreement is made, it makes sense to provide for that law to govern questions concerning contract formation and formal validity.

(g). I accept, and take into account the fact, that the CPR is a special product of Israeli common law which has been designed to give effect to domestic/national community values, so that this is an area of Israeli law that is very sensitive to strong domestic policy considerations, in particular the need to protect vulnerable wives. I also accept that these domestic policy priorities were important factors in the reasoning of the judges in *Nafisi*. I therefore need to be careful to respect the Israeli jurisprudence and not to adopt or impose a Cayman or English law perspective. I also note the views of Professor Fassberg in the textbook referred to by Professor Halperin-Kaddari. But she is tentative in her analysis (see the final paragraph from the extract quoted by Professor Halperin-Kaddari), in view of the absence of clear authority, and while she considers that the judgments in *Nafisi* appear to express a willingness to apply the law of a foreign domicile where it provides for sharing or community property, she does not say that an Israeli court cannot apply a law that is different from the CPR.

(h). I must do my best to form a view as to what decision the Israeli Supreme Court would come to on this issue and as to the rule of Israeli law to be applied in the present proceedings (based on the expert evidence from Professor Halperin-Kaddari and Professor Shifman). In my view, for the reasons I have explained, Professor Shifman's opinion most accurately reflects the reasoning of President Barak (and the majority decision in *Nafisi*) and the proper interpretation of section 15 of the PRL and is to be preferred to Professor Halperin-Kaddari's opinion.

245. Accordingly, in my view, a section 15 agreement does not need to be made in writing and approved by the Israeli court. The second issue therefore needs to be considered. Did the First Plaintiff and Mr Perry agree to determine their matrimonial property rights under Israeli law and have such rights as are provided by English law after they moved to London in 1999-2000?

(a). the First Defendant invites the Court to conclude that Mr Perry and the First Plaintiff expressly or implicitly agreed that their marital rights would be governed by the law of England and Wales and not by the law of Israel when they moved to London in 1999 or 2000. Such an agreement, the First Defendant argues, is to be inferred from the circumstances surrounding and the reasons given for the move.

(b). there are, once again, two issues to be considered. First, does the evidence support the conclusion that at some point around the time that Mr Perry and the First Plaintiff moved to London they agreed and intended to make London the centre of their lives (so as to make England and Wales their place of domicile for the purpose of section 15 of the PRL)? Secondly, if so, does this of itself, or this combined with other facts and circumstances, constitute sufficient evidence from which the Court can infer an agreement between Mr Perry and the First Plaintiff that their matrimonial property relations were in future to be governed by English law?

(c). as regards the first point, it seems to me that the documentary evidence does show that when Mr Perry and the First Plaintiff moved to London, they chose to make England their home and did not intend to return to Israel. The IR UK Arrival Form and the FFW October Letter, on which the First Defendant relies, are in my view of particular significance. I have set out extracts from both documents above. The IR UK Arrival Form contains formal declarations by Mr Perry (including a confirmation that "*the information ... given in this form is correct and complete to the best of my knowledge*

and belief") and was prepared after the receipt of considered and detailed advice from FFW. In it, Mr Perry made it clear that he (and the First Plaintiff) had made a move that was intended to have long term and serious consequences. Israel was to be left behind (he had no intention of returning to Israel) and London was to become his primary home. While he did not intend to remain in the UK permanently, since he had plans to move to France in fifteen years' time, he planned to remain for many years. According to the IR UK Arrival Form, Mr Perry arrived in England on 7 May 2002. This means that the actual move to London that the First Defendant relies on took place rather later that the timeframe to which it refers. However, the chronology and timing of the move, as disclosed by the IR UK Arrival Form and the FFW October Letter, strongly suggest that the move was connected with the Israeli Settlement Agreement, which had been entered into on 17 May 2001. It seems to me to be right to infer, as the First Defendant submitted, that Mr Perry needed to move his tax residence away from Israel and he wanted to cut his links with Israel to bring to an end the action by the Israeli tax authorities to make claims against him and interfere with his business.

(d). in view of this documentary evidence, I do not find convincing the Plaintiffs' submission that the move to London was connected with the Second Plaintiff's residence there, was intended to be temporary and that Mr Perry maintained a strong continuing connection with Israel. The First Plaintiff's evidence does not deal directly with Mr Perry's intentions although she says that "*while [she] loved London and spent a lot of time there [she] always regarded Israel as [her] home.*" In my view, the contemporaneous documentation completed by Mr Perry, that contained a formal statement of the reasons for and intended duration of the move to London, applied to both Mr Perry and the First Plaintiff as a couple (on the First Plaintiff's case, they lived the life of a couple) and is to be treated as setting out the true position and intentions of them both. Mr Perry's return to Israel to stand trial and serve his sentence after conviction does not undermine this conclusion. There is also nothing in the evidence of the Second Plaintiff that does so.

(e). on this basis I am satisfied that the evidence supports the conclusion that at the time that Mr Perry and the First Plaintiff moved to London they agreed and intended to make London the centre of their lives, so that they became domiciled in the UK at that point for the purposes of section 15 of the PRL. The next question is therefore whether the conduct of Mr Perry and the First Defendant at or after that time (and before that date but after the point at which they had a settled intention to move) constitutes evidence of an

agreement that, following the move to London, there would be a change not only in the couple's tax status (and the tax regime to which they were subject) but also in the law governing their matrimonial property relations. In my view, there is insufficient evidence from which to infer such an agreement.

(f). the First Defendant submitted that the move gave Mr Perry and the First Plaintiff a reason to change the law that governed their financial affairs, including the law governing and defining their matrimonial property rights. It was not just a question of changing their tax status and becoming subject to the UK tax regime. There would be clear benefits that would flow from having their matrimonial property rights determined according to English rather than Israeli law because, if Israeli law continued to apply after the move to England, it would be necessary to have certain types of agreement (property agreements, discussed further below) approved by the Israeli court and Mr Perry would obviously wish to avoid having to apply and make disclosures to the Israeli courts. The Israeli Settlement Agreement made it important for Mr Perry to sever all links with Israel and to avoid the need to appear before the Israeli courts.

(g). I accept that, assuming that there had been no separation agreement before the move to London, there were reasons why Mr Perry (and the First Plaintiff) may have wished to review and revise the couple's matrimonial property rights. Indeed, to review the full range of their financial affairs, following the significant move they made to London. However, there is no evidence to suggest that they did so. There is no documentary evidence to show that Mr Perry (or the First Plaintiff) took advice on or discussed with advisers the impact of the move on the couple's matrimonial property rights. This is so despite there being documentary evidence of tax advice. There is no reference in the Letter of Wishes to an agreement made at the time of the move to replace the spouses' Israeli matrimonial property rights with rights determined in accordance with the English rules and regime. This would have been a very significant development, assuming, of course, that the First Plaintiff retained her rights under the CPR at that time. As a result, it is to be expected that there would be some record of advice being taken or the issue being discussed. The evidence adduced at trial also does not show that there was any discussion of matrimonial property rights at the time of the move.

(h). in these circumstances, I do not consider that the Court can infer that an agreement was made, expressly or impliedly, by Mr Perry and the First Plaintiff to change their

matrimonial property relations. Their conduct was not directed to that question. Nor do the circumstances surrounding the reasons for their move demonstrate that they must have had their matrimonial property relations in mind and decided that these needed to be changed, and become subject to English law after their arrival in London.

(i). whether there was an agreement of the kind contended for by the First Defendant is, as I explained, a matter of English law. The First Defendant's case is based on there having been an agreement (to substitute the English rules and law and replace the Israeli rules and law regulating matrimonial property relations) made by words or conduct taking place in England (or possibly shortly before the move to London) which was made "*in accordance with*" English law, being the law of the couples' domicile at the time the agreement was made (for the purpose of section 15 of the PRL). For these purposes, the parties accepted and I assume that English law is the same as Cayman Islands law. No authorities were cited to me (English or Cayman) on the question as to the approach to be adopted by the Court when considering whether to imply or infer the existence of an agreement from words or conduct.

(j). accordingly, Professor Shifman's evidence as to the approach under Israeli law to the implication of an agreement to change property relations when parties emigrate was not directly relevant. His evidence as to the inferences to be drawn from the three different examples put to him by Mr Fenwick was either his opinion as to the applicable Israeli law or an inadmissible expression of his own view as to the inferences of fact that the Court should draw based on applicable Israeli law. In any event, in my view it does not follow from the fact that a new country becomes a couple's centre of life that they are to be taken to have agreed, without more, that this new country should decide all aspects of their marital relationship.

The Agreement to Have Separate Property Point

246. There are three key issues:

(a). is an agreement of the kind contended for by the First Defendant and the Fifth Defendant (to divide and have separate rights to matrimonial property) a "*property agreement*" so that it must be in writing and approved by the Israeli court? This is an Israeli law question.

(b). even if such an agreement is a "*property agreement*", can it nonetheless be enforced even where the requirements for writing and court approval are not satisfied? This is also an Israeli law question.

(c). if the agreement alleged to exist in this case was not a "*property agreement*" or, if it was, can such an agreement still be enforced despite not being in writing and approved by the Israeli court and does the evidence establish that the First Plaintiff and Mr Perry agreed to operate a regime of property separation before, and was such an agreement affirmed after, their move to London? The First Defendant argues that there was such an agreement which was valid and binding both as a matter of Israeli and English law.

Is the alleged agreement a property agreement?

247. The first question is therefore whether the separation agreement which the First Defendant and the Fifth Defendant say was entered into by the First Plaintiff and Mr Perry needed to be in writing and approved by the Israel court in order for it to be binding under Israeli law:

(a). both experts agree that *Shai* (1985) is the leading authority on the meaning of "*property agreement.*" This is subject to Professor Shifman's argument that the decision in *Shai,* to the effect that an agreement dealing only with part of the matrimonial property will be treated as a property agreement, had been overruled in subsequent cases.

(b). in *Shai* there was a written agreement between a husband and wife, entered into during their marriage (they had been married in 1976). The husband agreed to transfer half of his interest in a house owned by him to his wife. The written agreement set out that the wife would be unable to transfer her interest to any third party and made provision for what would happen to the house in the event of divorce or the death of either spouse. If there was a divorce, the house would be sold and the proceeds split between the spouses. If one spouse died before the other and before they had been divorced, the surviving spouse would become entitled to the other spouse's share. The husband subsequently refused to take the steps required to transfer title to the house. The wife's claim to enforce the agreement had been dismissed by the District Court, which treated the agreement as a property agreement that was not valid due to the absence of court approval. The Supreme Court dismissed the appeal.

(c). I have already quoted above an important passage from the judgment of Vice President Ben-Porat in which he 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. If so, the agreement was a "*property agreement.*" It is worth setting this passage out again:

> *"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....*

(d). Vice President Ben-Porat went to on to develop his analysis. Spouses were entitled to enter into ordinary agreements which did not need to be in writing or court-approved. "*Property agreements*" were a sub-set of agreements between spouses. For an agreement to be classified as a property agreement, it had to be a forward-looking agreement for regulating the spouses' relationship in the event of termination of the marriage or the death of one spouse. The fact that it was specifically designated for the event of death or divorce was key. Vice President Ben-Porat said as follows:

> *"It is also my belief that, a "Property [Relations] Agreement" is not the only thing to consider in terms of property relations between spouses and it is necessary to distinguish between a "Property Relations Agreement" – or, in the full or partial absence thereof, between Chapter Two of the Law then constituting a "Property Relations Agreement" – and an ordinary agreement or granting of a gift or other transaction between the spouses throughout the marriage in accordance with general law thereunder, which is not necessarily the case with other agreement. With all due respect, I find the words of the learned author, Dr A. Rosen, in his book "Property Relations between Spouses" (Microshor, 5742) 303, to be relevant to our case:*
>
> > *"...(a) the Property [Relations] Agreement does not exhaust the methods by which spouses may contract, nor does it deny the existence of other arrangements, pursuant to family laws, which continue to be binding on the spouses".*
>
> *On the contrary, this framework seems to me too narrow, since spouses may enter into clear commercial relations and transfer property to each other with or without consideration, and this is in fact a common daily spectacle.*
>
> .....
>
> *In my opinion, 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. Hence, in order to remove (for*

example) a specific asset from the circle of resources balancing, an ordinary agreement will suffice (without court approval), by virtue of Section 5(A)(3) of the said Law; and if so applies to this matter, which is significantly related to what will happen in the event of divorce of death, then all the more so with respect to other daily matters having no impact upon the occurrence of such events."

[underlining added]

(e). Professor Shifman also relied on the decision in *BAM* (2010):

(i). in *BAM*, the spouses were married in 1952 (before 1974) and had entered into a written agreement in which they divided their property (or considerable parts thereof) between them. Court approval was not obtained. The petitioner (the wife) sought to set aside the agreement.

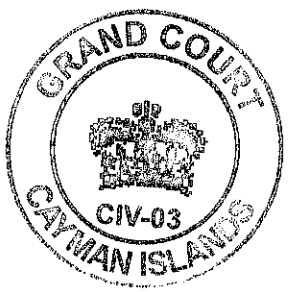
(ii). there had been some problems in the marriage before the agreement was entered into (the spouses had been living apart) and there was evidence that the agreement was made in order, or at least as part of arrangements made, to restore stability in the marriage. The agreement contained the following recital:

> *"This agreement is made between the [spouses] to live separately for the time being with the consent of both parties and with good will and mutual understanding and peace between them."*

(iii). three issues arose: (a) did the agreement look forward to the eventuality of the termination of the marriage (it was argued that the agreement did not do so as it was conditioned and based on the expectation of domestic peace between the spouses after their marital problems); (b) did the fact that the parties had acted according to and received property under the agreement mean that they were barred from challenging it, by reason of estoppel ("*the principle of good faith, bar and estoppel*"); and (c) did the requirement for a "*property agreement*" apply to couples married before 1974?

