Easter Term
[2023] UKPC 16
Privy Council Appeal No 0014 of 2022

JUDGMENT

Lea Lilly Perry and another (Appellants) v Lopag Trust Reg and another (Respondents) No 2 (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin
Lord Sales
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
18 May 2023

Heard on 18 January 2023

Appellants
David Brownbill KC
Daniel Warents
Sparsh Garg
Nick Dunne
(Instructed by Bridge Law Solicitors Limited)

Respondents
Graeme McPherson KC
Tim Chelmick
Frederick Wilmot-Smith
(Instructed by PCB Byrne LLP)

LORD HODGE:

1. It has long been the practice of the Board to decline to hear appeals which are in substance a challenge to the findings of fact of the first instance court which have been upheld by the appellate court, save in exceptional circumstances. This appeal raises the question whether there are exceptional circumstances which would justify the Board in hearing this appeal in so far as it seeks to challenge concurrent findings of fact. The Board is satisfied that, in so far as the appellants seek to challenge concurrent findings of fact, no such exceptional circumstances exist in this case and advises that the appeal be dismissed.

2. As discussed more fully below, the appeal raises three principal questions. The first is whether there are concurrent findings of fact and if so, whether the Board should review the findings because of any failure of the Court of Appeal properly to address the appellants' challenge to the findings of fact of the trial judge. Secondly, the appellants argue that findings of fact in relation to foreign law need to be treated differently from other findings of fact and do not readily fall within the scope of the Board's practice in relation to concurrent findings of fact. The third question is whether the Board should decline to follow the decision of the Supreme Court in *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 on the basis that an equitable claim based on mistake extends to a transaction brought about by a party's ignorance as well as by a mistaken belief or tacit assumption. A panel of seven Justices has been convened because of the challenge to *Pitt v Holt*.

(1) The Board's practice in relation to concurrent findings of fact

3. In *Devi v Roy* [1946] AC 508 the Board explained its practice of declining to hear appeals which were in substance a challenge to concurrent findings of fact by the courts below, save in exceptional circumstances. Lord Thankerton, delivering the judgment of the Board, set out at p 521 in his fourth proposition the scope of the exception to the general practice. He stated:

> "That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may

> be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

4. More recently the Board has established a procedure by which an appellant in a case which, at least in a substantial part, seeks to disturb concurrent findings of fact will need to demonstrate the required exceptionality, initially in the appellant's written case and, if the Board is not persuaded by that written submission, by concise oral submissions at the start of the appeal hearing: see *Sancus Financial Holdings Ltd v Holm (Practice Note)* [2022] UKPC 41; [2022] 1 WLR 5181 and *Gormandy v Trinidad and Tobago Housing Development Corpn* [2022] UKPC 55.

5. Under this procedure if an appellant is arguing that the judgments of the courts below are undermined by the absence of evidence on which the courts could arrive at their findings, the appellant should set out clearly in the written case (i) what the findings are that are challenged on that basis and (ii) why those findings are critical to the outcome of the case. This will give the respondent the opportunity to answer those assertions in its written case. That in turn will enable the Board to assess the merits of the assertions in their pre-reading so that the matter can be addressed concisely in the initial debate. *Devi v Roy* lays down that the Board will depart from its practice in relation to concurrent findings of fact only in the exceptional circumstances which it sets out. It is not sufficient for a departure from the Board's practice that there are findings of fact which are unsupported by evidence unless those findings can be shown to be critical to the outcome of the case.

6. In *Sancus*, para 5, the Board set out the reasons for its practice of declining to hear appeals against concurrent findings of fact in the absence of such exceptional circumstances. They are, in summary, (i) that the reliability of the trial judge's findings will already have been subjected to careful review by a properly constituted and experienced court of appeal, (ii) when the trial judge and the appellate court have agreed upon a finding of fact, it is inherently unlikely that a second appellate court will be well placed to disagree with both of them with any degree of confidence, (iii) the parties are entitled to expect a reasonable degree of finality in litigation, (iv) the examination of detailed evidence underlying findings of fact is an expensive and time-consuming process for the Board and is likely to strain the Board's limited resources, and (v) in cases where the facts to be found relate to or may be influenced by local customs and practices, local courts are likely to have a deeper understanding of their customs and culture than the Board.

(2) The factual background

7. Mr Perry was an Israeli-qualified lawyer and businessman who accumulated substantial wealth for himself and his family by the provision from about 1983 onwards of financial services which allowed Israeli residents to participate in the (then) West German social security pension scheme. Unfortunately, he used criminal means to acquire part of his wealth. At the time of his death in 2015 he was serving a ten-year prison sentence for fraud which had been imposed by the Israeli courts but had been released into house arrest in 2012 on the ground of ill health. In October 2013, as part of his succession and wealth management planning, Mr Perry transferred the single issued share in a Cayman company, Britannia Holdings (2006) Ltd ("BH") to Lopag Trust Reg ("Lopag"), a Liechtenstein trust enterprise, as trustee of a discretionary trust known as the Lake Cauma Trust. BH held shares in a Cayman Islands insurance company and, through subsidiary companies, other assets of considerable value. In January 2017 Fiduciana Verwaltungsanstalt became a co-trustee of the Lake Cauma Trust and in February 2018 Fiduciana was replaced as co-trustee by Admintrust Verwaltungsanstalt ("Admintrust"). Mr Perry's widow, Lea Lilly Perry and her elder daughter, Tamar Perry, challenge the transfer of the BH share to the Lake Cauma Trust on two principal grounds. First, Mrs Perry argues that the share transfer was void or should be set aside because it breached her matrimonial rights under Israeli law. She argues that the transfer was effected without her knowledge and consent and separately that it did not comply with formalities which Israeli law required. The Board refers to that argument as "the matrimonial claim". Secondly, Mrs Perry and Tamar (on behalf of Mr Perry's estate) argue that the transfer should be set aside for equitable mistake. They assert that Mr Perry would not have transferred the share if he had known that discretionary beneficiaries did not have effective rights to enforce the trustees' obligations. The Board refers to this argument as "the mistake claim". Mr and Mrs Perry's other daughter, Yael Perry, gave evidence at trial contesting the claims by Mrs Perry and Tamar Perry. Since succeeding in her opposition to the claims at first instance, she has taken no part in the proceedings on appeal. Lopag and Admintrust continue to oppose the challenge.

