Credit Suisse Trust Ltd v Haggiag
Royal Court
24th March 2017

JUDGMENT
17/2017

Declarations sought in relation to Trusts

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **CREDIT SUISSE TRUST LIMITED**
(as Trustee of the Translux Financing Trust and as former Trustee of the United Prod Foundation)

Plaintiff

-and-

(1) ROBERTO HAGGIAG
(2) SIMON E HAGGIAG
(3) MICHAEL HAGGIAG
(4) MIRELLA PETTENI HAGGIAG
(on behalf of herself and of all of the objects or potential objects of the Plaintiff's discretion as Trustee of the Translux Financing Trust (including the minor, unborn and unascertained persons) other than the First to Third Defendants)

Defendants

Hearing dates: 14th and 15th December 2016

Judgment handed down: 24th March 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiff: **Advocate R Fullman**
Advocate for the First Defendant: **Advocate C H Edwards**
Advocate for the Second to Fourth Defendants: **Advocate J P Greenfield**

Cases & legislation referred to:
The Royal Court (Reform) (Guernsey) Law, 2008
The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009

The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
In re Westbury Property Fund Limited [2005-06] GLR 176
The Royal Court Civil Rules 2007
Financial Services Authority v Rourke [2002] CP Rep 14
The Trusts (Guernsey) Law, 1989
The Companies (Guernsey) Law, 2008
Lewin on Trusts, 19th ed.
The Trusts (Guernsey) Law, 2007
Hague Convention on the Law applicable to Trusts and on their Recognition (1 July 1985)

Introduction

1. In this action, the active parties seek a series of declarations. I will refer to those declarations in more detail in due course, but it has been apparent throughout that the purpose of seeking these declarations has been to obtain them principally as against the First Defendant because the other parties were in broad agreement as to the matters in respect of which these declarations are being sought. In particular, because the First Defendant had instituted proceedings before an Italian court, one of the purposes for obtaining the declarations was to have material to be placed before that court that would potentially influence the outcome of those proceedings. In the event, the parties have managed to resolve their differences and reach terms under which the Italian proceedings commenced by the First Defendant have been settled. As a consequence, the First Defendant has ceased to participate in this action. This has meant that there has not really been any opposition mounted to the relief being claimed. It has also brought into sharper focus whether the relief being sought indeed serves any purpose.

2. The original Cause in this action was tabled on 20 March 2015. Leave to serve the First Defendant out of the jurisdiction had been granted one month earlier. The Plaintiff is Credit Suisse Trust Limited, represented by Advocate Fullman. That company is the present trustee of the Translux Financing Trust and it is the former trustee of the United Prod Foundation. It has brought this action in those capacities. The four Defendants are beneficiaries of both trusts, albeit that the class of beneficiaries is wider than just the four of them. The First Defendant, Roberto Haggiag, has been referred to as "RHJ", an abbreviation for Roberto Haggiag Junior, which is used so as to distinguish him from his uncle, Roberto Haggiag Senior (and so "RHS"), who created both of the trusts. In some of the material I have seen, RHJ is called "Robertino". The Second and Third Defendants, Simon E. Haggiag and Michael Haggiag are the children of RHS. The Fourth Defendant, Mirella Petteni Haggiag is the widow of RHS. At the tabling of the Cause, Advocate Edwards appeared on behalf of the First Defendant. Advocate Wendy Lewis appeared on behalf of the other three Defendants. The action was placed inscrite.

3. The First Defendant applied to have the order permitting service out of the jurisdiction set aside or, as an alternative, to stay this action on the grounds of *forum non conveniens*. There was also an issue about whether or not Mourant Ozannes could properly represent the First Defendant because Advocate Wessels, a partner in that firm, had been involved in earlier litigation, representing *inter alia* Leah Ketty Genah, who was one of the Plaintiff's intended witnesses in this action. An application for an injunction prohibiting ongoing representation was made by the Plaintiff and then dismissed by me on 29 May 2015 (see Judgment 25/2015). The application to set aside or for a stay was dismissed by Lieutenant-Bailiff Marshall QC on 7 October 2015 (see Judgment 47/2015). Those judgments, particularly the second of them, contain a considerable amount of detail about these proceedings, meaning that I can summarise some of the more peripheral matters without needing to repeat everything set out therein. One other procedural step that occurred between those two judgments was the appointment of the Fourth Defendant to represent the interests of all the members of the beneficial class of the Translux Financing Trust