(iv). Judge Rubenstein, upholding the lower courts, held that:

(A) the agreement was not a "*property agreement*" as it did not satisfy the requirement of having to look forward to separation or termination of the marriage. The following quotation explains his thinking (in paragraphs e-f):



> *"The distinction between agreements that look forward to separation and "ordinary" economic agreements runs as a common thread through the case law....and it does not support the Petitioner's position...Another indication that the specific present circumstances do not involve a property agreement [is] the fact that the agreement does not state that it covers all of the spouses' assets....."At this point it should be mentioned that it is not easily that the court will classify an agreement between spouses which appears to be a comprehensive agreement, as an agreement that is not a property [relations] agreement.....in the present [case], it needs to be kept in mind that the Petitioner argued (as further grounds for the nullity of the Agreement) that it foresaw domestic peace. Indeed, it may be concluded from the [recital] that it left an opening of hope for domestic peace despite the separation....In view of this argument (which was denied on the grounds that there is no indication in the Agreement that it was **conditioned** on domestic peace), it is hard to accept [the argument] that the Agreement foresees a divorce..... Although the Petitioner reiterates that the Agreement was made against the background of a claim she filed for divorce – she does not equally emphasise the fact that prior to the signing of the Agreement the parties filed **joint** notices to the Rabbinical Court and the Family Court, in which they announced that they were "resuming full domestic peace, with all the consequences and implications thereof," seeking to close the cases.."*
>
> [underlining added]

(B). the petitioner was estopped from challenging even a "*property agreement*" where it had already been performed and the spouses had acted according to the agreement. The petitioner had received and disposed of property under the agreement. A commercial building in Long Island City had been transferred to her and subsequently sold (with the proceeds presumably going to her). Judge Rubenstein asked rhetorically *"....how can a party to an agreement act for its consummation with one hand and claim that it never took effect (due to the absence of approval) with the other?"*

(C). couples who were married before 1974 but entered into a "*property agreement*" thereafter were required to comply with formality requirements in section 2 of the PRL. The rationale for requiring approval applied in the case of couples who married before 1974. He quoted from the judgment in *Monk v Monk* where Justice Bach had said that:

> *"Because of the special delicate and complex relations between husband and wife, the legislator determined that a [property agreement] between them is invalid unless a court is convinced that the agreement was made voluntarily, without pressure and that both parties precisely understood the matter and the potential consequences of their signing such agreement."*

In his (Judge Rubenstein's) view there was no difference between the regimes governing the PRL and CPR.

> *"To me.....,..there is no differen[ce], nor can there be any difference, between the two regimes – property relations and community property; the emphasis lies in the fact that a specific couple has decided to subject itself to arrangements that are different to those known to the legal system (arrangements which naturally preclude the concern of unfairness, inequality or exploitation), and the court's approval is required to ensure that they are doing so on an informed, conscious and voluntary basis."*

(v). accordingly, despite the recognition of the strong presumption (this was a case which related at least to considerable parts of the spouses' property), Judge Rubenstein concluded that the agreement was not a "*property agreement.*" It seems to me that he regarded the purpose of the agreement as critical. The agreement was made for the purpose of allowing the marriage to continue. It involved the irrevocable transfer of much of the matrimonial property, which would therefore not be available for sharing and distribution in accordance with the CPR on divorce. Nonetheless, since the agreement was made to facilitate the continuation of the marriage, it could not be said to have been made "*with a view to balancing matrimonial assets in the case of death, divorce or separation*".

(f). both *Shai* and *BAM* support the conclusion that what is required is a fact sensitive assessment of the purpose of the particular agreement being challenged. This requires a review of all the circumstances (the "*whole picture*" to use Judge Rubenstein's phrase – see paragraph l of *BAM*).

(g). this approach is consistent with the evidence of Professor Halperin-Kaddari. During her cross-examination, she was asked about her opinion as to the meaning of a "*property agreement*" and said as follows:

> *"ANSWER* *an agreement that foresees the ending of the relationship between the couples. It foresees either divorce or death and it addresses future arrangements between the couple, regardless of whether it in fact addresses one... [asset] or the totality of the assets of the couple.*
>
> *QUESTION* *... you do not say that any agreement by which the spouses agree to the assets of one or the other being alienated requires writing under article 1?*
>
> *ANSWER* *I do not say that. I say that an agreement that has the implication of affecting the spousal relations at some point in the future whether they divorce or whether one of them passes away that would be a property agreement for the purpose of the law."*

(h). one factor is unlikely to be determinative. The mere fact that the agreement does not cover all the matrimonial assets is not, of itself, decisive. For example, in *BAM* the fact that the agreement only related to part of the marital assets was only an "*indication*" that the agreement did not look forward to (nor did it contemplate or was it designed to regulate rights to property on) termination of the marriage ("*Another indication that the specific present circumstances do not involve a property agreement [is] the fact that the agreement does not state that it covers all of the spouses' assets").* To that extent, I agree with Professor Halperin-Kaddari's opinion that that *BAM* was not authority for the proposition that an agreement that did not cover the entirety of the spousal assets could never be a "*property agreement*."

(i). so it seems to me that in order to answer the question of whether the alleged agreement is a "*property agreement*" it is necessary to review the terms of the agreement (with reference to the surrounding circumstances) and to establish the purpose for which it was made. Two issues therefore arise. First, what were the terms of the alleged agreement? Second, what was its purpose (did it look forward to, contemplate or was it designed to regulate rights to property on termination of the marriage)?

(j). the First Defendant, in its written closing submissions (at [196]), puts its case in this way: "*There is clear evidence that Mr Perry and [the First Plaintiff] agreed, in or around 1998, that their property would cease to be held jointly and that they would instead hold their assets separately.*" However, the precise terms of the alleged agreement are not pleaded or spelled out.

(k). the primary documentary evidence as to the existence, terms and purpose of the alleged agreement is the Letter of Wishes and the 12 March Meeting Notes. The Letter of Wishes is the main document relied on by the First Defendant and the Fifth Defendant as evidencing the existence and terms of the alleged agreement.

(l). I would make the following comments about the content and interpretation of the Letter of Wishes and the 12 March Meeting Notes:

(i). the Letter of Wishes was dictated in 2015. This was many years after the alleged agreement (there appears to have been no contemporary record of any such agreement).

(ii). the Letter of Wishes clearly states that in Mr Perry's view there had been an agreement:

> *"we agreed on a divorce and asset division between us"*
>
> *"what was promised to [the First Plaintiff] at the time"*
>
> *"[the First Plaintiff] would have insisted that the previous agreement will be complied with.*
>
> *"I bring into calculation all estates that have already been given to [the First Plaintiff]"*

(iii). the Letter of Wishes identifies when the agreement was made:

> *In the late 90's or towards the late 90's, in the heels of an argument between us, we agreed..."*

(iv). the Letter of Wishes also sets out the core terms of that agreement, which include asset separation:

> *"we agreed [in the late 90's] on a divorce and asset division between us in which .... all assets in Israel [would] be granted to [the First Plaintiff] plus 50 million Marks that [would] be payed to her after I collect[ed] [the funds] from the German Pension Program. An amount of one million Marks was paid to her in advance."*

(v). it appears from the Letter of Wishes that the asset division was based on the principle that there should be a 50:50 split of the value of the matrimonial property. The assets to be given to the First Plaintiff (all the Israeli assets plus DM 50 million) were understood as representing (approximately) half the value of Mr Perry's and the First Plaintiff's matrimonial property at the time:

> *"In my understanding, if the German Pension Program had less succeeded, meaning that what was promised to [the First Plaintiff] at the time was bigger than half of the properties today, [the First Plaintiff] would have insisted that the previous agreement will be complied [with]."*
>
> *"when I calculate the value of half of the inheritance, I bring into calculation all estates that have already been given to [the First Plaintiff] 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.*

(vi). but, as the first extract in (v) above confirms, Mr Perry understood the division to have been fixed and that the First Plaintiff had an entitlement to the assets allocated to her. Mr Perry noted that the division of assets had been agreed (and presumably the calculation of the First Plaintiff's half share made) before it was known precisely how much would be received from the Organisation (the German Pension Program) so that if the sums paid by the Organisation turned out to be less than assumed, the First Plaintiff would end up receiving more than a half share of the true value of the matrimonial property – and Mr Perry expected that in that eventuality the First Plaintiff would nonetheless have required that the agreement be complied with.

(vii). the Letter of Wishes and the 12 March Meeting Notes confirm that some assets had already been transferred to the First Plaintiff pursuant to the agreement (being the Pinkas Street Property, the Recanati Street Property, the Yemin Moshe property and the jewellery collection).

(viii). the Letter of Wishes suggests that Mr Perry believed that the existence of the agreement, and the First Plaintiff's entitlement thereunder, was consistent with the subsequent creation of the trusts and that effect could still be given to her entitlement after and despite the existence of and transfer of certain properties to the trusts.

(ix). the Letter of Wishes and the 12 March Meeting Notes show that Mr Perry considered that further transfers to or for the benefit of the First Plaintiff needed to be made. The First Plaintiff was to be the sole discretionary beneficiary of a separate trust into which further assets would be transferred. These further assets were the South Street Property; cash of USD 50 million (which was to be invested in bonds and equities by the trustees) and the shares in Côte D'Azur Estate LLC (which owned the villa in Villefranche).

(x). the Letter of Wishes read with the 12 March Meeting Notes indicates that Mr Perry believed that the First Plaintiff had not received all she was entitled to under the agreement. They record the transfers of the Israeli properties but not the payment of the DM 50 million (save for the advance payment of DM 1 million). Therefore, Mr Perry appears to have believed that that the earlier agreement had

not been fully executed and that further transfers were needed, at least in part, to give effect to it.

(xi). it appears on the face of the Letter of Wishes and the 12 March Meeting Notes that the First Plaintiff's undischarged entitlement was DM 50 million less the advance payment of DM 1 million and the value of the jewellery collection. The new trust arrangements involved transferring the South Street Property, cash of USD 50 million and the shares in Côte D'Azur Estate LLC to the First Plaintiff's trust.

(xii). it is likely that Mr Perry was seeking both to give effect to the earlier agreement and to make an adjustment to reflect an updated valuation of the couple's matrimonial property, with a view to allocating a fair (half) share to the First Plaintiff. The Letter of Wishes states as follows:

> *"[the First Plaintiff] would have insisted that the previous agreement will be complied with.*
>
> *I call this inheritance but a big part of it is trust arrangements that have already been done and only need adjusting...*
>
> *"when I calculate the value of half of the inheritance I bring into calculation all estates that have already been given to [the First Plaintiff]"*

(xiii). it appears that Mr Perry took the view that he was still able to give instructions for the transfer of and was in control of the assets in the trusts. There is no suggestion that the new asset allocation and transfers were subject to a new agreement and no arrangements were apparently made for obtaining the First Plaintiff's consent. The Letter of Wishes stated that:

> *"I'm making these inheritance arrangements."*

(xiv). the Letter of Wishes uses the future tense not only when talking about the new trust assets to be transferred to the First Plaintiff's trust but also the properties that were covered by the earlier agreement (such as the Israeli assets).

> *"All real estate assets in Israel, whether are written in [the First Plaintiff's] name or whether are written in both our names, will become [the First Plaintiff's] property directly."*

(xvi). but Mr Perry acknowledges that there were disagreements with the First Plaintiff and that she did not agree, or may not have agreed, with him that there had been an

agreement to create separate property rights and give up claims under the CPR (but the basis for believing that there was such a disagreement and the scope and nature of the disagreement are not explained):

> *"I'd like to clarify a few things, there are some differences of opinion between [the First Plaintiff] and me regarding the question on if there are marital properties between us.*

(xvii). the First Plaintiff was still to be part of and benefit from the family trust arrangements since the expenses relating to the properties to be held in her trust (presumably the real estate assets held in the trust) were to be paid by the general trust which Mr Perry intended to create provided that and for as long as the Fifth Defendant, Second Plaintiff and their children were given the right to use the properties. And management of the trust assets was to be in the hands of the trustees with SPA as the protector of the trust.

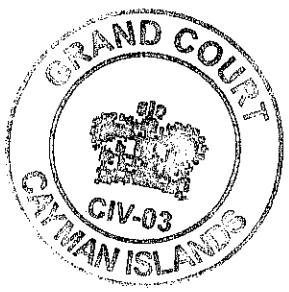
(m). in my view, certain points are to be derived from the language used in the Letter of Wishes and the position set out in the 12 March Meeting Notes. Mr Perry considered that there had been an agreement with the First Plaintiff entered into in or around the late 1990's. The agreement provided for an immediate division of their matrimonial assets. Mr Perry refers to there having been an agreement to "*a divorce and asset division.*" The division involved the immediate transfer of identified assets (or at least giving the right to a transfer of such assets) to the First Plaintiff with an entitlement to be paid a specific cash sum in the future if and when, and perhaps out of, sums received from the Organisation (subject to an immediate advance payment of DM 1 million). The assets and funds to be transferred had been determined by applying the principle that there should be a 50:50 division of all the matrimonial property as calculated at the time of the agreement. The First Plaintiff was only entitled to the assets and funds given to her under the agreement and would have no further claim on other matrimonial property or assets of Mr Perry (this is not spelled out but in my view is implicit in Mr Perry's description of the agreement). Mr Perry believed that the terms of the asset division had been settled and agreed. But he accepted that the First Plaintiff disagreed or may have disagreed. In his view, the First Plaintiff had become entitled to receive the properties and funds he listed. Asset transfers had been made as part of and pursuant to the agreement but further transfers of funds and assets (for example in respect of the First Plaintiff's share of the

funds to be received by Mr Perry from the Organisation) were needed to give full effect to the agreement.

(n). it seems to me that the proper approach to deciding whether the agreement alleged to exist by the First Defendant and the Fifth Defendant would, if proven, be treated as a "*property agreement*" is to apply the test established by the case law, as explained above, to the agreement as understood and described by Mr Perry and recorded in the Letter of Wishes and the 12 March Meeting Notes. As I have explained, these are the documents heavily relied on by the First Defendant and the Fifth Defendant and it seems to me that the testimony of the witnesses on the question of whether the First Plaintiff and Mr Perry entered into a separation agreement and the effect of the Letter of Wishes do not add anything material on the question of the purpose and terms of the alleged agreement.

(o). as I have set out above, the case law establishes that what is required is a fact sensitive assessment of the purpose of the particular agreement under review. As I have said, for an agreement to be classified as a property agreement, it has to be a forward-looking agreement for regulating the spouses' relationship in the event of termination of the marriage or the death of one spouse. The fact that it is specifically designated for the event of death or divorce is key. Adopting the language of Judge Rubenstein in *BAM* the question can be formulated as follows: "*Does the agreement foresee a divorce?*" There is a critical distinction (described by Judge Rubenstein in *BAM* as "*a common thread [running] through the case law*") between "*agreements that look forward to separation and "ordinary" economic agreements*" such as gifts or other transfers and transactions made during the marriage. Applying this test to the agreement as understood by Mr Perry and as alleged by the First Defendant and the Fifth Defendant, in my view it is clear that the agreement is and would be treated as a "*property agreement*".

(p). it seems to me that the agreement did foresee a divorce. The asset division and transfers referred to by Mr Perry and said by him to have been agreed were made in contemplation of and to avoid the application of the CPR in the event of a divorce. It put in place, and its purpose was to put in place, an alternative regime for dealing with the matrimonial property that would operate even if the spouses divorced (or died). It was not an "ordinary" agreement. An "ordinary" agreement between spouses would be one whose purpose was to give one spouse a benefit (such as a gift) to be enjoyed and used during the marriage without reference to (and unconnected with) what would happen to the



matrimonial property in the event of divorce (or death). The purpose of such an agreement would not be to regulate rights in the event of divorce or death but to meet some other need or objective of the spouses (for example, because one spouse wanted to make a gift for the sole use and benefit of the other or there was a need for one spouse to own outright a particular asset because it was needed, say, by a child of that spouse, by a former husband, to live in). Where the purpose of the agreement was to make a permanent division of all the matrimonial property so as to extinguish CPR rights and avoid the future operation of the CPR in the event of divorce or death, the agreement satisfied the futurity requirement and the requirement that it be specifically designated for the event of death or divorce (an agreement for regulating the spouses' relationship in the event of termination of the marriage or the death of one spouse). It was made with divorce and death in mind and in order to regulate what would happen then (even though the absolute rights were to vest immediately and not subsequently when the divorce or death occurred).