(3) The application of the concurrent findings of fact practice to findings in relation to foreign law

8. As the Board explains below, findings of fact in relation to foreign law are findings of fact but they are in a special category. The lower courts' findings of fact are closely tied into their findings of fact in relation to foreign law. It is appropriate therefore first to address the Board's approach to concurrent findings of fact in relation to foreign law before turning to the question whether there are circumstances which bring this appeal within one of the exceptions recognised by Lord Thankerton in *Devi v Roy*.

9. Mr David Brownbill KC for the appellants argues that the Board's practice in relation to concurrent findings of fact should not be applied in this case to the challenged findings of fact in relation to foreign law because such findings differ from ordinary findings of fact. In essence, he submits, the trial judge and the first appellate court can use their legal training and experience to analyse and reach their own conclusions in relation to foreign law. So too may the Board, which, he submits, should not defer to the conclusions of the courts below. The Board does not agree.

10. The starting point is that findings in relation to foreign law are findings of fact because a judge is not to be imputed to know foreign law: *Nelson v Bridport* (1845) 8 Beav 527; 50 ER 207. Absent agreement between the parties, foreign law is proved by suitably qualified experts in the relevant foreign law. Nonetheless, such findings of fact are in a special category. Judges frequently quote the dictum of Cairns J in *Parkasho v Singh* [1968] P 233, p 250 that "the question of foreign law, although a question of fact, is a question of fact of a peculiar kind". Findings of fact as to foreign law are in a special category in part because, in certain circumstances, in particular when the foreign law is a common law system analogous to the judges' domestic law, the judge at first instance and the judges in the appellate courts can use their legal skills and experience in the analysis of domestic law to analyse the foreign law. In such circumstances the appellate judges are not at any significant disadvantage in carrying out that analysis compared with the trial judge. While the circumstances of cases may vary widely, the Board derives some propositions from the case law.

11. First, the task of the trial judge when there are disputed questions of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it: *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428; [2017] 1 CLC 969 ("*Dexia*"), para 34; *Morgan Grenfell & Co Ltd v SACE Istituto per I Servizi Assicurativi del Commercio* [2001] EWCA Civ 1932 ("*Morgan Grenfell*"), para 50. It is not sufficient for a party to identify a judgment of a foreign court of first instance which may be on point and assert that the task of the appellate court is simply to analyse that judgment.

12. Secondly, if the foreign legal system is a common law system which adopts a similar approach to legal reasoning and statutory interpretation to that of English law, the English judge at first instance is entitled and required to bring to bear his or her knowledge of the common law and the rules of statutory construction in analysing the foreign law. So too is the appellate court. In *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 ("*MCC Proceeds Inc*"), a case concerned with the construction of the Uniform Commercial Code which was part of the law of New York, a common law system, Evans LJ giving the judgment of the Court of Appeal stated (para 13):

> "When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the [appellate] court is as well placed as the trial judge to form its own independent view."

The important words in that statement are "to the extent" and the reference to familiar principles and legal concepts. The court went on to state that it was not entitled to substitute its own view for the view of the trial judge when there was acceptable evidence to support the judge's finding unless the English court interprets the statute in accordance with English rules of construction and there is no evidence that different rules would govern the foreign court's construction or evidence that the words would have a special meaning in a foreign context (para 20). The Court of Appeal in *Dexia* cited these passages in *MCC Proceeds Inc* with approval (paras 38 and 39). The Court of Appeal in *Dexia* also quoted from the judgment of the Court of Appeal in *Morgan Grenfell* paras 50 and 51, in which the court observed that where the court was faced with differing views as to Italian law, which was not based in any relevant aspect on the common law, there was less room for the judge to apply his or her own legal training and experience to help to resolve the relevant question.

13. Thirdly, where the foreign law is in a foreign language the trial judge will often be dependent on translations of the relevant texts, which may or may not be precise and which may or may not be disputed, and on the evidence of the foreign law experts to understand the meaning and nuances of the foreign language in the relevant text. Thus, in *Byers v Saudi National Bank* [2022] EWCA Civ 43; [2022] 4 WLR 22 ("*Byers*"), the trial judge had to address questions of Islamic law, of which the only authorised texts were in Arabic, and he had to work with translations and with the assistance of foreign law experts. The Court of Appeal concluded that it should be slow to interfere with the judge's findings of fact on Saudi Arabian law and should do so "only … in accordance with the principles applicable generally to findings of fact made by a trial judge who has based his findings on evidence from witnesses" (para 105). In reaching that view the Court had regard to the foreign language of the authorised texts, the fact that the concepts and principles of Saudi Arabian law were far removed from the common law, the lack of any familiarity of the English courts with the practice and culture in the capital markets of Saudi Arabia, and the fact that the judge at first instance had depended on the assistance of extensive expert evidence to explore and explain the many Saudi Arabian court decisions to which the experts referred in support of their contentions.

14. Fourthly and more widely, where the first instance judge is dependent upon the evidence of foreign law experts, who disagree as to the interpretation and application of a foreign law, and has to decide issue by issue whose evidence to

prefer, the judge will have regard to all the evidence presented to him. The judge will reach a view based on an assessment of each expert having regard to each expert's evidence as a whole, and the way in which each expert answered the questions posed in chief and on cross-examination to justify his or her opinions. The judge will thus evaluate the experts' reasoning. Not all the matters which have influenced the judge in forming a view on which evidence to prefer will always be recorded in any detail in a judgment or can be ascertained from reading a transcript of the proceedings. The judge will have regard to "the whole of the sea of evidence presented to him whereas an appellate court will only be island hopping". Those words of Lewison LJ in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, are in such circumstances as applicable to a case involving expert evidence on foreign law as they are to cases involving the evidence of witnesses of fact more generally. See the judgment of Longmore LJ in *Dexia* at para 42.