who were not already parties to the action. The Plaintiff had proposed a different person as an additional defendant to fulfil this function, but the Court decided that the Fourth Defendant was well-placed to do so and that it would be more cost-effective. The Defendants tabled their Defences (all dated 6 November 2015) on 13 November 2015. The Second and Third Defendants sought their own declarations by way of a Counterclaim and the Fourth Defendant sought just one declaration herself, relating to her not being an heir of her late husband, RHS. A Réplique to the Defence of the First Defendant was lodged by the Plaintiff on 4 December 2015.

4. It was at a directions hearing held on 24 June 2016 that the Court was informed that the First Defendant would no longer be taking any further active part in these proceedings as a result of a settlement reached between all those needing to be involved that had been concluded on confidential terms. The First Defendant would, however, continue to remain a party so as to be bound by any declarations to be made. Directions, subsequently varied by consent, were given to prepare the case for the trial in December 2016. They included giving leave to the Second to Fourth Defendants to amend their respective Defences. The parties made an election pursuant to section 13(1)(a) of the Royal Court (Reform) (Guernsey) Law, 2008 that the Court should be constituted by a judge sitting unaccompanied by Jurats, with which I was content and that is the reason why I have heard this action sitting alone.

5. As a result of discussions that took place on the first day of the trial, Advocate Edwards appeared on the morning of the second day on behalf of the First Defendant. The principal issue was that no steps had been taken until then to withdraw the defence of the First Defendant that had been tabled in 2015. Had that Defence remained in place, the Plaintiff would have needed to address the case advanced in it. However, it quickly became apparent that it had been envisaged that leave to withdraw that Defence was to be sought as part of the package of terms agreed between the parties, but that had not taken place. Accordingly, upon the First Defendant confirming a number of matters that were relevant to these proceedings, the First Defendant's application for leave to withdraw his Defence dated 6 November 2015 was granted. I also made orders as to costs.

6. The matters confirmed on behalf of the First Defendant by Advocate Edwards included:

   (a) his admission that the Documents (i) dated 30 December 2004 and (ii) dated 26 January 2005, both addressed to the Plaintiff as the Trustee of the United Prod Foundation did not create any rights or obligations whether in the nature of a partnership or an *associazione in partecipazione* under Italian law, or otherwise;

   (b) his admission that at no time had he procured the transfer of a 20% or 29% shareholding in Lotte Holdings Limited to the Plaintiff as Trustee or procured that such shareholding was held for the benefit of the Plaintiff as Trustee, and that such shareholding now cannot be transferred;

   (c) his admission that (i) RHS did not control the assets of the Trusts or either of them at any time; and (ii) that the Second Defendant had never controlled and does not control the assets of the Translux Financing Trust; and

   (d) his consent to the making of all the declarations sought in paragraph 3 of the Plaintiff's Amended Cause and the declarations sought by the Second to Fourth Defendants in these proceedings and that he accepted that it is appropriate for the Court to make those declarations.

   The significance of these matters will become more apparent when I turn to the facts.

7. At the trial, I heard oral evidence from the Second Defendant, from Geoffrey Le Poidevin, who is a director of the Plaintiff, and from Lea Ketty Genah, who gave her evidence through an interpreter. Each of them submitted a witness statement that became their evidence-in-chief. They were gently cross-examined, albeit more for the purpose of clarification rather than with a view to attacking the accuracy or credibility of what each had to say, because the facts were effectively agreed as between the active parties. I have also had the benefit of witness statements from Advocate Simon Howitt, Charles Lubar, Jacopo Franzan, Amanda Johns, Advocate William Simpson, Advocate Catherine Moore, Andrea Gamba and the Fourth Defendant. Hearsay notices pursuant to section 2 of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 and rule 1(2) of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 have been served in respect of those statements. Albeit hearsay evidence, no one has suggested that the weight to be afforded to the evidence in those statements should be any less than if the makers of them had attended to give oral evidence. I have received expert evidence on matters of Italian law from Domenico Scordino and Sergio La Via. The latter gave some oral evidence as well. I have also received, reviewed and taken into account a large amount of documentation. Where such documentation was originally written in Italian, I have used (and will refer to) the English translations provided.