(q). I prefer Professor Halperin-Kaddari opinion on the principles to be derived from *Shai* and the other cases. In my view, the approach I have adopted and my decision are in accord and consistent with both *Shai* and *BAM* (and the other cases cited).

(r). in *BAM*, the fact that the agreement did not relate to all the spouses' property was seen as a significant factor indicating that the agreement was not focussing on a future divorce as it did not seek comprehensively to regulate the spouses' property rights in the event of a divorce. The law governing the distribution of matrimonial property on divorce would still need to be applied in relation to that other property. Furthermore, the evidence established that the spouses were not actively contemplating a divorce. They had taken active steps by filing joint notices to the Rabbinical Court and the Family Court in which they announced that they were "*resuming full domestic peace, with all the consequences and implications thereof," seeking to close the cases*." This was sufficient to convince the court that the risk of a divorce was not seen as necessitating the adjustment and regulation of the matrimonial property rights and therefore not the purpose of the agreement. The agreement did not "*foresee a divorce*" and was therefore to be treated as falling on what I might call the ordinary agreement within marriage side of the line.

(s). in *Shai*, it was clear that there was to be an immediate transfer to the wife of an interest in matrimonial property but she was not permitted to deal with and realise that interest

during the subsistence of the marriage (or before her husband's death). The spouses were to remain in joint occupation of the house until divorce or death. The agreement in that case made provision specifically for how the interest acquired by the wife and the interest retained by her husband were to be realised and dealt with on divorce (or death). Therefore, the agreement not only provided for an immediate transfer of an interest but also looked forward to and regulated the realisation of that interest in a future divorce (or death). The agreement described by Mr Perry did not limit the interest to be acquired by the First Plaintiff in a similar way. But it did not need to do so, since Mr Perry was not retaining any interest in or a right to occupy the properties transferred. Nonetheless, the purpose of the agreement was to make provision for the division of the matrimonial assets so as to ensure that on divorce or death the First Plaintiff had absolute ownership of the assets and funds transferred to her and no claim against other matrimonial property or assets of Mr Perry. In my view it is not necessary, in order to satisfy the requirements of a "*property agreement*", that the rights to matrimonial property conferred by the agreement be conditioned or qualified so as only to become fully exercisable (such that the property transferred can only be realised) once the divorce or death occurs. It is clear that an agreement of the type understood by Mr Perry was not an ordinary agreement involving a gift between spouses, or restructuring of the spouses' property portfolio, during their marriage for reasons unconnected with divorce and not involving a relinquishment of all rights to share matrimonial property on divorce under the CPR.

(t). I note and take into account the statement made by Judge Rubenstein in *BAM* that "*it should be mentioned that it is not easily that the court will classify an agreement between spouses which appears to be a comprehensive agreement, as an agreement that is not a property [relations] agreement.*" This is consistent with the view of Professor Halperin-Kaddari regarding the Israeli' courts' approach in cases where there is a dispute over whether an agreement referable to divorce will be treated as a "*property agreement.*" While, in my view, Professor Halperin-Kaddari failed to give sufficient weight to the nuanced approach involving a balancing of factors referred to in the cases, I accept that the cases make it clear that that, in view of the strong underlying policy issues supporting the need for a strong formalities requirement, an Israeli court will be cautious and slow to treat an agreement which appears comprehensively to regulate the spouses' matrimonial property rights on divorce as not being a "*property agreement.*"

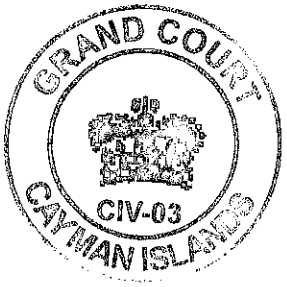
(u). the comments addressed to the First Plaintiff show Mr Perry seeking to explain and justify his proposals to her. He does not say that he is seeking her consent. He "*instructs*" what is to happen to the assets. It appears that he believes that he has the power to require the arrangements to be put into effect, even if the First Plaintiff objects. Indeed, he is making the arrangements because the First Plaintiff is, in his view, refusing to treat their children fairly and so he anticipates that the new arrangements will not be in accordance with her wishes. He states that he does "*not intend to deprive [the First Plaintiff]*" but because she had "*no intention of giving the girls anything*" – out of *her* property – he considers that a revision to the division of the marital assets is necessary to protect the children. However, he confirms that the new arrangements will treat the First Plaintiff fairly and respect the 50:50 split previously agreed. She is still to have half the value of the assets ("inheritance").

Can a property agreement which is not in writing and has not been court approved still be enforced?

248. The second issue, to which I now turn, is whether the alleged agreement could still be enforced, by someone with standing to enforce it, or otherwise treated as effective so as deprive the First Plaintiff of her CPR rights, even if it is to be treated as a "*property agreement*" and even if it was not in writing or approved by the Israeli court?

249. Professor Shifman argues that matters do not end with the conclusion that the alleged agreement was a "*property agreement*". In his opinion, even if there was such an agreement, it remained enforceable despite the failure to satisfy the formality requirements of sections 1 and 2 of the PRL.

250. As I have noted, he relied on dicta in *Avidor v. Avidor* that the failure to obtain court approval did not mean that the court could ignore the agreement for all purposes. Such a failure did "*not mean that [there was no] agreement at all. There [was] a valid agreement, but it was not a "matrimonial property agreement.""* During his cross-examination, Professor Shifman made two points. First, an agreement, which failed to satisfy the formality requirements, could be enforced like any other ordinary agreement. It did not give the parties the enhanced rights that only arose under a "*property agreement*" (so that where the PRL or other laws required a "*property agreement*" to be in place, the ordinary agreement would be insufficient). But in the present case, the First Defendant did not need to show that the First Plaintiff and Mr Perry were parties to a "*property agreement*". Provided there was any binding agreement under which the First Plaintiff's rights over the Share were extinguished, the First Defendant's defence would



succeed. Secondly, an ordinary agreement could be relied on to support an estoppel defence. If the grounds for establishing an estoppel against the First Plaintiff were made out, she would be unable to deny the validity and effect of the agreement.

251. I am not persuaded by Professor Shifman's arguments on the first point. Professor Shifman was unable to cite any authority in which the Israeli court had held that an unwritten "*property agreement*" was enforceable and the authorities on which he did rely were at best inconclusive and at worst, in view of the poor English translations provided to me, unintelligible. In particular the translations of *Avidor* and *Koch v Koch* are so poor that I found it impossible properly to understand (without having to undertake unreliable reconstruction and detective work) the facts, the decisions and the court's reasoning. I note Professor Halperin-Kaddari's explanation of the *Avidor* decision, which seems to me to be convincing. I also question how Professor Shifman's argument can be consistent with the decision in *R.C. v A.C.* There is also the issue of whether the First Defendant, which is not a party to the alleged agreement, has standing to enforce it.

252. I deal with the second argument below when I come to discuss the Estoppel Point.

Does the evidence establish that there was a binding separation agreement between the First Plaintiff and Mr Perry?

253. Having held that: (i) the agreement asserted and relied on by the First Defendant and Fifth Defendant would, had it indeed been made, be a "*property agreement*" for the purpose of sections 1 and 2 of the PRL; and (ii) such an agreement must at least have been in writing in order for it to be a binding agreement enforceable as such, it is not strictly necessary for me to answer the question of whether the evidence is sufficient to establish that there was in fact such an agreement. However, in case I am wrong on these matters and in view of the extensive evidence filed on this issue I set out below my conclusions on the question.

254. As I have explained the First Defendant and the Fifth Defendant rely both on the documentary evidence and witness testimony.

255. As regards the documentary evidence, the First Defendant and the Fifth Defendant rely heavily on the Letter of Wishes and the First Plaintiff's affidavit evidence given in the SOCA Proceedings:

(a). as I have explained, they argue that the Letter of Wishes is clear, specific and detailed and strongly supports the existence of a divorce and asset separation agreement between Mr Perry and the First Plaintiff on the terms described by Mr Perry. The circumstances surrounding the drafting of the Letter of Wishes gave it added evidential weight. It was, as they said, in substance a death-bed statement. Furthermore, the Plaintiffs' attempts to suggest that Mr Perry did not mean what he said and did not believe that there had in fact been such an agreement but instead made up the existence of the agreement to put pressure on the First Plaintiff to agree to his proposals were incredible. I find these arguments, subject to the point made below, convincing. Mr Perry is clear as to his own understanding – there was an agreement - and he is clear as to its terms. He discusses in detail the impact of that agreement on the new arrangements he wishes to put in place. I find the suggestion that he was making up and manufacturing the terms of the agreement to be unconvincing. It seems, in the context in which it was dictated, to be a genuine statement of his beliefs and wishes. The Plaintiffs' explanation, that Mr Perry deliberately misrepresented the position in order to promote family harmony, is not credible. It seems unlikely that he would have sought to promote family harmony by generating fresh and further disputes by referring to an agreement that he knew had not been made. If he was trying to prevent the First Plaintiff from asserting her matrimonial property rights by stating that she had been party to a separation agreement which he knew had never been agreed, he would surely have known that the First Plaintiff was unlikely to be persuaded not to enforce those rights merely by reason of what he had said in the Letter of Wishes. And if this was the case, why would he acknowledge that the differences of opinion between himself and the First Plaintiff on the existence or continuation of rights to community property? Had he wished to apply pressure on the First Plaintiff he could have done so more effectively by being direct and explicit as to the consequences that would flow from a failure to accept the new arrangements he proposed. Furthermore, the explanation seems to me to be inconsistent with the tone of candour which Mr Perry adopted when dictating the Letter of Wishes.

(b). however, the weight to be given to the Letter of Wishes as evidence of the existence of an agreement, pursuant to which *both* Mr Perry and the First Plaintiff were willing parties, must be reduced because of Mr Perry's acknowledgement that there had not been a consensus as to whether he and the First Plaintiff had given up their right to community property. He says that there were "*some differences of opinion*" on the question of

whether "*there are marital properties between us*". I take that to mean that he recognised and acknowledged that his own account and understanding of what had been agreed was not accepted and was contested by the First Plaintiff. He is therefore accepting that there was an ongoing dispute and disagreement over the existence of an agreement of the kind to which he refers.

(c). the First Defendant and the Fifth Defendant argue that the existence of the alleged separation agreement can be inferred from (and Mr Perry's understanding of the existence of such an agreement is supported by) further documentary evidence. This is the evidence given by the First Plaintiff in the SOCA Proceedings. I have set out above the relevant extracts from LP's First SOCA Witness Statement and LP's Second SOCA Witness Statement. These indicated that she had made no general claim to joint ownership (as to 50%) of assets held by Mr Perry in his own name:

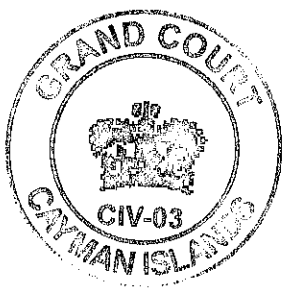
(i). in LP's Second SOCA Witness Statement, the First Plaintiff noted that she had already provided (in LP's First SOCA Witness Statement) details of her assets in the UK ("*certain assets of mine within the UK*"). She was now responding to the requirement to provide information on all of her worldwide assets (excluding certain low value items). In paragraph 8 of LP's Second SOCA Witness Statement, she listed twelve different assets, or categories of asset, that she had or controlled (she used the expression "*have or control*"). These included various bank accounts (including joint accounts with Mr Perry); one property (the Pinkas Street Property in Tel Aviv); items of jewellery, paintings; shares in an Israeli company and "*Other assets obtained from my parents, or purchased with funds not connected to Mr Perry, which have no connection to Mr Perry's funds, and of which I am providing no details in this statement*". She also confirmed that she was a discretionary beneficiary of the Heritage Trust.

(ii). so the First Plaintiff confirmed that she had retained a separate interest in assets obtained from her parents and assets purchased with funds not connected to Mr Perry's funds. She did not however include the real estate that was referred to in her witness statement dated 11 February 2019 in these proceedings. As I have explained above, that witness statement was filed in response to interrogatories served by the First Defendant. The First Plaintiff confirmed that at some time after 1997 the Recanati Street Property had been transferred from joint names into her

name alone and that a house at 32 Tura Street, Jerusalem had been transferred into her name in 2001. Nor, critically, did she refer to rights under the CPR and disclose that she had an interest in half of all Mr Perry's property (acquired during the marriage).

(iii). the First Plaintiff received her own legal advice in relation to the SOCA Proceedings. She admitted during her cross-examination, after initially denying that she had ever had a conversation with Mr Asserson, that she had met with Mr Asserson and colleagues of his and that it was reasonable to assume that she would have taken the steps that they had asked her to take in correspondence. It can therefore properly be assumed that the witness statements filed in the SOCA Proceedings would have been prepared carefully, with the benefit of such advice, after proper inquiries had been made and in full awareness of the significance of the statement of truth and the importance of ensuring that the evidence was accurate and complete (and of the serious consequences of failing to do so). The First Plaintiff directly retained the law firm, Asserson Law, to act for her in the SOCA Proceedings by signing an engagement letter with them. Furthermore, the documents discovered in these proceedings show that she gave instructions to Asserson. For example, there are emails from an associate at Asserson to the First Plaintiff discussing the preparation of, and a meeting to discuss, her evidence; a letter from Asserson dated 10 March 2010 informed SOCA that Asserson had taken instructions from the First Plaintiff. In addition, the narrative contained in bills prepared by Asserson refers to significant charges for travel to and attendance at a meeting with the First Plaintiff and in connection with the drafting of the First Plaintiff's witness statement.

(iv). it is, in light of the Israeli Matrimonial Property Claim made by the First Plaintiff in these proceedings, remarkable that no reference is made to her alleged CPR rights in the evidence she filed in the SOCA Proceedings. LP's First SOCA Witness Statement and LP's Second SOCA Witness Statement on their face and in context (the context being the filing of evidence in serious legal proceedings) clearly support the conclusion that at the time they were signed (24 December 2009 and 18 November 2010) the First Plaintiff accepted that she had no CPR rights and that the Share was not property in respect of which she had an interest. The Share was registered in Mr Perry's name at the time of these witness



statements. BHO6 was incorporated in 2005 and (as is confirmed in the Plaintiffs' written closing submissions) the Share was registered in his name from that date until it was transferred to the First Defendant in October 2013. While, as Mr Brownbill emphasised during his oral closing submissions, the Share was not included in the freezing order obtained by SOCA or SOCA's second set of proceedings, the First Plaintiff's disclosure obligation, as I have explained, was unqualified and related to all assets she owned including assets owned jointly.