15. There is thus a spectrum of circumstances in which the principal variable is the degree to which the judge can use his or her skill and experience of domestic law and of the domestic rules of statutory interpretation to ascertain the foreign law and apply it to the case in question. For example where a judge is an English lawyer, at one end of the spectrum there are cases in which the foreign law is a common law system which applies the same or analogous principles and means of legal analysis as English law. In such cases there will be considerable scope for the trial judge to bring to bear his or her legal skills and experience in domestic law in determining and applying the foreign law. The judges of a court hearing the first appeal will also be able to bring to bear their own skill and experience. In such a circumstance the members of the Board also would be able to do so and would be unlikely to invoke the practice relating to concurrent findings of fact. At the other end of the spectrum are cases of disputed foreign law in which the skill and experience of the judge in domestic law has a minimal role to play in the ascertainment and application of foreign law, as in *Byers*. In such cases the court at each level of the hierarchy is dependent on the written and oral evidence of expert witnesses, tested by cross-examination. The trial judge's findings on the content and application of foreign law have a close kinship to other findings of fact. In that circumstance the first appellate court will be slow to intervene in the judge's assessment and the Board's practice in relation to concurrent findings of fact should be adopted.

16. The editors of *Dicey, Morris & Collins on the Conflict of Laws* (16th ed., 2022) in their discussion of proof of foreign law start by setting out a rule. Rule 2-(1) states: "Where a party relies on foreign law, that law must be pleaded and proved as a fact to the satisfaction of the court by evidence or sometimes by other means." In the discussion of the rule the editors recognise that the courts take judicial notice of their domestic law and of notorious facts (such as that roulette is not unlawful in Monte Carlo). They state (para 3-006) that the court may take judicial notice of a

foreign law if its content is, at least in part, determined by a rule of domestic law and if, according to the domestic law, the foreign law is the same as, or substantially similar to, the domestic law. Foreign law need not be proved if it is admitted or if the parties request the court to decide a question of foreign law without proof, but the courts are reluctant to take the latter course except in cases concerning the interpretation of foreign statutes (para 3-008). While recognising that foreign law is a question of fact "of a peculiar kind", the editors cite *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755; [2011] 1 AC 763, 777, paras 28-29, for the proposition that "generally, an appellate court, which will not have had … the opportunity to put questions to the expert witness of foreign law, will be slow to substitute its opinion for that of the trial judge" (para 3-010). This discussion in a leading textbook is consistent with the idea of a spectrum of cases in which the key variable is the extent of the ability of a judge and an appellate court to use their skill and experience in domestic law to ascertain the relevant rules of foreign law and apply them to the facts of the case.

17. Mr Brownbill submits that where an appeal involves the application of agreed or uncontested principles of foreign law to the facts, an appellate court is in no different a position than it would have been in if called upon to consider the application of agreed or uncontested principles of domestic law. In support of this contention he refers to the decision of the Court of Appeal in *Cassini SAS v Emerald Pasture Designated Activity Co* [2022] EWCA Civ 102 ("*Cassini*"). He refers in particular to what the court, in the judgment of Snowden LJ, stated at paras 47 and 48:

> "47. In that regard, although findings as to foreign law are treated as findings of fact by the English courts, it was common ground between the parties that they are different from other findings of fact and are not subject to the same restrictions on scrutiny by an appellate court. Although an appellate court will bear in mind that the trial judge had the advantage of seeing and hearing the expert witnesses, and of clarifying their evidence directly with them, the appellate court is *entitled* to consider the expert evidence afresh and form its own view of the cogency of the rival contentions in determining whether the trial judge came to the correct conclusion: see *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 at 286 per Megaw LJ. That is certainly so where, as here, the appellate court has been provided with the reports and a full transcript of the evidence and cross-examination of the experts. (Emphasis added)

> 48. I also agree with the Judge that the reputation of the experts is a factor to take into account in the assessment of expert evidence, but it is by no means determinative. It is the substance of the evidence and the cogency of the opinions and analyses offered by the experts, both in their reports and when they are tested under cross-examination, that is of primary importance."

18. *Cassini* concerned the evidence of two experts who put forward very different theories as to how a French court would determine a novel point of French law concerning a French insolvency procedure known as sauvegarde which protected a company in financial difficulty from its creditors while it proposed a restructuring plan to its creditors and obtained the approval of the plan by the court. Prima facie, the dispute was not one to which the English judge's skill and experience of English law would have given him much assistance. The common ground of the parties, which Snowden LJ recorded in para 47 of his judgment, is unexceptionable if it is understood simply as a reference to *Parkasho* to which the Board referred in para 10 above. Similarly, the Board accepts Snowden LJ's statement in paragraph 47 that the appellate court is *entitled* to consider the expert evidence afresh. The Board observes that the case of *Dalmia Dairy Ltd,* on which Snowden LJ relied for that proposition, concerned an award in an international arbitration which was governed by the law of a common law jurisdiction, namely India, and is therefore consistent with the spectrum approach which the Board has discussed above. The judge and the Court of Appeal were readily able to apply their skill in and experience of English law in their analysis of the relevant rules of Indian law. It is striking that Megaw LJ went on to analyse the relevant rules of Indian law in relation to an arbitrator's jurisdiction and the validity of an arbitral award and to observe the close parallels between those rules and those of English law. See also the judgment of the Court of Appeal in *King v Brandywine Reinsurance Co* [2005] EWCA Civ 235; [2005] 2 All ER (Comm) 1, which concerned the interpretation of commercial documents under the law of New York.