The pleadings

8. The Plaintiff's Amended Cause refers to the creation of a discretionary trust by RHS as the settlor by deed dated 6 September 1993. Originally, the trust was called the Roberto Haggiag Foundation, but its name was changed the following month to the United Prod Foundation. Reference is made to some of the provisions of the trust deed and it contains an explanation of events in late 2003 through to the middle of 2004, with which I will deal in more detail in due course. The Plaintiff extracts some allegations made by the First Defendant in the proceedings that he had commenced in the Tribunale Civile di Roma and asserts that they are not true. The Amended Cause also covers a document dated 30 December 2004, which was executed by RHS, a further document dated 26 January 2005, some of the content of which is quoted, which was treated by the Plaintiff as a letter of wishes, and the indication given by RHS at a meeting on 26 May 2005 that that document should be ignored by the Plaintiff. The Plaintiff further asserts that the steps required of the First Defendant pursuant to the terms of the document dated 26 January 2005 were not fulfilled by him. The Plaintiff also asserts that that document could not be treated as a valid offer by RHS of any contractual relationship, whether an *associazione in partecipazione* (which is an Italian law concept and which also formed a principal element of the First Defendant's proceedings in Italy) or anything else and makes a similar assertion in respect of the document dated 30 December 2004. The Amended Cause next deals with the creation by RHS of a new discretionary trust, known as the Translux Financing Trust, by deed dated 14 November 2005, into which various assets, including those previously held within the United Prod Foundation, were settled. In relation to this trust, the Plaintiff highlights some allegations made by the First Defendant in the Italian proceedings and asserts that they are not true. The final matter covered in the Amended Cause concerns the question of whether the First Defendant's allegation in the Italian proceedings that RHS died intestate is wrong, with reference being made to the Will dated 2 May 1994 which had been proved in the Canton of Vaud in Switzerland on 24 August 2010. Further, a "Certificat d'héritiers" dated 13 September 2012 has been issued identifying the heirs of RHS as the Second and Third Defendants. In the light of the facts set out in the Amended Cause, a fairly extensive set of declarations is sought by the Plaintiff covering both the historical position of the United Prod Foundation, the current position of the Translux Financing Trust and the ineffectiveness of the documents mentioned as establishing any contractual relationship between RHS and the First Defendant, especially in the manner

contended for by him in Italy. For ease of reference, I have set out those declarations in full in the first section of the Annex to this judgment.

9. Les Défences of the First Defendant, which had denied that the Plaintiff was entitled to many of the declarations sought, although some admissions had been made, eg, that the document dated 26 January 2005 could properly be treated as a letter of wishes for the purpose of clause 7 of the trust deed relating to the United Prod Foundation, have now been withdrawn. Although there was no formal order relating to the Réplique of the Plaintiff to that Defence, I am proceeding on the basis that it has no ongoing purpose in these proceedings.

10. The Amended Defence and Counterclaim of the Second and Third Defendants admits what the Plaintiff has pleaded and then supplements or, as the case may be, develops the facts and contentions contained therein. They have done so from their own knowledge, for example, that their late father had regarded himself as having alienated the assets that were settled into what became the United Prod Foundation. As parties to the Italian proceedings commenced by the First Defendant (although the Third Defendant's primary case in Italy was that he had not been validly served with them), they set out their contentions on the incorrectness of the First Defendant's claim. As the identified heirs of RHS, they were best placed to make assertions about the effect of the steps they had taken in Switzerland. In conclusion, they support the Plaintiff's claims for relief and seek their own set of declarations, which I have set out in full, again for ease of reference, in the second part of the Annex to this judgment.

11. The Amended Defence of the Fourth Defendant admits, so far as she is able to, what the Plaintiff has set out and, where she has insufficient knowledge, explains that she has no dispute with what it alleges has happened. In relation to her position as a possible heir of her late husband, RHS, she draws attention to the pre-nuptial agreement that they executed before their marriage, by which she renounced any right to be an heir of RHS. She seeks a single declaration about her positon in respect of her late husband's estate, which I have also included in the Annex to this judgment, simply to keep all the declarations sought in one location. She indicates that, both on her own behalf and on behalf of the beneficiaries she has been appointed to represent, she consents to the declarations sought by the Plaintiff.