(v). paragraph 17 of the WFO required the First Plaintiff to serve a witness statement informing SOCA of all her assets, and all assets under her control, *whether in or outside England and Wales, whether in her own name or not and whether solely or jointly owned* (save for assets valued at less than £500). These witness statements were documents prepared for litigation, containing a statement of truth. The First Plaintiff can only properly have signed the statements if she believed that she had no other claims to Mr Perry's assets. Had she believed that the CPR applied to marital assets, and that she had a right to half of all those assets, she was bound to say so. Otherwise, her evidence and disclosure would have been wrong, with very serious consequences. As I have explained, in view of the evidence that the First Plaintiff received her own advice (and the evidence relating to the nature of the advice she received) in relation to the SOCA Proceedings, I consider it appropriate to infer that she would have been advised about the need to prepare her evidence carefully and properly and to bring to the attention of her legal advisers any matters that were relevant to the evidence she was required to provide.

(vi). but the First Defendant says that these inferences and conclusions cannot be drawn because she is now able to disown the evidence she gave because she never bothered to read the witness statements and merely did, as she always did when it came to financial matters, what she was told to do by Mr Perry. During her cross-examination, the First Plaintiff was asked by Mr Fenwick about the SOCA Proceedings and these witness statements. Her answers were, in my view, unsatisfactory. They were damaging to her credibility as a careful and honest witness. She was argumentative and initially refused to accept that her evidence in the SOCA Proceedings was relevant to her claim that she had rights under the CPR (her initial response, when asked about the SOCA Proceedings, was that "*[SOCA] lost so if they lost why should we even talk about that*?" and she had to be

reminded by me to answer the questions put to her). She said that she would sign anything her husband asked her to sign without even understanding the document she had been given:

"QUESTION	*Is it right that before signing [your First SOCA Witness Statement] you took sufficient steps to satisfy yourself that you knew the contents of the statement...?*
ANSWER	*.....I don't remember.....*
.....	
QUESTION	*Would you have signed this witness statement saying it was true if you did not believe that what was written in it was true?*
ASNWER	*As I said previously, if my husband gave me something to sign, I would sign it without blinking an eyelid. In later years, it wasn't like that.*
QUESTION	*Are you saying that your husband gave you this document to sign?*
ANSWER	*I really don't know but it would seem logical that it came from him or from his attorney, otherwise how would I have acquired it?*
QUESTION	*Well, you signed a document and what I'm trying to establish is whether you believed the contents.....to be true.*
.....	
ANSWER	*I'm really sorry to say, but if my husband gave me something to sign, I would sign it and I would not examine or verify the contents.*
QUESTION	*So is it your evidence that you were prepared to sign and say you were a beneficiary of the Heritage Trust without asking what the Heritage Trust was?*
ANSWER	*That would seem reasonable.*

(vii). by way of further explanation (and by way of mitigation) the First Plaintiff did say that she was unable to remember what was in her witness statements and that they had been prepared at a difficult time because Mr Perry was ill. I accept that one spouse is entitled to rely on the other spouse as to the contents of and basis for signing a document relating to matters dealt with by that other spouse. However, even taking these factors into account, the First Plaintiff's admission that she would blindly sign whatever she was asked to sign by her husband, without any

review, even when she was giving formal evidence in court proceedings, was very significant for two reasons. First, it showed the extent to which she treated Mr Perry as being in complete control of her affairs and actions. Secondly it showed that she had little regard for the law and duties applicable to witnesses in legal proceedings (and that was at least reckless as to whether her testimony was true). She accepted that Mr Perry was in complete control, with her knowledge and consent, of all matters relating to their financial affairs and dealings with the family's assets. He had unfettered power and authority to act and the First Plaintiff would accept whatever decision he made. It is not an exaggeration to say that she abdicated all responsibility for reviewing what she was asked to sign and for oversight of Mr Perry's activities. She qualified one of her answers by saying that "*in later years*" she took a different approach. However, I find this answer unconvincing. She does not say when or why her attitude changed and did not say anywhere in her evidence that there had been such a change in her relationship with Mr Perry before the transfer of the Share to the First Defendant.

(viii). it is necessary to decide whether the First Plaintiff's evidence is to be believed and if it is the significance for the purpose of the Israeli Matrimonial Property Claim of her explanations and admissions. I discuss this issue further below when dealing with and assessing the written and oral testimony given by the witnesses of fact.

256. The First Defendant and the Fifth Defendant also rely on the evidence of the transfers of real estate and funds to the First Plaintiff as supporting the account given by Mr Perry in the Letter of Wishes of the existence and terms of the alleged separation agreement. However, the evidence is limited and at best circumstantial in that it only shows that transfers were made of funds in the currency and amount and a number of the properties referred to by Mr Perry. The Court is asked to infer that the transfers were made as part of and were connected with the alleged agreement. But in my view the conflicting evidence supported by a non-party concerning the likely reason for the real estate transfers, the absence of any indication that the fund and real estate transfers were related to an agreement between the spouses or an obligation of Mr Perry, and the fact that there were regular payments made by Mr Perry to the First Plaintiff for ordinary funding purposes means that there is insufficient to justify drawing that inference:

(a). I accept that the transfer of the Recanati Street Property and the purchase in the First Plaintiff's name of the Pinkas Street Property, both of which took place at some point

after 1997, are consistent with Mr Perry's account and the existence of the agreement to which he referred in the Letter of Wishes and the 12 March Meeting Notes. However, the letter from Professor Gliksberg, dated 11 February 2019, does provide some independent support for the First Plaintiff's account that the transfer and purchase in her name had been done for tax planning purposes on Professor Gliksberg's advice, albeit that the weight to be given it has to be reduced because it does not confirm that the advice related to these properties and, as the First Defendant argued, it does not refer to and is not supported by any contemporaneous documentary evidence showing that there had been tax advice recommending transfers to the First Plaintiff.

(b). the First Plaintiff, as I have explained, admitted (in her 11 February 2019 witness statement) that she had received DM 500,000 from Mr Perry in 1998. But she denied any knowledge of or receiving any benefit from payments allegedly made to Codex:

(i). as regards the payment which the First Plaintiff admitted she had received, she denied that they had anything to do with a separation agreement. Her evidence was that the payment of DM 500,000 was paid into an account which she had formerly held with her mother (at Migros Bank) and the funds were not intended for her use and were only dealt with in accordance with Mr Perry's instructions. During her cross-examination, she was shown the written transcript of Mr Perry's evidence in other proceedings dated 18 September 2011 which indicated that two payments totalling DM 500,000 had been made via Hector to her Migros Bank account. The relevant passage in the transcript is as follows:

> *"Hector Co.*
>
> *In addition to the above groups, there was also Hector. Mr. Hecke established Hector in 1997.*
>
> *Hector's sole function in the group was to serve as a channel for transferring funds from the BGO group to the Medos group, and therefore, this company was not intended to keep funds – everything coming in from BGO would flow out to Medos. This meant that Hector's only justification for existence was the connection between BGO and Medos. Hector had no revenues or assets of its own.*
>
> *The first transferrals to Hector were made according to my instructions. And when I saw that this channel was working efficiently I considered Hector a part of the group, and presented it as such to Oehri. Therefore, from that moment on Oehri did not need my approval to make transfers from the BGO group to Hector.*
>
> *The only exception to this rule was in mid-1998. I wanted to transfer a certain sum of money to my wife out of Israel, and did not want to transfer it directly from the*

BGO group. I consulted with Hecke on the subject, and he said that he can solve the problem if I transfer an additional amount to Hector, and then he would see to paying the money to my wife. And indeed, the funds were transferred to Hector, and from there to my wife's account in Migros bank – account no. 16/799.111/6/01. Two such payments were made: one on 31.8.98 in the sum of DM 50,000, and another on 25.9.98 in the sum of DM 450,000. As stated, the two payments were made to the same account (and not as testified by Hecke that he made a payment to a different lady).

[underlining added]

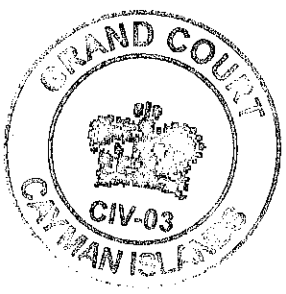
The First Plaintiff responded by saying that the sums paid to her Migros Bank account had been paid so that she and Mr Perry "*should have a few hundred thousand marks in case of need.*".

(ii). the First Plaintiff, in her 11 February 2019 witness statement acknowledged that she had been told by the Second Plaintiff about another payment of DM 500,000 to Codex but disclaimed any knowledge of Codex. The First Plaintiff's position was supported by the evidence of Mr Greenspoon. He gave evidence, as I have explained, that none of the funds paid to Codex were ever available to the First Plaintiff but were being used by Mr Perry to purchase artwork. The First Plaintiff, he said, was a mere conduit for that money and was never intended to benefit from it. The First Plaintiff's evidence that she knew nothing about Codex was undermined by Mr Greenspoon's evidence during his cross-examination that he and the First Plaintiff had, in fact, had a meeting with Codex in Vaduz in 1996 (or as the First Defendant claimed 1998) and this does suggest a link between the First Plaintiff and Codex.

(iii). Mr Oehri, as I have also explained, gave evidence that also sought to link Codex to the First Plaintiff. He believed that Codex was the service provider or trustee administering the Teios Foundation, which had been set up to hold the First Plaintiff's interest in various assets. He also considered that the payment to Codex had been made by Hector, on Mr Perry's instructions, for the First Plaintiff's benefit. But the basis for Mr Oehri's belief was weak. He said during his cross-examination, as I have noted, that his evidence was based on a review of all of the Hector documents including its bank accounts. But he had not retained or been able recently to review copies of the relevant documents, which he acknowledged had not been disclosed in these proceedings and had probably been destroyed many years ago (since Hector itself had been deleted or dissolved many years

ago). He was also unclear as to precisely when he had reviewed them or indeed in what currency the payments were made and when the payments to Codex to which he was referring took place (he said "*somewhere around 2002, 2003*" when asked by Mr Brownbill about when the First Defendant had been contacted by Codex to assist with making payments to the First Plaintiff). Furthermore, Mr Brownbill on the second day of his cross-examination of Mr Oehri: (i) noted that the charts produced by Mr Naeff to show what would happen to Mr Perry's assets after his death if the Letter of Wishes was implemented, showed that Hector had been owned by the Heritage Trust prior to Mr Perry's death and would remain controlled by the First Defendant thereafter; and (ii) produced documents showing that the shareholders of Hector as at 6 November were the First Defendant and Admintrust and that Hector had gone into liquidation in Liechtenstein on 12 November 2018. This Mr Brownbill submitted showed that Hector's records had been available to the First Defendant and should have been reviewed and discovered. Mr Oehri's account was wholly unreliable and flawed.

(iv). in my view Mr Oehri's evidence on these matters, for these reasons is not reliable. The evidence that payments had been made to and for the benefit of the First Plaintiff via Hector provided some support for the submission that payments routed through Hector might be for the benefit of the First Plaintiff. But that was wholly insufficient to show that the Codex payments were in fact for her benefit. In addition, the meeting in Vaduz, while raising questions over the credibility of the First Plaintiff's evidence, does not itself provide evidence that the payments in question were made for the First Plaintiff's benefit. And critically, Mr Oehri's evidence has nothing to say on the critical question of whether the payments in question were made to discharge Mr Perry's obligations under the alleged separation agreement, or indeed to discharge any obligation of Mr Perry's. It is noticeable, in my view, that Mr Oehri did not say in his written testimony that the payment he referred to was made to discharge an obligation let alone as being pursuant to a settlement agreement. Of course, he was under no obligation to provide such detail but he might have been expected to mention such a reason if the payment was for such a specific purpose.



(v). in view of these conclusions I do not need to deal in detail at this point with the Plaintiffs' criticisms of Mr Oehri's integrity and reliability. But I will explain the matters relied on by the Plaintiffs. These can be summarised as follows:

(A). the Plaintiffs relied on the fact that Mr Oehri has previously been severely criticised by the Israeli Court in the verdict in Mr Perry's criminal trial concerning evidence which he gave about the nature of his business relationship with Mr Perry and Mr Perry's ownership and control of entities formally administered by Mr Oehri (which the Plaintiffs submitted was a central part of the evidence Mr Oehri had given in these proceedings). Mr Justice Caspi repeatedly described Mr Oehri's evidence as "*mendacious*", stated that he had "*on many occasions, adopted a line of concealment, including with regard to the question of [Mr Perry's] control of the companies*", and found that Mr Oehri had "*lent a hand, so it turns out in actual practice, to acts of concealment and deception and was even ready to tell falsehoods for this purpose*".

(B). the Plaintiffs also claimed that significant evidence had emerged during the course of the trial (primarily from Mr Naeff's testimony) which implicated Mr Oehri in the manufacturing and backdating of documents for fraudulent purposes. The First Plaintiff had issued proceedings in the Delaware Court of Chancery against Dr Neupert and the BGO Foundation, one of Mr Perry's Liechtenstein Foundations managed by the First Defendant relating to the ownership of the shares in Côte D'Azur Estate Corporation. In a memorandum opinion delivered by the court shortly before the trial in these proceedings dealing with and dismissing the BGO Foundation's motion to dismiss for lack of personal jurisdiction, Laster VC made a number of seriously critical findings relating to the First Defendant, Dr Neupert, Mr Naeff and Mr Oehri. In particular, the Delaware court found that a power of attorney granted by the BGO Foundation had been backdated. Laster VC found that:

> *"[Mr] Naeff and [Dr] Neupert created the [power of attorney] ..... they prepared it in late September or October 2016, they backdated it to February 5, 2016. By doing so, [Mr] Naeff, [the First Defendant], and the [BGO] Foundation helped create a paper trail that would seem to validate [Dr] Neupert's Delaware-related acts..... I have taken into account [Mr] Naeff's pattern of making false statements in the contemporaneous documents, as well as multiple instances in which he offered less-than-credible testimony.*

(C). during his cross-examination in these proceedings Mr Naeff was shown a copy of the relevant power and confirmed that the signature on it was that of Mr Oehri (during his re-examination he said that he disagreed with the findings "*in general*", that there were many things he would do differently today but he did not act in bad faith).