19. The Board does not interpret *Cassini* as an authority for Mr Brownbill's general proposition in para 17 above. It is not apparent whether the parties referred the court to cases such as *Dexia*, *MCC Proceeds Inc* and *Morgan Grenfell*. In any event, it is not inconsistent with the idea of a spectrum that there are cases where the first appellate court considers itself able to review the findings of a trial judge on the law of a foreign legal system which is not in the family of common law systems; much will depend on the nature of the alleged error of the trial judge and the circumstances in which the error arose. In *Cassini* the Court of Appeal upheld the trial judge's interpretation of French law, in which he preferred the evidence of one French law expert over the other, and the court did so by addressing at a high level of generality the purpose of the French sauvegarde procedure on insolvency. The

sauvegarde procedure provided a moratorium on *monetary* claims against the protected debtor, and the Court of Appeal was able to conclude that, where a contracting party had paid the protected debtor for goods or services, the ordering of specific performance against the protected debtor would not be contrary to the purposes of the sauvegarde regime as the court could refuse to make the order where the cost to the protected debtor of complying with the obligation to perform was manifestly disproportionate to the interests of the creditor. By contrast, the opinion of the other expert in that case led to results that were contrary to the broad purpose of the sauvegarde procedure. The distinction between the experts' positions existed at a high level of generality and did not involve the court in a detailed analysis of foreign law.

20. Similarly, *Ted Jacob Engineering Group Inc v Morrison* [2019] CSIH 22; 2019 SC 487, to which Mr Brownbill refers, is not inconsistent with the spectrum approach. In that case the First Division of the Court of Session reviewed the conclusions of the commercial judge concerning the law of the United Arab Emirates as in force in Dubai. The First Division considered itself able to do so because, among other reasons, the codified provisions of the law of the UAE were indirectly based on the French codes and were civilian in nature, and it was not difficult for a Scots lawyer to understand the legal concepts and rules of another civilian system as Scots law, which is a mixed legal system, has civilian roots.

21. The appellants also submit that it is not essential for foreign law principles, including disputed principles, to be proved by expert evidence. Mr Brownbill cites in support of that proposition the recent decision of the UK Supreme Court in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45; [2022] AC 995. In that case, Lord Leggatt, with whom the other Justices agreed on this issue, discussed the doctrine that in the absence of satisfactory evidence of foreign law, the court will apply English law ("the presumption of similarity"). This appeal is not concerned with the presumption of similarity. Nonetheless, Lord Leggatt's comments are pertinent because he recognises both that the arrival of the internet has greatly increased the ability of lawyers to gain access to foreign law texts and that the extent to which a judge will have to rely on expert evidence to ascertain and apply foreign law will depend on the circumstances of the case. At para 148 Lord Leggatt describes as "outdated" the idea that foreign legal materials can only be brought before the court as part of the evidence of an expert witness. He states: "Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. … On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says." This appeal is not concerned with how far and in what circumstances a domestic court should now be able to dispense with expert evidence of foreign law. It is concerned with the question of

whether and to what extent appellate judges may use their training and experience in domestic law to analyse and review the findings of fact of a trial judge on foreign law which is based on the evidence of expert witnesses. In that context, Lord Leggatt's dicta, in the Board's view, are consistent with the spectrum approach which the case law in this field supports.

22. Mr Brownbill also refers the Board to the judgment of the Hong Kong Court of Final Appeal ("HKCFA") in *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2019] HKCFA 45; (2019) 22 HKCFAR 392 ("*Zhang*"). He places particular emphasis on this case in his oral submissions. This is because the cases to which the Board has referred so far have related to the position of the first appellate court. In *Zhang* the HKCFA was considering its position as a court of final appeal and the practice of not entertaining challenges to concurrent findings of fact. The HKCFA, a court of second or final appeal, adopts a practice, following that of the Board which was until 1997 the court of final appeal of Hong Kong, of not overturning concurrent findings of fact in the absence of "exceptional and rare circumstances where an appellant can show some miscarriage of justice or violation of some principle of law or procedure to warrant such a review" (para 91). At para 97 the HKCFA summarised the principles which it held to be applicable to its approach to concurrent findings as follows:

> "(a) Self-evidently, the Court's practice of not entertaining challenges to concurrent findings of fact applies to findings which are findings of fact. Where it is sought to challenge conclusions of law based on the facts found concurrently by the courts below are involved (sic), the Court will not be similarly constrained.
>
> (b) The Court's practice is, in any event, not rigid and there are circumstances in which the Court will set aside findings of fact notwithstanding that they have been made by both a trial court and an intermediate appellate court.
>
> (c) Expert evidence of foreign law, although a matter of fact, will be treated differently to other, ordinary, findings of fact.
>
> (d) Even if uncontradicted, the court will examine the content of any expert opinion evidence as to foreign law and will reject it as unsatisfactory if the circumstances so warrant."

23. The Board has no difficulty with the first three propositions ((a) – (c) above) as they are not inconsistent with the spectrum approach, which will apply the concurrent findings of fact practice in some circumstances but not others. Further, as the Board's judgment in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26 shows, there are circumstances in which the Board will overturn concurrent findings of fact. In the Board's respectful view, proposition (d) is too broadly stated as a reflection of the Board's practice, unless the concluding words "if the circumstances so warrant" apply to both the practice of examining the evidence and the rejection of that evidence. It appears from para 96 fn 75 of the judgment that the HKCFA derived principle (d) from the judgment of Le Pichon JA in *Full Wisdom Holdings Ltd v Traffic Stream Infrastructure Co Ltd* [2004] 2 HKLRD 1016, para 23, which concerned the approach of an intermediate court of appeal and not a court of final appeal: see the concurring judgment (para 1) of Geoffrey Ma, who was then the Chief Judge of the High Court. Be that as it may, the actual decision in *Zhang* is consistent with the spectrum approach (i) because the judges of the HKCFA, who are trained and very experienced in English law, were examining the trust law of Jersey, enacted in the Trusts (Jersey) Law 1984, which is derived in large measure from English law and the judges could readily bring their expertise to bear in the analysis of that law, and (ii) neither Jersey law expert had given oral evidence and the intermediate appellate court had adopted a self-contradictory reading of one expert's report without the expert having had the opportunity to comment on that interpretation. Unsurprisingly, the HKCFA found itself in as good a position to assess the relevant law as the trial judge had been.

24. Para 206 of the appellants' written case refers to the judgment of Lord Neuberger, the President of the UK Supreme Court, in *Actavis UK Ltd v Eli Lilly & Co* [2017] UKSC 48; [2017] Bus LR 1731. In that judgment, with which the other Justices agreed, Lord Neuberger stated (para 93), that the notion that the resolution of a dispute of foreign law involves a factual finding is "somewhat artificial". That is not in dispute. The Board observes however that the willingness of the UK Supreme Court to review findings of the trial judge on the patent law of France, Italy and Spain (i) was undertaken "with some diffidence", acknowledging that the court should be slow to differ from the trial judge, and (ii) occurred in the context of the court's consideration of patents by reference to the European Patents Convention and the Protocol on the interpretation of Article 69, a subject matter with which the Justices of the Supreme Court had some experience. Further, the trial judge in that case had not heard oral evidence from the experts, causing Lord Neuberger to state (para 93) that the court was "in as good a position as [the trial judge] was to analyse the effect of the evidence as to foreign law". The reasons for disagreeing with the trial judge did not relate to an interpretation of the rules of the foreign law but to the application of those rules to the patent in question, which the Supreme Court interpreted differently from the courts below.

25. In the Board's view, both *Zhang* and *Actavis* are consistent with and do not contradict the spectrum approach. The Board therefore respectfully agrees with Beatson JA in his discussion of appeals against findings of foreign law in paras 77-84 of his impressive judgment. The question for the Board, which was addressed in its pre-reading, was to identify where on the spectrum the findings as to foreign law lay in this appeal.

(4) The findings in relation to the matrimonial claim

26. Mrs Perry's matrimonial claim is based on the assertion that the share which Mr Perry transferred to Lopag was matrimonial property under Israeli law and had been transferred without her consent. The transfer, it was submitted, was therefore invalid. The judge held that the parties to a marriage acquired an immediate and vested joint ownership of assets of a purely family character, including the family residence and other assets ("matrimonial assets") under a non-statutory Israeli rule of community of property ("the Community Property Rule"). He also held that under sections 1 and 2 of the Spouses (Property Relations) Law 1973 ("the 1973 Law") arrangements between couples affecting such matrimonial property rights upon death or divorce had to be recorded in a written property agreement and approved by the relevant Israeli court. The judge in para 277 of his judgment held that under Israeli law answering the question whether an asset fell to be treated as a matrimonial asset or "asset of a purely family character" involved

> "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." (internal quotation marks removed)

27. It was a matter of dispute between the parties whether a spouse's consent to dealings with matrimonial assets could be given generally or whether one needed a specific consent in relation to the transaction in question and whether that consent had to comply with the formalities of the 1973 Law. The judge did not find Mrs Perry to be a credible witness and held that she had given her general consent to her

husband which allowed him to deal with assets which were part of or connected to his business activities during the marriage, including for tax planning and succession planning purposes. But that issue is no longer central to the parties' dispute, because, as explained below, the judge held that the share was not a matrimonial asset but a business asset.

28. The judge held that assets, which were not matrimonial assets, such as business assets, were not subject to the Community Property Rule and either spouse could deal with those assets with such general consent. But joint ownership rights under the Community Property Rule would crystallise in relation to such non-matrimonial assets on a "critical date" or "critical event" in the marriage, such as the death of one of the spouses or a serious crisis between the spouses which put the continuation of the marriage at risk, of which bankruptcy or a spouse's breach of the duty of good faith would be examples. What amounted to a critical event involved a fact sensitive assessment in the context of the particular marriage. Critically to the outcome of the case, the judge held (i) that the share transferred to Lopag was a business asset which was not covered by the Community Property Rule as both spouses understood that Mr Perry needed sole power to manage and dispose of investment assets for the purpose of tax and succession planning, and (ii) that the transfer, during the currency of the marriage, of the share to a discretionary family trust, of which Mrs Perry became one of the potential beneficiaries, was not a "critical event" in the marriage which would have caused the crystallisation of the right of joint ownership and the removal of Mr Perry's authority to deal with it. See paras 271-285 of Segal J's judgment in which he accepted some of the expert evidence of each of the parties' expert witnesses on Israeli law and rejected other parts of their evidence.

29. The Court of Appeal (Sir John Goldring, President, and Sir Richard Field and Sir Jack Beatson JJA) considered four challenges in relation to Segal J's determination of the matrimonial claim. Those were that the judge had erred in finding (i) that Mrs Perry had consented to Mr Perry dealing with family assets for the purposes of tax and succession planning, (ii) that the transfer of the share did not require a formal property agreement approved by the court, (iii) that the share was a business asset with which Mr Perry was permitted to deal without such formal consent, and (iv) that the transfer of the share did not constitute a "critical event".

30. Beatson JA's careful and detailed judgment considered each of those challenges in paras 85-124. He held that Segal J was entitled to conclude that Mrs Perry had consented to Mr Perry's dealing with the family's assets for tax and succession planning purposes, notwithstanding her wish to use such assets to control the behaviour of her children and grandchildren. Beatson JA accepted that the judge was entitled on the evidence to reach the view that knowledge of a specific

transaction was not required and explained why he distinguished the Israeli District Court case of *RC v AC* (Case 269444-10-17), 27 March 2018, on which the appellants relied, from the present case, particularly because in the present case there had been a course of dealing since 2000 in which Mr Perry had set up Liechtenstein and British Virgin Islands ("BVI") trusts, of which Mrs Perry was aware and from which she had benefited. Beatson JA then considered and rejected the challenge that there was an inconsistency between the judge's finding of consent and his reasoning as to when a written property agreement was required, holding that the consent was not premised on the end of the relationship between the spouses.