(D). the Plaintiffs submitted that in these circumstances, the Court should be extremely cautious before relying on any disputed evidence of Mr Oehri or on any documents produced by him unless there was appropriate independent corroboration for such evidence. Mr Oehri's evidence on the alleged separation agreement relied on his assertion that the Teios Foundation had been established in 1998 for the First Plaintiff's benefit but the only documentary material that has ever been produced which refers to the name Teios was a set of draft by-laws disclosed by the First Defendant in these proceedings but which were never mentioned at any time before Mr Oehri's trial evidence was served in December 2018. In the context of Mr Oehri's past history of dishonest conduct and apparent willingness to participate in the manufacture and backdating of documents for dishonest purposes, it was particularly disturbing that the draft by-laws for the Teios Foundation (the name of which has not been identified on any other document disclosed in these proceedings) were apparently found at Mr Oehri's home address (one of only two documents relating to the Perry family that Mr Oehri had at home, as revealed for the first time in Mr Naeff's fifth affidavit dated 26 February 2019, which was only handed to the Plaintiffs' counsel shortly before Mr Oehri re-commenced his cross-examination on day seven of the trial). In circumstances where the alleged Teios Foundation was never mentioned by the First Defendant before Mr Oehri's trial affidavit was served in December 2018, and indeed the First Defendant's original pleaded case was that it had "*no direct knowledge*" of the "*factual issues*" raised by the Israeli Matrimonial Property Claim, the Plaintiffs had grave concerns as to the authenticity of that document. They submitted that in effect the Court was being asked to believe a man who repeatedly stated that he kept practically no written records of his involvement with Mr Perry's affairs whatsoever in the 1990s just so happened to have kept highly material documents such as the First

Defendant's full record of communications with FFW concerning the establishment of the Heritage Trust, or the draft trust deed given to him by FFW, at his home for no particular reason.

(c). in addition, there were documents prepared by Mr Perry, for his English solicitors Asserson, commenting on the testimony given by Mr Martin Hecke which it was said confirmed that one of the main purposes of Hector was to effect transfers to the First Plaintiff's account. The statements were dated 13 January 2004 and 26 February 2004. But they were in note form and of very limited assistance. Mr Perry's note of Mr Hecke's evidence regarding the goals for creating Hector merely states that one of the goals was to make transfers to the First Plaintiff.

257. Consideration also needs to be given to the testimony of the witnesses on the question of whether the First Plaintiff and Mr Perry entered into a separation agreement and the effect of the Letter of Wishes:

(a). as regards the First Plaintiff:

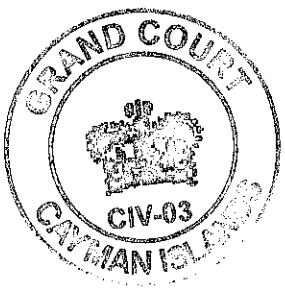
(i). the First Plaintiff is clear that she never entered into a binding separation agreement with Mr Perry or received any payments or asset transfers as part of such an agreement. She also asserted that she was aware – and the implication is always aware – of her matrimonial property rights under Israeli law and that all property acquired during her marriage was held jointly (see, for example, [28] of her trial affidavit).

(ii). she referred to the Letter of Wishes in her trial affidavit. She said that she "*did not understand*" it and "*was very surprised*" by what Mr Perry had said about their marital difficulties (I have quoted the relevant passage from paragraph 31 above). She denied that she and Mr Perry had agreed to divorce or that she had received the DM 1 million to which he had referred, or any other payment as part of a separation of assets. She also said (in paragraph 33) that "*After we resolved our differences in July 1998, we never discussed a matrimonial settlement again.*" This suggests that a marital settlement *was* discussed in the period before the marital problems were settled. This was confirmed in the First Plaintiff's oral evidence. She said that "*for a period of two weeks [after she found out about Mr Perry's affair] we did in fact speak about divorcing.*"

(iii). the First Plaintiff also noted that the Letter of Wishes had caused difficulties between her and the Second Plaintiff, who initially wished to see the arrangements set out in the Letter of Wishes implemented. The First Plaintiff felt that the Second Plaintiff and the First Defendant "*all favoured [Mr Perry's] trusts and therefore wanted me to give up my marital rights. I was expecting to receive property on my husband's death but I had received nothing and felt I was being deprived of my assets because they were being treated as held in the trusts....I therefore took separate legal advice from Mr Mendelsohn*" (paragraph 37).

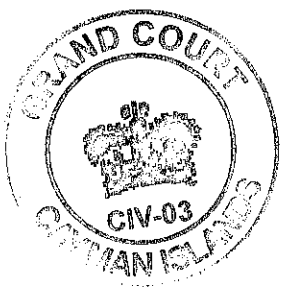
(iv). the First Plaintiff exhibited a letter dated 27 April 2016 from the First Defendant's Tel Aviv lawyers (Ze'ev Scharf) enclosing a draft settlement agreement. Ze'ev Scharf stated that they believed it to be in the best interests of the trusts that the agreement be signed; that the agreement contained a release and waiver by the First Plaintiff of all claims against the trusts and their assets and that the agreement was drafted in the spirit of and to fulfil the Letter of Wishes. The draft agreement confirmed the First Plaintiff's ownership of assets already registered in her name: the Pinkas Street Property, the Rekanati Street Property and the jewellery, fan and diamond collections. The South Street Property, Villa La Treille and Trump Tower apartments were to be held by the trust to be established for the First Plaintiff's benefit so that she could use them if and when she wished. Substantial amounts of cash were also to be transferred to the First Plaintiff and her trust. The draft agreement contained a general and wide-ranging release and waiver by the First Plaintiff of any claims to any other assets or against the other trusts or their assets. However, there is no specific mention, whether in the recitals or the operative part of the draft agreement, of the First Plaintiff having claims under the CPR.

(v). it was obviously in the First Plaintiff's interest to deny the existence of any separation agreement and for that reason her evidence needs to be treated with some caution. Furthermore, as I have already explained, she was not an impressive witness. She repeatedly gave the impression not only that she struggled to understand basic questions (she had difficulty at the beginning of her evidence in understanding what was being asked of her when she was invited to confirm her signatures on her affidavit in these proceedings), and the relevance and significance of the issues about which she was being questioned (she could not see



why the evidence given in the SOCA Proceedings could be of any relevance since "*they lost and we won*" and there had been a judgment in "*our favour*") and had a selective grasp of detail but also that she was prepared to be evasive when confronted with difficult questions and did not appreciate the seriousness of giving evidence in court. So she said that she was able to remember the details of the Migros Bank account she had held with her mother and the reasons for the payments to it by Mr Perry but was completely unable to remember anything about the evidence she gave in the SOCA Proceedings ("*I was not involved in any of the affidavits or statements of SOCA and I'm seeing [LP's Second SOCA Witness Statement for the first time ..... I don't remember a statement that I made in 2010...*"). She denied that she had any knowledge of the trusts until after Mr Perry's death (despite the references in her SOCA evidence to being a beneficiary of the Heritage Trust) and said that had she known about them she would have strenuously objected to the transfer of assets into trust. This was wholly inconsistent with her evidence that she "*believed in [Mr Perry] 100%*" and would sign whatever she was asked to sign and do whatever she was asked to do by him. She had clearly not bothered to read any of the relevant documentation before giving her evidence in these proceedings and obviously did not appreciate how damaging it was to her credibility as a serious and reliable witness to admit that she had been prepared to give detailed and fact specific evidence in the SOCA Proceedings, proceedings after all relating to criminal activity and very serious allegations against her husband, without bothering to read and check the statements that she was being asked to make.

(vi). I accept and take into account the fact that the First Plaintiff was cross-examined and had to give her evidence through an interpreter and that on occasions this was disruptive and impacted on her ability quickly to understand questions. I also accept that she was not a business-person and therefore it was clearly understandable that she did not have an understanding of business, let alone legal, issues. Wives in the First Plaintiff's position are not expected to have any business or financial expertise and may properly rely on their husband for guidance and advice. I also accept that the First Plaintiff's life has been dramatically damaged and affected by Mr Perry's death (which resulted in a sad and tragic loss for all his family) and that she feels seriously aggrieved at the conduct of the First Defendant and its directors/employees (particularly Dr Neupert) and that she has been forced



to fight for her rights. I also note that the First Plaintiff dealt with dignity and some restraint with Mr Brodie's personal and probing questions about her marital relations and family life. But the problem here is that the First Plaintiff failed to take her responsibilities as a witness in the SOCA Proceedings, and in these proceedings, 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.

(b). as regards the Second Plaintiff:

(i). in her trial affidavit, she said (at [33]) as follows:

> *"Neither of my parents ever issued divorce proceedings and they did not come to any kind of matrimonial arrangement or settlement. I see that my father states in [the Letter of Wishes] that they "agreed" to divorce each other. I can only imagine that he said this in order to try to avoid any disagreements between the family members after his death as to the division of property bearing in mind my mother's matrimonial rights. But it is quite clear from what he told me that they only ever discussed this in the broadest terms. I have no doubt that if there had been any kind of formal agreement my father would have put it in writing. Further, my father and I were incredibly close and he was in contact with me frequently during this difficult period and discussed it with me. If he had reached a formal agreement with my mother I have absolutely no doubt that he would have told me and I am certain that he would have consulted me about it before any agreement was made."*

(ii). but during her cross-examination she acknowledged that initially she regarded the account given by Mr Perry in the Letter of Wishes as correct – "*like the bible*". It was only after the First Plaintiff received advice from Dr Mendelson regarding her matrimonial property rights under Israeli law that she understood her "*mistake*" although she was unable to recall exactly when Dr Mendelson started advising her mother. Mr Fenwick showed the Second Plaintiff an email dated 14 September 2015 from the Second Plaintiff to Dr Neupert in which she confirmed that:

> *"My mother took one of the best lawyer in Israel.... They suppose to [sic] meet at the end of the month. Please let her consult just with him, otherwise she'll find a reason not to sign the contract."*

(iii). in her view the First Plaintiff had no understanding of and was not involved in Mr Perry's business or commercial matters. She did not and still struggles to

understand what a discretionary trust is. The First Plaintiff was prepared to leave business matters to Mr Perry and the Second Plaintiff – they "*were the ones who dealt with such matters.*" She was prepared to sign whatever documents she was asked to sign (including tax self-certification forms relating to the Damerino Trust). But the Second Plaintiff maintained that the First Plaintiff, even before receiving advice from Dr Mendelson, had the clear and firm belief that she was the joint owner of all Mr Perry's property and was entitled to half of the matrimonial property on death or divorce. Furthermore, had the First Plaintiff been asked about the settlement of the Share into the Lake Cauma Trust, she would not have agreed. The First Plaintiff would not have agreed to anything that she understood to deprive her of title to property or her rights. This view was consistent with the First Plaintiff's conduct that had been referred to in the Letter of Wishes. She did not give up her rights lightly. The Second Plaintiff acknowledged that she was aware of the settlement of the Share into the Lake Cauma Trust but did not see the need to inform her mother of what was being done. She said that she was not concealing anything from her mother but "*it was simply not the kind of thing[s] in which she would be engaged with me*" because the First Plaintiff had no knowledge of commercial matters and Mr Perry and the Second Plaintiff dealt with such matters without reference to her. She was not a part of the decisions on such matters. She denied that at the time of the transfer of the Share she and Mr Perry knew that the First Plaintiff, had she been asked, would have refused her consent. At the time Mr Perry and the Second Plaintiff never intended to deprive the First Plaintiff of her rights: "*I never believed ... that anything would arise in connection with deprivation of rights, but after the entire conflict showed itself, came up and my mother took an attorney to deal with her matters, and he explained to me what I should have known, there was no possibility of transferring property which included my mother's property to trusts without her permission and consent.*"

(iv). she also referred, in her trial affidavit (in [34] and [35]), to the settlement negotiations with the First Defendant and the Fifth Defendant during the latter half of 2015 and the early half of 2016 (needed as a result of the First Plaintiff's "*potential claim pursuant to Israel matrimonial law*") and said that nothing was ever agreed so that the First Plaintiff's matrimonial claim was never released.

(v). she was asked by Mr Fenwick about distributions which she had made to the First Plaintiff from the Catolac trust in February 2016, after Mr Perry's death, when the First Plaintiff received a distribution of less than 50% of the total funds distributed. The Second Plaintiff said that she did not discuss with her mother that funds were paid from a discretionary trust. As far as she was aware, her mother never knew that funds were held in or paid from discretionary trusts.

(vi). she was also asked about ownership of the yacht HiLilly. Mr Perry had transferred title of the yacht to the Second Plaintiff. However, the First Plaintiff wanted to own the yacht. There was no dispute as to ownership of the yacht but the First Plaintiff had designed it and been closely involved with it. The Second Plaintiff did not like the sea and thought that "*it was fair that she will have it*". She therefore transferred the shares in the company that owned the yacht to the First Plaintiff. This approach and understanding appears to accept that Mr Perry had the right and power to transfer assets free of the First Plaintiff's matrimonial property rights.

(vii). she was unclear whether the First Plaintiff's entitlement to 50% was a share of each asset or to the value of all assets (so that Mr Perry might own 100% of some assets and less than 50% of other assets).

(viii). the Second Plaintiff was clear and cogent and worked hard to overcome some initial difficulties with the translation process in an effort to ensure that what she was saying was properly translated and understood. Where the documents required it, she was candid for example about the fact that she changed her mind about the reliability of the Letter of Wishes. But her partisan attitude – it was clear that she felt passionately that she and her family had been the victims of gross misconduct by the First Defendant and Dr Neupert and that she was deeply affected by the history of acrimony caused by the long running family dispute, particularly as regards her sister - seriously weakened her credibility and meant that at times she could be evasive and occasionally combative. She frequently gave 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 case.

(c). as regards the Fifth Defendant:

(i). in her trial affidavit (at [80]), the Fifth Defendant stated that:

> *"In the late 1990s my parents negotiated a separation and decided to split my father's property in recognition of the fact that their marriage was effectively over. The property that Lilly inherited from her family was never part of the agreement. My father used to say to me from time to time that [the First Plaintiff] believed that there are "her assets" (i.e. all the assets she inherited from her parents) and "our assets" (i.e. all the assets my father earned during his lifetime). The fact that [the First Plaintiff] used to discriminate between what was hers and what was not suggests to me that she never considered my parents to have community of property. On the contrary, if they had divorced when I was a young girl, I am sure that she would have fought tooth and nail to keep 'her assets' away from my father because she did not want to indulge in any sharing or division."*
>
> [underlining added]

(ii). in her trial affidavit (at [88]), the Fifth Defendant had also stated that the matrimonial settlement had discharged to presumption of community of property.

(iii). her evidence in cross-examination was that her parents had "*separated their property*". She had been told by her father that there had been a conversation with the First Plaintiff. She had never seen a written or signed agreement. She appeared to have concluded that the discussion had resulted in an agreement in part because the report of the conversation led her to believe that an agreement had been reached ("*From my point of view, a conversation that has a bottom line, I would refer to it as an agreement*") and in part because of the Letter of Wishes. She was unable to recall precisely when she was told about this but believed that it was in the early 2000s during a conversation with Mr Perry at his office in Montefiore Street in Israel during one of his visits there, at which the Second Plaintiff was present, in which he also discussed the establishment of the Heritage Trust. During this conversation Mr Perry had said that he had transferred the Recanati Street Property to the First Plaintiff, that he had purchased the Pinkas Street Property in the First Plaintiff's name and that the First Plaintiff had insisted that she be given a flat that Mr Perry had purchased for the Fifth Defendant. The Fifth Defendant said that subsequently she learned that additional assets had been transferred to the First Plaintiff as part of the settlement. For example, when in 2008 the First Plaintiff had removed the jewellery collection from the safe at the property in London, Mr Perry had told the Fifth Defendant that the jewellery was part of the property he had given to the First Plaintiff.