31. Turning to the challenge to the judge's finding that the share was a business asset, Beatson JA pointed out that the parties agreed on the approach in principle which the Board has set out in the quotation from the judge's judgment in para 26 above. The dispute was over the application of that principle of Israeli law to the circumstances of the case. This involved "a multifactorial evaluation of facts and factors" (para 115). The question therefore was whether a reasonable judge could have concluded that the share was a business asset. Notwithstanding the significant value of the share, Beatson JA held that the judge was entitled to conclude that it was reasonable to expect Mr Perry might need to deal with it for business purposes.

32. Finally, in relation to the challenge to the judge's finding that the transfer of the share was not a "critical event" bringing into play the Community Property Rule, Beatson JA observed that the judge's reasoning reflected the fact-specific and sensitive inquiry which Israeli law required in determining whether a transaction was a "critical event". On the evidence led before the judge, including that of Mrs Perry, the judge had been entitled to conclude that the transaction did not involve a serious crisis in the marriage and that it was not an unusual economic action involving a breach of good faith. Even if breach of good faith were not required to make a transaction an unusual economic action, the evidence showed that, apart from certain real estate items and valuable personal items, Mrs Perry was content to allow her husband to transfer assets into trusts for the purposes of tax and succession planning.

33. The Court of Appeal therefore rejected the challenge to the judge's decision on the matrimonial claim. In so doing the Court of Appeal (i) upheld the judge's findings as to the relevant Israeli law and (ii) held that the judge had not erred in applying his findings as to Israeli law to the facts of the case.

34. There are therefore concurrent findings of fact in relation to the Israeli law of matrimonial property. Where on the spectrum of findings of fact about foreign law does this appeal lie?

35. The Board is satisfied that this appeal lies at or very close to the end of the spectrum in which findings of fact in relation to foreign law are to be treated in the same way as findings of simple fact. A judge trained in Cayman Islands law or English law would not be able to any material extent to apply his or her skills and experience in those domestic laws to the analysis of this area of Israeli law which has no obvious counterpart in the domestic legal system with which the judge was familiar. In gaining his understanding of the relevant Israeli law Segal J was assisted by the reports of two Israeli legal experts, Professor Halperin-Kaddari, whom the appellants called, and Professor Shifman, who was called by the respondents. Both experts produced written expert reports and reply reports. The judge heard cross-examination of them over almost two and a half days. He evaluated their evidence and accepted the evidence of each expert in relation to some matters while rejecting the expert's evidence and preferring that of the other expert in relation to other matters.

36. The judge was explicit in his judgment about his dependence on the evidence (including the oral evidence) of the experts in reaching his conclusions on the matrimonial claim. He stated (para 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 [were] 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."

37. The judge made similar comments about the relevant Israeli law being in the process of development and refinement (para 238) and about the precise juridical nature, effect and operation of the Community Property Rule in relation to assets which are not of a family character giving rise to complex and controversial issues of Israeli law (para 273).

38. In these circumstances the Board is satisfied that both the ascertainment of the relevant rules of Israeli law, and their fact sensitive application to the circumstances of the relationship between Mr and Mrs Perry, fall squarely within the Board's practice in relation to concurrent findings of fact, unless the appellants can establish that there exists one of the exceptional circumstances identified in *Devi v Roy*. This is not a case, as the appellants submit, of the Board simply reading and analysing a particular Israeli case, such as the decision of the District Court in *RC v AC*, to determine what the relevant Israeli law is. As the Board has pointed out above, the task of the judge in assessing foreign law is to reach a view on what the final court of appeal in that legal system would decide. Further, the application of the relevant rules to the circumstances of the marriage of Mr and Mrs Perry depends upon the judge's assessment of the purely factual evidence of the witnesses whom he saw and assessed in court. The Board has already recorded the judge's finding that Mrs Perry was not a credible witness. He found her daughter, Tamar, to have a partisan attitude which "seriously weakened her credibility" and that she could be evasive and occasionally combative (para 257). This is clearly a case in which the judge's assessment of the witnesses while and after they gave oral evidence has played a significant role in his findings as to the application of the relevant rules of Israeli law.

39. Mr Brownbill seeks to circumvent the application of the Board's practice by arguing that Segal J had erred in law by making findings of fact for which there was no evidential basis whatsoever. In the Board's view, in order to establish an exception to the Board's practice on this ground and meet the high hurdle set in *Devi v Roy*, the finding of fact which is alleged to have no evidential basis must be of such materiality to the decision that, if the allegation is established, the decision cannot stand: see paras 3-5 above.

40. The finding on which Mr Brownbill founds in relation to the matrimonial claim as being without evidential foundation is at para 268 of Segal J's judgment in which

he states that Mrs Perry 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 assets to and from such trusts. The Board is satisfied that there is nothing in this challenge for two reasons. First, there was clear evidence that Mr Perry was careful to obtain tax advice when making important decisions, such as the decision by Mr and Mrs Perry to reside in the United Kingdom. That decision led to the establishment of the first Liechtenstein trust, the Heritage Trust, in 2000 to hold the shares in the BVI company which owned the house which Mr and Mrs Perry had acquired in London and also to hold the loan which Mr Perry had made to the BVI company to acquire the house. London solicitors furnished Mr Perry with tax advice on this occasion. Further assets were transferred to the Heritage Trust by 2002. This move to London followed the commencement by the Israeli tax authorities of an investigation into Mr Perry's tax affairs and that of his business organisation and a money-laundering investigation by the Swiss authorities. As the judge records, Mrs Perry knew of the existence and purpose of a number of the trusts. She recorded in a witness statement in proceedings in the United Kingdom relating to a freezing injunction obtained by the Serious Organised Crime Agency that she was the discretionary beneficiary of the Heritage Trust. She knew the identity of and had contact with the trustees and from time to time was able to obtain funds from them. The judge did not accept as credible her evidence about her ignorance. In the Board's view it beggars belief that Mrs Perry was not aware at least in the broadest terms that her husband was conducting tax and succession planning through the establishment of the Liechtenstein and other trusts. In any event, the finding that she was so aware is not critical to the outcome of the case. The finding was relevant to the question of her general consent. But the critical findings of the judge that the share transferred to Lopag was a business asset and that the transfer was not a "critical event" did not depend on that finding.

(5) The findings in relation to Liechtenstein trust law

41. The Board now addresses the question of errors of law in relation to the findings concerning Liechtenstein trust law. Questions concerning this foreign law are relevant to the appellants' claim for equitable relief for mistake. At the trial the appellants called Dr Bernhard Lorenz to give expert evidence on Liechtenstein law. The respondents called Mr Christoph Bruckschweiger. Both experts lodged reports and reply reports as well as a joint expert report. Segal J recorded (para 19) that he generally found Mr Bruckschweiger to be more persuasive and to provide more cogent and well-grounded justifications for his opinions. But the Board observes that the areas in which the experts disagreed were limited.

42. The appellants' case before Segal J was that Mr Perry set up the Lake Cauma Trust as a succession planning exercise to benefit his family who were the discretionary beneficiaries. They claimed that Mr Perry had a conscious belief or tacit assumption that the beneficiaries of that trust would have effective legal rights to apply to the Liechtenstein courts to enforce the trustee's (or trustees') obligations and that he had been mistaken in that belief. They asserted that they were thereby entitled to an equitable remedy setting aside the transfer to Lopag.

43. Segal J rejected the case that such a belief or tacit assumption could be inferred from the evidence led before him. He went on to consider whether if, contrary to that conclusion, Mr Perry had such a belief or assumption, he was mistaken in the view that there were effective remedies for discretionary beneficiaries in Liechtenstein. The judge accepted the expert evidence that discretionary beneficiaries, unlike other beneficiaries, did not have the right to obtain from the court injunctive relief, an order requiring information to be provided about the trust, or an order to remove a trustee for cause. But he recorded that the expert evidence, tested by cross-examination, established that discretionary beneficiaries had access to the Liechtenstein court via ex officio or supervisory proceedings under article 927 of the Personen- und Gesellschaftsrecht 1926 ("PGR") (in English, Persons and Company Law). In the 20 sub-paragraphs of para 178 of his judgment Segal J analysed the written and oral evidence of the experts on the PGR and the civil procedure rules and discussed the matters on which they disagreed, preferring the evidence of Mr Bruckschweiger. He concluded that the court, on receipt of notice from a discretionary beneficiary, has an obligation under its supervisory powers to exercise proper control over the existence and administration of the trust property. He recorded Mr Bruckschweiger's evidence (i) that in certain circumstances the court would join a discretionary beneficiary as a party because the beneficiary would be treated as being a person directly affected, (ii) that discretionary beneficiaries had the right to rely on powers to apply for the appointment of a supervisory trust officer or official auditors, (iii) that even although beneficiaries had no statutory rights to information about the trust, they could be given contractual rights to such information in the trust deed, and (iv) that in the Damerino Trust Deed (a Liechtenstein trust established by Mr Perry in 2009 using the same standard form as had been used in the Heritage Trust Deed) the discretionary beneficiaries were entitled to see the trustee's records whereas in the Lake Cauma Trust Deed that right had been given only to the protector. While recognising that the disagreements between the experts revealed that some aspects of the relevant Liechtenstein law remained unsettled, the judge held that the Liechtenstein court's supervisory jurisdiction gave discretionary beneficiaries access to the court and to real and material protections which he regarded as effective.

44. The Court of Appeal summarised the judge's findings on this evidence in paras 67-70 of its judgment. In paras 125-126 Beatson JA recorded the four errors which the appellants alleged that the judge had made. Three were challenges to primary facts or inferences the judge had drawn from Mr Perry's conduct; the fourth alleged error was the judge's finding that discretionary beneficiaries had effective rights under Liechtenstein law. In relation to that alleged error Beatson JA recorded that the judge had considered the expert evidence carefully and had given reasons for preferring the evidence of Mr Bruckschweiger to that of Dr Lorenz, that Liechtenstein law was very different from the law of the Cayman Islands or English law, and that the experts had been cross-examined for a day. The court, he held, was not in as good a position as the trial judge to make the assessment and could not, as the appellants urged, review the judge's findings of foreign law in the same way as it reviews findings of domestic law. There are therefore concurrent findings as to the relevant Liechtenstein law.

45. The Board agrees with the Court of Appeal. As with Israeli law, Liechtenstein law is not readily accessible to judges trained in English law or the law of the Cayman Islands. Unlike Jersey law, which the HKCFA considered (para 23 above), Liechtenstein trust law is not closely modelled on English trust law. The judge relied on the oral evidence of the experts in reaching his findings. This dispute lies at or close to the end of the spectrum in which, for the purpose of the Board's practice on concurrent findings of fact, findings of fact in relation to foreign law are to be treated in the same way as other findings of fact.

46. The Board observes that the Liechtenstein courts have exercised the supervisory jurisdiction in relation to the Lake Cauma Trust. In 2018 the Princely Court in the exercise of its supervisory jurisdiction, after receiving complaints from the appellants and other family members against Lopag, declined to remove Lopag as trustee, holding that the appointment of a second trustee and a neutral protector gave sufficient protection to the interests of the discretionary beneficiaries as a class.

47. The appellants again seek to get round the Board's practice in relation to concurrent findings of fact by arguing that the judge had made serious errors of law by finding facts for which there was no support in the evidence. Mr Brownbill founds on three instances where he submits there was simply no evidence to support the finding.