(iv). the Fifth Defendant did not have and had not seen any notes or other record of the alleged matrimonial settlement. She noted that the Second Plaintiff had told her, after Mr Perry's death, that he had told the Second Plaintiff where to find documents that would cause the First Plaintiff "tremendous problems" if she refused to accept the arrangements contained in the Letter of Wishes but no such documents had been seen by the Fifth Defendant. She said the Second Plaintiff had taken Mr Perry's mobile phone and iPad and that she did not know what had happened to the documents in a locked cabinet that Mr Perry had owned.

(v). the Fifth Defendant had not referred to the marriage settlement in her earlier affidavit evidence in these proceedings because they had dealt with other issues and it had been unnecessary and inappropriate to deal with the substance of the Israeli Matrimonial Claim made by the First Plaintiff in any detail until her trial affidavit.

(vi). the Fifth Defendant stated in her trial affidavit that the First Plaintiff's claim that she only became aware of the transfer of the Share into the Lake Cauma Trust after Mr Perry's death was "*absurd*". The First Plaintiff was aware of the trusts because she was present in the house where she and Mr Perry resided during the period of his illness when there were numerous meetings with advisers including the First Defendant during which the trusts were discussed and the First Plaintiff "*made herself aware of what [Mr Perry] was planning to do*". The First Plaintiff had "*always been preoccupied with money and what she was due to receive on Mr Perry's death*". She was never too reticent to ask Mr Perry about his plans and Mr Perry had told the Fifth Defendant that the First Plaintiff "*was constantly asserting her claim to a division of his assets and expressing her desire to determine what the [Second Plaintiff] and [she] should receive.*" During her cross-examination, the Fifth Defendant said that she understood this to mean that the First Plaintiff was asking that Mr Perry divide his assets that were in and subject to the trusts again because she wanted more (she wanted to be able to control her children). According to the Fifth Defendant, the First Plaintiff had her rights to the property given to her under the marriage settlement and was a discretionary beneficiary of the trusts like the Second Plaintiff and the Fifth Defendant.

(vii). the Fifth Defendant gave her evidence in a cool, calm, measured and considered manner. She had formed a clear conviction in her own mind as to the existence of a separation agreement based on various conversations with her father and her view as to the First Plaintiff's conduct and history of wanting to protect her rights to, and prevent her children from acquiring, property which she regarded as hers. The Plaintiffs in their written closing submissions criticised the Fifth Defendant for delivering her evidence "*in an effected [sic] monotone and at an unnaturally slow pace, often giving unnecessarily lengthy answers which appeared to be designed to slow down the process and obfuscate the position*". This seems to me to be unfair. The Fifth Defendant's delivery seemed to reflect a desire to maintain a firm control over what she said and how she said it. It did though reinforce the impression of a rigid and predetermined story that the Fifth Defendant was concerned to follow and stick to. The Plaintiffs also criticised the Fifth Defendant for showing a callous disregard of her mother when answering questions about the First Plaintiff. There is no doubt that the dispute between the First Plaintiff, the Second Plaintiff and the Fifth Defendant remained raw and significantly affected their attitude towards, and evidence given in, these proceedings. It was also clear that the Fifth Defendant remained hostile to her mother in particular and that she saw these proceedings, at least to some extent, as involving a fight against, and an opportunity to thwart, her mother and sister.

(d). as regards Mr Oehri:

(i). in his trial affidavit Mr Oehri had given evidence concerning the relationship between the First Defendant and Mr Perry and, as I have explained, confirmed that Mr Perry had asked him to acquire a Liechtenstein foundation which would hold assets for the First Plaintiff's benefit – the Teios Foundation. He says (in [22]) that while he was not told about the "*specifics of the personal issues*" between the First Plaintiff and Mr Perry he did recall a conversation with Mr Perry in which he had said in German that "*he had to give [the First Plaintiff] part of his assets to "calm her down.*"" He said that although he could not remember the precise words used he recalled that Mr Perry had said in German "*words to the effect that [the First Plaintiff] has her assets and I have mine.*" He then went to say (in [23]) that "*I recall that some years later [Mr Perry] told [me] that as part of his agreement with [the First Plaintiff] [Mr Perry]also gave or promised to give [the First*

Plaintiff] real estate properties in Israel and that all in all she had received "enough" from him"".

(ii). Mr Oehri elaborated on this evidence during his cross-examination. He said that he particularly remembered the conversation in which Mr Perry had said that he had to give assets to the First Plaintiff to calm her down since he had only heard this expression once in his life and he thought the conversation must have taken place in 1998.

(iii). Mr Brownbill challenged Mr Oehri's evidence on these matters and put it to Mr Oehri that these conversations and the events referred to by Mr Oehri had never happened. He said that, if the events related by Mr Oehri had happened, Mr Perry was bound to have referred to the Teios Foundation when discussing the property given to the First Plaintiff but had not done so. Mr Oehri's response was that this was possible but since neither he nor the First Defendant had anything to do with the Teios Foundation, he was unable to comment further.

(iv). Mr Oehri's evidence regarding the existence of a separation agreement was anecdotal and without detail or documentary support. The fact that Mr Perry had said that he had decided to transfer some assets to the First Plaintiff to calm her down does not of itself necessarily imply that Mr Perry and the First Plaintiff had entered into a separation agreement with respect to all their matrimonial property. Mr Oehri's recollection that at some unspecified time Mr Perry had used words *to the effect that* he had given or would give the First Plaintiff the Israeli real estate and that she had received enough from him suggests that there were continuing discussions as to what the First Plaintiff was to receive and that, while Mr Perry considered that the First Plaintiff had received all she was entitled to, the First Plaintiff was pressing for more and disagreed. Furthermore, Mr Oehri's evidence related only to the views of Mr Perry and said nothing about the conduct or attitude of the other person supposed to be party to the separation agreement, namely the First Plaintiff,that confirmed that she regarded herself as or acted as though she was bound by or subject to a separation agreement. In my view, even leaving aside the serious issues as to Mr Oehri's credibility, his evidence is to be given very limited weight and does not constitute material support for the existence of a binding separation agreement.

(v). in addition, I must say that I found Mr Oehri's evidence to be of limited assistance. As I have already said, I accept that Mr Oehri was asked about matters that had taken place many years ago and that in view of his advancing years it is to be expected that his recollection would be limited and incomplete. Furthermore, he was giving his evidence through an interpreter. But even after taking these matters into account I found his evidence to be general and insufficiently detailed. The information he gave about the Teios Foundation was incomplete and out of date and it was clear that he had not bothered to check whether Hector was still managed by the First Defendant and whether further information and documents were available to support his account. He admitted repeatedly that he was not sure about the detail of the status of the relevant entities and payments.

(vi). the findings of the Israeli court in particular are obviously damaging to his credibility. Mr Justice Caspi formed a very unfavourable view of Mr Oehri. He said that:

> *"The impression I gained from this witness, who has accompanied [Mr Perry] for some twenty years, inter alia, in the management of money, including transfers from [the BGO Foundation] and the companies, was an extremely poor one. If I had thought that his testimony would be more convenient to him from his place of domicile and that therefore he would adhere to revealing the truth, this was not the case. The testimony was full of evasions and he also, on many occasions, adopted a line of concealment, including with regard to the question of [Mr Perry's] control of the companies.... In this he was even more extreme than [Mr Perry], who stated that Oehri knew, as distinct from Hecke, about his control of the companies ..... More than that, in the compass of a flagrant lie, Oehri dared – later on in his testimony – to contend adamantly that from what he had been told verbally by [Mr Perry], as also from what is written in documents, according to him, this does not indicate that [Mr Perry] is entitled to the profits and the fruits as ultimate beneficiary in the companies.*
>
> *One must not forget, at this stage even [Mr Perry] had already admitted the things. Such a cautious and mendacious approach reconciles with Oehri's fear of coming to Israel the nature of which he also did not disclose precisely in his testimony."*

(vii). these finding indicate a willingness to *"to tell falsehoods"* when giving evidence. Obviously, I do not treat these findings as binding on me or determinative of Mr Oehri's credibility in these proceedings. But I do take them to support my own reservations about the candour and completeness of Mr Oehri's evidence and to justify adopting a cautious approach to reliance on his disputed evidence and to seek independent corroboration for such evidence before giving it significant weight.

(e). as regards Mr Greenspoon:

(i). while he did not address the separation agreement issue in his trial affidavit or during his cross-examination, Mr Greenspoon stated in paragraph 3 of his witness statement dated 11 February 2018, filed for the purpose of interlocutory applications, that Mr Perry had never told him about a separation agreement ("*I can also confirm that at no point did [Mr Perry] ever suggest that he and [the First Plaintiff] had agreed to have separate property or that the Israeli properties were to be transferred to [the First Plaintiff] as part of a marital agreement.*").

(ii). I found Mr Greenspoon generally to be a credible and reliable witness although it was clear that he was concerned to present his evidence in a manner that was favourable to the Plaintiffs' case and to respect Mr Perry's reputation and memory. However, I accept that he was giving an honest account but take the view that his evidence is of limited weight since he is unable to say that the issue of a separation agreement was ever discussed with, or the existence of such an agreement denied by, Mr Perry.

258. In order to decide whether there was a binding separation agreement between the First Plaintiff and Mr Perry it is necessary to take into account and weigh all the evidence. Doing so, taking into account the points I have already made about when reviewing the documentary and written and oral witness testimony, and on balance, I am not satisfied that there is sufficient evidence of there being such an agreement:

(a). the Letter of Wishes established that Mr Perry believed that there had been an agreement with the First Plaintiff on the terms (the clear and detailed terms) set out therein. I reject the Plaintiffs' explanation of why Mr Perry referred to a separation agreement in the Letter of Wishes. It is strong evidence of there having been an agreement but it is not definitive. In acknowledging that there were (some) disagreements with the First Plaintiff on the critical issue as to whether they still remained subject to the CPR (as to whether there were marital properties), the Letter of Wishes indicates that Mr Perry knew that there was a doubt and dispute as to whether the First Plaintiff had actually assented and agreed to his plan and proposal. The Letter of Wishes raises a material doubt as to whether the First Plaintiff actually agreed, in a formal and binding manner, to Mr Perry's

plan and proposal. Other persuasive evidence on this issue is needed to establish that the First Plaintiff did in fact give her assent to be bound.

(b). in my view there is, on balance, insufficient evidence to show that the First Plaintiff entered into a separation agreement with Mr Perry.

(c). the First Plaintiff's evidence in the SOCA Proceedings is, if her attempts to disown it are rejected, consistent with her having given up pursuant to an agreement her CPR rights in respect of all Mr Perry's assets (other than the assets she identified as her property or as joint property) and is to be treated as corroboration for Mr Perry's view that there had been a separation agreement. However, even if the First Plaintiff's attempts to disown it are rejected, that evidence only shows that the First Plaintiff accepted that she did not have rights over Mr Perry's other assets but does not establish that this was because of a separation agreement. It is consistent with her believing that she had no rights for other reasons.

(d). on the face of the documents, the evidence filed by the First Plaintiff in the SOCA Proceedings demonstrates that the First Plaintiff believed and accepted at the time she swore the witness statements in the SOCA Proceedings that she had no joint ownership rights in respect of any of the other assets she failed to mention, including the Share (the Share was, as I have noted, registered in Mr Perry's name at the time of the witness statements). Even if she was unaware of the identity of the, and precisely what, other assets Mr Perry owned which would be subject to her matrimonial property rights (and her evidence was that she was not aware of the existence of the Share), she was aware of, and must have appreciated that there would be, other assets which were subject to her rights and that her claims needed to be mentioned.

(e). the First Plaintiff does not argue that her failure to mention her matrimonial property rights over these other assets was ignorance of her rights. The First Plaintiff's evidence is that she was (always) aware of her matrimonial property rights under Israeli law.

(f). so is the First Plaintiff's explanation and excuse to be believed? She now disclaims any responsibility for her evidence in the SOCA Proceedings and says that it cannot be used to show her true state of mind and position as she never paid any attention to the contents and statements contained in the witness statements and affidavits. She says that she

simply signed whatever documents were put in front of her without paying any attention to their content. She says that this was because she trusted and was asked to give the evidence (and would do whatever she was asked to do) by Mr Perry.

(g). I do not accept that the First Plaintiff paid *no* attention to the contents of her evidence in the SOCA Proceedings. This proposition is inconsistent with the documentary evidence in these proceedings. That evidence indicates that the First Plaintiff did receive legal advice (and active advice involving at least one meeting with Asserson) on her witness statements (summarised above – see for example the emails in March 2010 from Ms Johnson of Asserson) and in the circumstances I infer that she received proper advice that would have involved an explanation of the reason for and purpose of the witness statements, the questions she was being asked to answer, the need to consider carefully and if necessary take advice on the answers to be given, the need to make proper enquiries before answering and also the First Plaintiff's duties and responsibilities.

(h). however, there is nothing in the evidence which clearly contradicts the First Plaintiff's account. She may have received proper and detailed advice and decided nonetheless to do what she believed Mr Perry required her to do. On balance, I accept this account. The evidence taken as a whole shows or at least strongly suggests that the First Plaintiff signed documents which made no mention of her rights because that is what Mr Perry wanted and because she accepted that his decision in relation to such matters was to be followed. He presumably wanted that because he believed that there had been a separation agreement. The First Plaintiff did not demur. The evidence shows that she was aware (or is to be taken to have been aware) of what she was being asked to do in the SOCA Proceedings witness statements. Nonetheless, she just signed the witness statements because she regarded the decision as to what should be stated in the SOCA evidence as being one for Mr Perry, which she would follow without question.

(i) I am prepared to accept the First Plaintiff's evidence that she regarded herself as being bound to do as Mr Perry directed and by his decisions and actions relating at least to assets connected with the businesses he managed. She was prepared to do anything when instructed or requested by Mr Perry and would assent to and follow his decisions in relation to matters connected with his business affairs, which the SOCA litigation was. It might have been different when it came to purely domestic matters and property but in relation to business matters she was completely compliant and in his hands. However, as

I have said, it still does not follow from these matters that her conduct can be treated as evidence of her having agreed to the alleged separation agreement.

(i). for the reasons I have given, I do not regard the evidence of the transfers of real estate and funds to the First Plaintiff as sufficient to establish or lend material support to the argument that the First Plaintiff was a party to a binding separation agreement.