48. The first is the finding by Segal J in para 157 of his judgment that the creation and structuring of the Heritage Trust and the Lake Cauma Trust was driven by tax planning considerations. In his oral submissions Mr Brownbill spoke of a "primary tax motive or object". The Board is not persuaded that there is substance in this

challenge. It is clear that what the judge meant is that in establishing the Lake Cauma Trust Mr Perry engaged in "succession planning structured in a tax efficient way" which had been Lopag's submission (see para 133 of the judgment). The judge acknowledged that there was limited evidence available; but he was aware that Mr Perry was a sophisticated lawyer and businessman who had international investments, real estate in Israel, the United Kingdom and the USA, and used BVI companies and Liechtenstein trusts as vehicles to hold his assets. He had been subjected to tax investigations in Israel and proceedings in both Switzerland and the United Kingdom. When establishing the Heritage Trust, he had obtained detailed tax advice from London solicitors. The judge was entitled to infer that Mr Perry was aware of the tax consequences of establishing another Liechtenstein trust when he established the Lake Cauma Trust and that he would have had regard to the tax consequences of so doing, whether or not he received specific tax advice in relation to that trust.

49. Secondly, the appellants submit that there was no evidence to support the judge's finding in para 157 that Mr Perry was aware that English trust law differed from that of Liechtenstein. There is nothing in this point; it has an air of unreality having regard to Mr Perry's background and experience. Mr Oehri, a founding member of Lopag, gave evidence that Mr Perry had been given a copy of the PGR when he was receiving advice on the establishment of the Heritage Trust. The Board agrees with Beatson JA's assessment at para 129 of his comprehensive judgment:

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

50. Thirdly, Mr Brownbill submits that there was no evidence to support the judge's finding in paras 163-164 of his judgment. In those paragraphs Segal J found that the evidence did not demonstrate that Mr Perry, in carrying out his succession planning by establishing the Lake Cauma Trust, had formed any views or made any tacit assumptions as to the standing of discretionary beneficiaries before the court

under Liechtenstein law to enforce the trustee's obligations. He held that the absence of evidence that Mr Perry raised questions concerning the litigation remedies available to the discretionary beneficiaries strongly suggested that he did not regard such remedies as important or relevant. He continued (and this is the finding which is challenged): "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." In support of this inference the judge referred to evidence by Tamar Perry and Mr Greenspoon, who was formerly the son-in-law of Mr and Mrs Perry and who had worked with Mr Perry after his marriage to Tamar Perry. The judge also referred to Mr Bruckschweiger's evidence that the protector had power to remove the trustee without recourse to the Liechtenstein court. The Board observes also that the judge recorded that powers to gain access to the records of the trustee, which were given to the discretionary beneficiaries in the Heritage Trust, were given to the protector in the Lake Cauma Trust. In those circumstances the Board is satisfied that the judge was entitled to make the inferential finding that he did.

51. In any event, none of the findings of fact which Mr Brownbill challenges is critical to the outcome of the case. The judge was clearly aware that succession planning lay behind the establishment of the Lake Cauma Trust and the defendants did not argue otherwise. Even if Mr Perry had not been aware that there were differences between the English law of trusts and that of Liechtenstein law, there was no evidence that any belief or any tacit assumption made as to the remedies available to the discretionary beneficiaries influenced his decision to establish the Lake Cauma Trust (see below). Similarly, if it had been incorrect to infer that Mr Perry may have been content that the protector could look after the interests of the discretionary beneficiaries, the excision of that finding would not bridge that gap in causation.

52. The Board therefore is satisfied that this is a case in which it should adhere to its established practice of declining to hear appeals against concurrent findings of fact.

(6) The application to reconsider the decision of the Supreme Court in *Pitt v Holt*

53. Finally, the appellants invite the Board to overrule the decision in *Pitt v Holt* that a conscious belief or a tacit assumption may amount to a mistake but that "causative ignorance" cannot. As stated above, this application caused the Board to

convene a panel of seven Justices. But, as Lord Richards pointed out in the short debate, it is not open to the appellants to pursue this argument.

54. First, the appellants did not plead a case based on causative ignorance and never sought to amend their case to include such a claim. Secondly, as Segal J recorded in para 149 of his judgment, "[i]t is common ground that an operative mistake must be distinguished from mere ignorance". At trial and in the Court of Appeal the appellants did not reserve the right to argue in a higher court that *Pitt v Holt* was wrongly decided in holding that mere ignorance of a fact did not support an equitable claim based on mistake. In other words, the parties led evidence and conducted the trial on the basis that the decision in *Pitt v Holt* was correct in this regard. The case which the defendants had to meet was one of mistaken belief or tacit assumption. It would not be fair to allow the appellants to use findings made in relation to one dispute in order to determine a case which the defendants did not have to address. Thirdly, the judge made no finding that there was any causal link between Mr Perry's belief or tacit assumption (or ignorance) and his decision to establish the Lake Cauma Trust. As Mr Brownbill explains in his oral submission, the appellants had requested the judge in their closing submissions to make such a finding but the judge had declined to do so. There is therefore no basis in the judge's findings of fact for the conclusion that but for Mr Perry's (suggested) ignorance of the differences between English law and that of Liechtenstein in relation to the rights of discretionary beneficiaries, he would not have transferred the share to Lopag to hold on the trusts of the Lake Cauma Trust. In the absence of such a finding in relation to causation or any basis for submitting that the Board must inevitably conclude that there was such a causal connection, an extension of the law of mistake beyond the decision in *Pitt v Holt* will not assist the appellants. Contrary to the appellants' written case, it is not inconceivable that a settlor would have created a trust for the benefit of his family in the knowledge that the beneficiaries could not enforce the trustee's obligations directly. For aught seen, the difference between the Heritage Trust and the Lake Cauma Trust in which rights given in the former trust to the beneficiaries were replaced in the latter trust by rights given only to the protector may have been deliberate to avoid internal family disputes over the control of the trust assets. This involves no absurdity. In any event, Segal J made a finding of fact that the Liechtenstein trust was effective in protecting discretionary beneficiaries. The appeal on this ground, if allowed to proceed, would inevitably fail. The Board therefore declines to hear submissions on this new ground.

(7) Conclusion

55. The Board will humbly advise His Majesty that the appeal should be dismissed.