(j). and, once again, for the reasons I have given, I do not regard the witness testimony as being of significant weight and sufficient to establish or lend material support to the argument that the First Plaintiff was a party to a binding separation agreement. Each of the parties had a strong self interest in presenting the evidence regarding the existence or absence of a separation agreement in the way that they did. In the absence of any contemporary documents to corroborate what they said in evidence, and in light of the other issues I have identified above, their accounts in my view are to be given limited weight.

(k). as I have said, there is no documentary evidence that refers to statements made by the First Plaintiff or documents confirming that she had agreed to a separation agreement. Importantly there are also no contemporary documents referring to discussions about a separation agreement let alone documents that record even in outline or draft what the terms might be. In view of the importance to both parties of their rights to matrimonial property, and to the First Plaintiff in particular, I find it intrinsically unlikely that there could have been a binding agreement without it being reduced to writing in some shape or form. The context of the significance and importance of the subject matter of the alleged agreement means in my view that the Court should be cautious and slow to infer the existence of an agreement, save where the evidence clearly demonstrates that both parties to the agreement reached a consensus and intended to be bound. As I have explained the evidence in this case does not meet that standard/test.

(l). in my view, it is likely that there was a discussion of a divorce and the terms of the divorce including the division of matrimonial property. It appears likely that the discussion went into some detail and that a plan for asset separation, along the lines referred to by Mr Perry, was developed at least by Mr Perry and discussed to some extent. But since the crisis in the marriage was resolved and relations returned to some degree of normality there was no need to have and in the end there was no formal and

binding agreement. Even though Mr Perry took the view that his plan and approach would be followed, it was not necessary to test whether the First Plaintiff formally agreed and consented to take the further step of confirming his understanding in a formal and binding agreement. Mr Perry was able to carry on as normal and remained in control of the family assets as paterfamilias and decision maker.

The Consent Point

259. The Consent Point involves the First Defendant relying on the conduct of the First Plaintiff to establish either her express or implied consent to the transfer of the Share. For the reasons set out below, I prefer Professor Shifman's view of the law on this issue and accept the First Defendant's argument that the First Plaintiff is to be treated as having given her consent to Mr Perry's transfers of assets into the family trusts including the transfer of the Share.

260. There was a good deal of discussion in the expert reports (and during cross-examination) about waiver and estoppel (which I discuss further below) but little about unilateral consent. Unilateral consent was discussed as a form of waiver – the giving up of the right to object to a transaction or the giving up of rights over the property transferred (to my mind waiver is different from consent - waiver involves giving up rights that have arisen while consent means advance approval that prevents rights arising).

261. In my view, the judgment in *R.C. v A.C.* (a decision handed down on 27 March 2018) makes it clear that: (i) a spouse may lose their interest in and claim to a property transferred by the titled spouse where they give their consent; and (ii) such consent can be proved by evidence without the need for any particular formality. However, there needs to be "*weighty evidence*" of "*the clear, unequivocal consent of*" the spouse concerned. In the case, R (who could not read or write) was the wife and A was the husband. A established a carpentry workshop, which the couple's children joined over the years. The business of the carpentry workshop was eventually conducted by means of two companies. Upon the establishment of each of the companies, 99% of the shares were registered in the name of A, and 1% of the shares in the name of R. A subsequently transferred some of his shares in the two companies to, and entered into a gift agreement with, two of the couple's children. Three months after the gift agreement, R issued proceedings seeking to challenge the transfer. She claimed that in recent years the two children had begun to stir up a dispute among the family members, while persuading A to transfer the company shares to them, and thus depriving R of her part of the assets. The District Court

upheld the trial court's decision that R was the owner of 50% of the shares in the two companies by virtue of the CPR and that the transfer of shares without consideration to the children should be set aside. However, the District Court reversed the decision of the trial court to give R a right in specie to half of the shares and remanded the case back to the trial court to decide whether specifically to grant R an interest in the shares or to grant her their monetary value.

262. Judge Levin said as follows:

> *"12. The trial court rejected the claim that R agreed to transfer her rights in the companies to the son and the daughter. The court was hard-pressed to infer from A's cross-examination that A had obtained R's prior consent to transfer the shares. The court also expressed its surprise that A's account, according to which he told R that he was transferring the shares to the son and the daughter, was not mentioned in his answers to the complaint, and was first raised only under cross-examination. The court's impression from A's testimony was that he believed that R's account in regard to the shares should not be accepted.*
>
> *The trial court noted that nothing could be inferred in regard to R's consent based solely on the fact that the son was not examined on his affidavit. That was the case inasmuch as A did not himself testify that he consulted with R and obtained her prior consent, while the son did not testify to positive, first-hand knowledge of the actual granting of that consent.*
>
> .....
>
> *14. The court also rejected the argument that R was estopped from arguing against the share transfer when she placed her complete trust in her husband, and when, according to his account, the transfer was made solely for economic motives. It was held that the primary motive for the transfer of the shares was the family dispute, and not the company's financial situation. The court further found that even if there were an economic consideration, "it is doubtful that it could validate that act, when its significance is the absolute dispossession of the wife from every right in those companies. It would have been proper to obtain her consent for such a far-reaching step, whether or not she had granted her a priori consent in those articles of association that were signed thirty years ago, or at least to inform her of this result" (para. 31 of the judgment).*
>
> .....
>
> *38. Of course, the community property rule does not deny the spouses' freedom to stipulate as to the property regime that will apply to them (the Shalem case, ibid., para. 10). The spouses may, by consent, establish a different property regime, or remove certain assets from the realm of community property. But a spouse who seeks to persuade the court as to consent to stipulate upon the community property rule must show weighty evidence. The community property presumption is a principled default based upon a social conception of the institution of marriage. One who seeks to deviate therefrom, is obliged to do so with the clear, unequivocal consent of his spouse.*
>
> .....
>
> *42. I also find no justification for intervening in the trial court's finding that A did not obtain R's consent for the transfer of the shares prior to the agreement with the son and the daughter. This is a finding of fact of the trial court, based upon its direct impression gained from the testimony of A and R. In addition to the impression itself, I join in the trial court's amazement that A's account that he obtained R's consent did not find its way into*

either the original answer or into the amended answer, and was first raised only upon cross examination"

[underlining added]

263. This appears to me to be a clear, authoritative and recent statement of the applicable Israeli law. Judge Levin accepted that a spouse could, in a case involving a share transfer by the titled spouse, consent to the removal of an asset from the CPR. He accepted that consent could be established by oral evidence of the parties and upheld the trial judge's fact-finding based on witness testimony. There is, in his summary of the trial judge's analysis and approach, and in his own review of the position, no suggestion that consent had to be in writing or satisfy the requirements of the PRL relating to a "*property agreement*". A decision as to whether or not consent had been given was to be based on an assessment of all the facts as presented in evidence. But there must be "*weighty*" evidence of consent and "*a spouse who seeks .... to deviate [from the CPR]... is obliged to do so with the clear, unequivocal consent of his spouse.*"

264. During her cross-examination, Professor Halperin-Kaddari accepted that consent could be implied. She said as follows:

"QUESTION	*Do you agree that consent can, where writing is not required, be implied by conduct?*
ANSWER	*In theory, consent can be implied, depending on the weight of the evidence. However, consent must require knowledge. So to prove consent by conduct, one must obviously first cross the threshold of knowledge and awareness."*

265. Accordingly, it is permissible and necessary for the Court to decide whether based on an assessment of all the facts as presented in evidence the First Plaintiff consented either to Mr Perry having the right and power to settle any assets including the Share into the family trusts or specifically to the transfer of the Share to the First Defendant. In my view, the evidence, in particular the evidence of the First Defendant herself, establishes that she did consent to Mr Perry's dealings, and 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 the First Plaintiff's domestic affairs (such as the properties in Israel which she intended to inhabit and personal items such as her collections of jewellery and fans). I consider that the relevant evidential threshold is satisfied in the present case.

266. I have already discussed the First Plaintiff's evidence in detail, in particular her evidence in relation to the evidence she filed in the SOCA Proceedings. I have explained that in my view her evidence in these proceedings shows at least that the First Plaintiff regarded herself as required (bound) to follow Mr Perry's decisions with respect to their matrimonial property (at

least their matrimonial property other than the houses she occupied or her personal chattels). The First Plaintiff accepted that Mr Perry was in complete control of all matters relating to their financial affairs and had unfettered power and authority to act as he saw fit. She would accept whatever decision he made (I have said that the evidence shows that the First Plaintiff had abdicated all responsibility for exercising any oversight of Mr Perry's activities). In such circumstances, it seems to me to follow that the First Plaintiff is to be treated as authorising and consenting to Mr Perry's dealings with these assets. Having given him such consent and authority, she cannot now seek to set aside or assert her claims against the First Defendant.

267. In my view, the facts and decision (result) in *R.C. v A.C* are clearly distinguishable. I note and take into account the fact that the court rejected the argument that R was to be taken to have represented that she would not object to the share transfer *merely* because she had placed complete trust and confidence in A ("*The court also rejected the argument that R was estopped from arguing against the share transfer when she placed her complete trust in her husband...*"). The same approach should be applied to the question of consent. The existence of a relationship in which a wife (or any spouse) places her trust and confidence in her husband (or other spouse) is not sufficient by itself, and does not on its own, provide sufficient evidence of the wife's consent to asset transfers made by the husband. But in my view, based on Professor Shifman's evidence and the Israeli authorities cited to me, consent can be proved where there is sufficient ("*weighty*") additional evidence to show that the wife had the requisite knowledge that her husband was making assets transfers of the kind to which objection is subsequently made and had authorised him to make, or accepted that he was entitled to make, and assented to his making, such asset transfers.

268. In the present case, the evidence (in particular the evidence relied on by the First Defendant) shows that the First Plaintiff 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. She knew of the existence and purpose of a number of the trusts, that she was a beneficiary of a number of the trusts, she knew the identity of, and had some contact with, the trustees and that she was able to obtain and did from time to time receive funds from the trustees. The First Plaintiff, on her own evidence, as I have explained, acknowledged that in these circumstances she would follow Mr Perry's directions and 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). In my view the Share was such an asset. I discuss below the question of whether the Share is to be treated as a business asset for the purpose of the operation of the CPR. But for present purposes, the question is whether the consent to dealings for the purpose of tax and succession planning which I consider the First Plaintiff to have given extends to the Share. In my view it did. It was one of the assets, and the type of asset, that the First Plaintiff was aware would be part of the tax and succession planning arrangements conducted and controlled by Mr Perry.

269. The First Plaintiff did not trouble herself with the details of the tax and succession planning arrangements and the trusts created pursuant thereto and admittedly did not understand the technicalities, particularly the legal technicalities and business complexities involved in establishing and operating discretionary trusts. But in my view the First Plaintiff was well aware that Mr Perry was placing family assets into trust for these purposes. Furthermore, she assented to him doing so and regarded him as authorised to do so. Her evidence on this could not have been clearer. The First Plaintiff is to be taken to have understood, based on what she knew, that assets were being put under the management of third parties – to whom she had to apply to obtain funds – and that there were a series of complex legal arrangements put in place to regulate how these assets were dealt with. She is to be taken to have given her consent to Mr Perry's dealings with the assets based on her admission and acknowledgement that she accepted that Mr Perry had unfettered control of all decision making in relation to financial matters and arrangements relating to tax and succession planning.

270. It is likely in my view that the First Plaintiff relied on receiving, as a trust beneficiary and through the transfers to her of particular assets that she regarded as important and of personal significance (in particular the real estate in Israel and the jewellery and fan collections), her share of the matrimonial property. But the clear ability of Mr Perry to deal with the family assets up to and after the Letter of Wishes strongly suggests that there was a continuing dialogue and debate (perhaps argument is a more accurate term) over how the trust assets would ultimately be distributed among the First Plaintiff, the Second Plaintiff and the Fifth Defendant. But there was no dispute over Mr Perry's authority and ability to transfer assets into the trusts.

The Business Asset Point

271. Once again, I found the recent judgment of Justice Levin in *R.C. v A.C.* to be helpful. Judge Levin said as follows:

> *"45. ……The question of when joint ownership of business assets crystallises is complex. It bears serious consequences for the conducting of business and for third parties.*
>
> *The Supreme Court addressed this issue in the Shalem case. It was emphasised there that the main effect of the community property rule is at the time of the dissolution of the spousal relationship. It was not intended to be applied on a daily basis, as long as the marriage is intact and there is trust and cooperation between the spouses (para. 11 of the judgment). The Shalem case adopted an approach that distinguishes between assets of a purely family character, most particularly the family residence, and other assets. It was held that in regard to assets that are not of a pure family character, joint ownership crystallizes on a "critical date" in the marriage. President (Emeritus) A. Barak wrote [para. 28]:*
>
> > *"Unusual economic events, such as the "liquidation" of the assets of one of the parties, an unusual economic action in breach of the duty of faith to the other spouse or one of the spouses being declared bankrupt may also constitute a "critical date." The "critical date" needs to be determined on a case by case basis, according to its circumstances, and the aforesaid are merely examples of possible situations of "critical dates". The joint ownership of the other assets crystallises on the "critical date". Until the "critical date", the joint ownership rule admittedly "hovers" over all of the rights and liabilities, like a kind of floating charge, but it only crystallizes on the "critical date"."*
>
> *46. In the present case, the transfer of the shares to the son and the daughter as a gift cannot be considered as an act in the normal course of business. It is a dramatic event in two aspects:*
>
> *In one aspect – the transfer of the entirety of the shares constitutes a "liquidation" of A's business. It removes the primary asset, nurtured over decades that served as the spouses' main source of income, from the spousal property. It removes a primary resource from the framework of community property.*
>
> *In the second aspect – the transfer of the shares is a dramatic event because it alters the situation that had existed for decades, in which all of the couple's children were involved in the business. Transferring the shares to the son and the daughter alone expresses a clear preference for two of the children over the other children. It should be noted that in R's testimony, her desire that all the children take part in the family concern is clear (see, e.g., p. 29, line 20, of the transcript of Feb. 23, 2017).*
>
> *47. Even if the decision to transfer the shares was a business decision, we are concerned with an unusual business action that can in no way be viewed as part of the normal course of business. It certainly cannot be viewed as the normal, day-to-day management of the assets.*
>
> *R indeed relied upon A's discretion and did not intervene in the management of the business. A also managed the companies without the involvement of R, and that was acceptable to her (see, e.g. p. 28, line 22, of the transcript).*
>
> *However, A was free to act as long as current business activity was concerned. That freedom of action does not include dispossessing R of her rights. There is no justification for subjecting R to the exceptional act performed by A, unilaterally, by virtue of the authorisation she granted him for the current operation of the business……*

> *The unusual act performed by A in breach of the balance between the parties constitutes, in my opinion, a "critical date" that crystallizes the spousal joint ownership. The transfer of the shares by gift to the son and the daughter has significant consequences of both an economic and a family nature. The trial court, therefore, correctly held that the transfer of the shares had to be made by a mutual decision."*
>
> [underlining added]

272. Judge Levin notes the distinction drawn in *Shalem* between assets "*of a purely family character, most particularly the family residence, and other assets*" and President Barak's statement in *Shalem* that the critical date determination must be made on a case by case basis. In *R.C. v A.C.* the value of the business had accrued over the entire course of the couple's lives. The trial judge and Judge Levin concluded that the husband (A) had only been authorised by R to effect asset transfers in the ordinary course of business (R had relied on A's discretion and had not intervened in the management of the business). The primary motive for the transfer of the shares was the family dispute, and not the company's financial situation (see paragraph 14 of the judgement). The share transfer was therefore outside the authority and beyond the powers given to A. It was an unusual act that was in breach of the balance between the parties, with significant adverse consequences of both a financial and family nature.

273. I have carefully considered the judgments of President Barak in *Shalem*, Judge Levin in *R.C. v A.C.*, the evidence of Professor Shifman and Professor Halperin-Kaddari and the authorities to which they refer. It appears that the precise juridical nature of rights arising under the CPR and the effect and operation of those rights with respect to assets that are not assets of a family character gives rise to a number of complex and controversial issues of Israeli law. But in my view, the following points can be treated as settled and good law for the purpose of these proceedings:

(a). the underlying premise of the analysis of the spouses' rights and obligations is that a joint ownership *agreement* exists between the spouses. The law seeks to give effect to that agreement in accordance with the parties presumed intentions and the strong policy objectives which govern the application of the CPR.

(b). there is a difference of treatment between assets of a purely family character (this was initially President Barak's term which is also used by Justice Levin although President Barak also refers to purely family assets - see *Shalem* at [24]), most particularly the family residence, and other assets.

(c). as regards assets that are of a purely family character, each spouse acquires an immediate and vested joint ownership interest in the relevant assets. The relevant asset can only be disposed of on the basis of mutual consent. Such rights are proprietary in nature and capable of affecting third parties to whom matrimonial assets are transferred.

(d). as regards assets that are not of a purely family character, joint ownership rights under the CPR crystallise on a "critical date" in the marriage.

(e). until the "critical date", the joint ownership rights "*hover*" over all of the matrimonial assets (and the liabilities connected to them). These rights constitute a deferred joint ownership interest. President Barak used the floating charge analogy. I accept that this analogy has not been universally accepted; that by reason of being an analogy President Barak is not suggesting that the a deferred joint ownership interest under the CPR – which arises in a family law context - operates in precisely the same manner as a floating charge – which operates in a commercial law context - and that it would be wrong to assume, without further expert evidence, that the Israeli floating charge is precisely the same as the Cayman Islands floating charge. Nonetheless, it is possible to use the analogy to identify the basic features and effect of the deferred joint ownership interest (under President Barak's intermediate approach).

(f). the spouse holding title has authority to manage and deal with and potentially to dispose of the assets that are not of a purely family character pending the occurrence of a critical event. He (or she) is subject to a duty of good faith to the other spouse.

(g). the critical event concept is designed to identify the point at which that management power is treated as having terminated. President Barak refers to this as being the death of one of the spouses or the "*date on which the marriage faces a real danger to its continuation because of a serious crisis between the spouses.*" He says that it needs to be determined on a case by case basis, by which I take him to mean that the identification of a critical event involves 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. President Barak gives as an example *unusual* economic events such as the liquidation of the assets of one of the parties, bankruptcy or "*an unusual economic action in breach of the duty of good faith.*"

(h). in *R.C. v A.C* Judge Levin assessed whether the share transfer gave rise to a critical event by reference to:

(i). the extent to which the transfer could be treated as "*unusual*" and beyond the scope of A's authority to manage the family business ("*R indeed relied upon A's discretion and did not intervene in the management of the business. A also managed the companies without the involvement of R, and that was acceptable to her. However, A was free to act as long as current business activity was concerned. That freedom of action does not include dispossessing R of her rights. There is no justification for subjecting R to the exceptional act performed by A, unilaterally, by virtue of the authorisation she granted him for the current operation of the business..... ").*

(ii). the effect and impact of the transfer on the position of R.

(i). the shares transferred were shares in the critical family business which was "*the primary [family] asset, nurtured over decades that served as the spouses' main source of income, from the spousal property*". It appears that the court concluded that in these circumstances and on the facts the only authority which A was to be inferred and treated as having was to operate the business and allow the business to trade in the ordinary course.

(j). the share transfer was a critical event because the gift could not be treated "*as an act in the normal course of business*". It was a liquidation of a substantial proportion of A's assets and removed "*a primary resource from the framework of community property*" and altered the long-standing status quo relating to the family's involvement in the family business (an issue which was closely connected with important family-related concerns).

274. The reason for treating the asset as being of a purely family character is to require the wife's consent to any disposal or dealing. It seems to me that President Barak regarded the characterisation of an asset as being of a purely family character as involving an assessment, in the context of the marriage in question, of the importance of the asset to the marriage and the

extent to which it was anticipated that the husband would have, and need to have, sole management powers of the assets in question.

275. President Barak referred to assets of a purely family character as being the spouses' residential apartment and said that it was "*possible that a similar rule should apply to the other main assets of the spouses which have significant economic and emotional ramifications on the marriage and on each spouse*" (although the issue did not need to be decided in *Shalem*). This suggests that it must be an asset of such a type that it is important or central to the conduct of ordinary family life or otherwise a significant part of the family's wealth.

276. In addition, President Barak indicates that account must be taken of the need to protect commercial efficiency, the autonomy of the spouses and third parties. He said that the intermediate 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"*

277. Accordingly, I do not accept Professor Shifman's narrow view of what is meant by and can be treated as be an asset of a purely family character. As I have noted Professor Shifman said, when rejecting Professor Halperin-Kaddari's evidence (that "*it's not just the family home [that is] to be included in what [President Barak] refers to as family assets; he includes all of these other investment-like assets as well*") that family assets are defined in *Shalem* as including the "*residential apartment, furniture, household chattels and the family car*". That view seems to me to fail to reflect President Barak's nuanced approach that 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*"; (b) the spouses (reasonably) expected would be subject to joint management (so that both spouses' consent was required for all disposals and dealings); 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.

278. One of the reasons given by President Barak for rejecting the first approach, which involves both spouses having to consent to every disposition of any matrimonial property, was that it weakened the separate identity of the spouses by requiring joint management of all common

property and could undermine commercial efficiency and harm third parties. Assets which are connected with the husband's business (where he is "*active in the business world*") and which are, having regard to their nature, likely to need to be transferred or dealt with by him for the purpose of conducting that business should generally be subject to his sole and not joint management.

279. In the present case it seems to me that the Share should not be treated as an asset of a purely family character. This is because the Share 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 and because 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.

280. 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. It was closely connected with and part of his business activities and it could be expected that it would be necessary to transfer or deal with the Share for reasons connected with the business. It was not simply a passive family investment.

281. It will be apparent that I therefore do not accept Professor Halperin-Kaddari's opinion that because the Share "*is a share in a holding company which ... was never traded.... it cannot be described as a business asset in the sense which [President] Barak was considering. Consequently, the rationale of allowing for smooth conduct of business for the titled spouse, which was at the basis of [President] Barak's deferred proprietary rights theory does not apply here at all*".

282. The question therefore arises as to whether the transfer of the Share to the First Defendant and the settlement of the Share on the Lake Cauma Trust constituted a critical event such that Mr Perry's power to dispose of it was terminated and the First Plaintiff's interest crystallised so as to be binding on the First Defendant.

283. As I have explained, 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*". It is (according to President Barak) an "*event that significantly endangers the*

relationship between the spouses". Deciding whether a critical event has occurred involves a fact specific and fact 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.

284. President Barak gives as an example *unusual* economic events such as the liquidation of the assets of one of the parties, bankruptcy or "*an unusual economic action in breach of the duty of good faith*".

285. In this marriage, as I have held, 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. Mr Perry was involved in extensive tax and succession planning transactions and asset transfers and it seems to me to be clear that while the First Plaintiff did not concern herself with the details she was aware of the existence of these activities and of their (broad) purpose. She was content to allow Mr Perry, and to give him permission, to conduct these activities and transactions in relation to matrimonial assets connected with his businesses but excluding a limited number of real estate assets and personal property that were important (family assets) to her. In this context, it seems to me that the transfer of assets into family trusts established by Mr Perry pursuant to these activities and for these purposes did not constitute a critical event or result in there being a critical event so as to terminate Mr Perry's authority and power to transfer assets (including the Share). The transfer of these assets (including the Share) do not come within the letter or spirit of the analysis of a critical event set out by President Barak. These transfers did not result in "*the marriage [facing] a real danger to its continuation because of a serious crisis between the spouses*" or constitute an "*event that significantly [endangered] the relationship between*" Mr Perry and the First Plaintiff. These transfers were not, and did not result in, a breach by Mr Perry of his duty of good faith. I do not accept that, even assuming that she did not know about it at the time, had she been asked directly whether she gave her express consent to the transfer of the Share into the Lake Cauma Trust, and told of its value, the First Plaintiff would have refused. This seems to be entirely inconsistent with the evidence (importantly including her own). Nor does this approach seem to me to be inconsistent with the policy objective of giving proper protection to wives. To treat the transfer of the Share into the Lake Cauma Trust as a critical event and to allow the First Plaintiff to assert her rights against the First Defendant (and the beneficiaries of the trust) would, in my

view, fly in the face of the reality of the relationship between Mr Perry and the First Plaintiff and their mutual understanding as to how the matrimonial assets were to be managed and dealt with.

Estoppel Point

286. In view of my conclusions on the Consent Point and the Business Asset Point it is not necessary for me to decide the Estoppel Point. I will, however, briefly comment on the expert evidence and outline my views on this issue.

287. In the Supreme Court case of *BAM* (5142/10), Justice Rubenstein said as follows (the quotation is taken from a translation, in summary form, of the decision prepared for these proceedings that is not always clear and easy to understand):

> *"Estoppel of the claim for executed financial agreement*
>
> *g. Another reason which the Family Court addressed (the third reason) is based on the fact that the parties acted in accordance with the agreement, and this reason too is anchored in the ruling of this court*
>
> *"in all what considers a financial agreement which was not approved but which the parties have followed, there is a case law doctrine that grants it practical validity by virtue the principles of bona fides, estoppel and prevention (family court appeal 7734/08 Anonymous vs. Anonymous……).*
>
> *This doctrine was recognized already in the middle on the eighties (see civil appeal 151/85 Roden vs. Roden, verdict 39 (3) (186)) and it is still effective today. In this case, there couldn't be a dispute that the plaintiff had accepted and used property according to the agreement and in those circumstances when there is an obligation to confirm the agreement as claimed and without disregarding it. There is the doctrine of estoppel and prevention, which prevent the plaintiff to state on these claims. We will take as an example the commercial building in Long Island which was transferred to her and ask how she can, on one hand, to sue for the real estate to be called and on another hand to state that there is validity to the agreement because it was not confirmed on the other hand."*

288. During her cross-examination, Professor Halperin-Kaddari was asked, after being referred to this passage in *BAM*, and also to a quotation from the judgment in *Doe v Doe (7468/11)* (a case concerning a pre-nuptial agreement), whether she accepted that this line of cases showed that there was a policy of giving effect to agreements, even where the formality requirements of sections 1 and 2 had not been satisfied. She responded as follows:

> *"I disagree...my understanding of the case law is that all these are exceptions..,first of all, when there has been written agreements. There is no case whatsoever that [enforced an agreement that had not been in writing]...There is always a requirement of writing....[If]many years have passed*

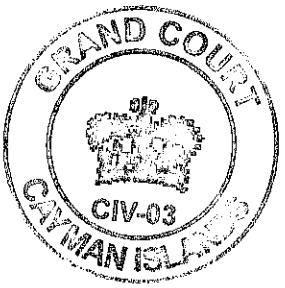
between the signing of the agreement , the parties had acted on [it] and the party now object[ing] to the enforcement of the agreement had already benefitted from [it]..[in such a case] and not always courts [have] taken the principle of estoppel and the principle of bona fide and ...said "You now cannot object to the enforcement of the agreement which you had signed, you were aware of that, you agreed to that: you cannot now rely on the fact that it was not approved by the court."

289. Subsequently, Professor Halperin-Kaddari accepted that it was not necessary, for an estoppel to arise under Israeli law, that there be a representation or other statement in writing. However, she noted that all the authorities in the context of property agreements between spouses in which an estoppel had been held to arise involved written agreements. But, if there was a written agreement, it was then a question of fact as to whether the conditions for an estoppel had been satisfied.

290. I prefer Professor Shifman's view of the authorities on this issue. It seems to me that they demonstrate that in principle the defences of estoppel or waiver are available. It is necessary for the Court to make a careful assessment of all the facts as presented in evidence. However, as is the case with the defence of consent, in order to give effect to the strong policy objective of protecting wives, there must be "*weighty*" evidence and "*a spouse who seeks .... to deviate [from the CPR]... is obliged to do so with the clear, unequivocal consent of his spouse*". As I have already noted, a wife is not to be taken as having represented that she would not object to the transfer of assets merely because she had placed complete trust and confidence in her husband.

291. In the present case however, it seems to me to be strongly arguable that the First Plaintiff's conduct, as set out above, particularly the position she adopted in the SOCA Proceedings, constituted representations that she assented to Mr Perry's dealings with the assets connected with his business and did not claim an interest in assets other than those identified in her SOCA witness statements, which it would have been reasonable for the First Defendant to rely on. However, even assuming that there is sufficient (weighty) evidence of the requisite representations, there is no evidence that the First Defendant did rely on those representations. There is no evidence that the First Defendant was aware that the First Plaintiff had or might have matrimonial property rights under Israeli law and relied on her conduct or statements in accepting the transfer of the Share or acting as trustee of the Lake Cauma Trust and other trusts. I would add that while the parties assumed that an estoppel defence would be governed by Israeli law there was no argument on the conflicts of law analysis of this point.

292. I also do not consider that the First Plaintiff can be treated as having waived her CPR rights. Professor Shifman accepted and *Yahalom* makes clear that in a good and harmonious marriage a spouse is not expected to raise any action for community of property while the other spouse is alive. It was only when the couple's marriage suffered from disharmony, or where the couple disputed the very existence of property rights, that a failure by the wife to raise or to enforce her rights could be treated as a waiver. It seems to me that the latter principle would only apply where there was continuing and active disharmony in the marriage in the period prior to the death of one of the spouses. In my view, this was not the case in the Perry's marriage after the problems in 1998. The evidence does not establish active disharmony of the kind that would have required the First Plaintiff to have asserted her CPR rights (assuming she retained such rights) before Mr Perry's death.



Mr Justice Segal
Judge of the Grand Court, Cayman Islands
27 May 2020