12. In the final section of the Annex to this judgment, I have set out in full the modified declarations that the Plaintiff and the Second to Fourth Defendants have invited me to consider making. These were advanced when the Advocates were closing the parties' cases and reflect, at least to an extent, the overlap there was between the declarations sought by the Plaintiff and these Defendants and some refinements that flowed from the evidence that had come out at the trial. Although there was no application to substitute any of this wording for the cases that have been pleaded, both Advocate Fullman for the Plaintiff and Advocate Greenfield for the Second to Fourth Defendants are content for me to take this composite set of declarations as the starting point for my consideration of what declarations to make. I have deliberately not referred to the prior question of whether or not I would grant some form of declaratory relief because, as I indicated at the conclusion of the trial, I will grant some relief and make those declarations that I consider I can properly make.

Legal principles

13. Before turning to the facts and how they translate into the actual declarations I will make, I can set out briefly why it is that I am satisfied that some form of declaratory relief is appropriate in this case. I queried with Advocate Fullman (in particular) whether the consequences of the settlement reached with the First Defendant made the issues in this case no more than of academic interest. He has persuaded me that there is some wider purpose to the making of declarations

about the United Prod Foundation and the Translux Financing Trust because of the way that dynamics within the Haggiag family, and so across the class of beneficiaries of the Translux Financing Trust, might emerge. Further, given the cross-jurisdictional nature of the persons and assets, having a clear statement of the position as it is seen from the Guernsey perspective will be useful. In any event, because the trustee is here in Guernsey acting in respect of a Guernsey trust, it is appropriate to afford the Plaintiff the security of the type of relief being sought to enable it better to administer the trust for the benefit of all the beneficiaries.

14. The jurisdiction of this Court to grant declarations in appropriate circumstances is well-established. Further, the jurisdiction to do so even where the matter is not contested has been recognised (*In re Westbury Property Fund Limited* [2005-06] GLR 176, where the power to grant the declaration was stated to be available, provided that there was no prejudice to persons not before the Court). Accordingly, the fact that the First Defendant has agreed to play no active part in this trial does not preclude the Court from granting the relief sought by the other parties. Further, the Fourth Defendant has been appointed to represent the interests of all the other beneficiaries and, in any event, the effect of rule 35(2) of the Royal Court Civil Rules, 2007 is that any judgment or order of the Court is binding on the beneficiaries of the trusts unless a contrary indication is given. I do not propose to give any such contrary indication.

15. The guidance offered by Neuberger J (as he then was) in *Financial Services Authority v Rourke* [2002] CP Rep 14 is also useful, albeit that it starts from a provision which has no equivalent in the 2007 Rules, but reflects the position that is taken in Guernsey in any event:

> "*The court's power to grant a declaration is to be found in CPR Part 40.20, which in these terms:*
>
> > *"The court may make binding declarations whether or not any other remedy is claimed."*
>
> *Accordingly, so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section [sic], it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order.*
>
> *In Patter v Burke [1991] 1 WLR 541 Millett LJ stated that, in effect, it was the court's duty "to do the fullest justice to the plaintiff to which he is entitled", and he went on to hold that there was no rule of law which prevented a declaration of fraudulent conduct.*
>
> *In Messier-Dowty v Sabena [2001] 1 All ER 275 the issue was whether a negative injunction should be granted. Lord Woolf said this:*
>
> > *"The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved, the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice …*
> >
> > *So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly*

related to jurisdiction. It should instead be kept within proper bounds by the exercise of the courts' discretion."

It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should not grant the declaration."

16. All of these principles were referred to by Lieutenant-Bailiff Marshall when she declined to set aside the order for service out of the jurisdiction on the First Defendant or for a stay of these proceedings (Judgment 47/2015), and I align myself, certainly as regards the pleaded cases, to her comments:

> "*119. The actual declarations sought by the Plaintiff are not only very numerous but also very general, and frequently contain several limbs. The jurisdiction of this court to grant declarations is inherent and undoubted. Its scope follows English practice: see Re Westbury Property Fund Ltd [2005-06] GLR 176 (Royal Court). A declaration can be, and usually is, a declaration of right, but it can be a declaration of fact. Indeed, any finding of fact which a court makes as a necessary foundation for its ultimate conclusion in a case has the status of a judicial declaration of fact in the form of res judicata on that issue, even if it is not embodied in a formal declaration of the court.*
>
> *120. However, the granting of any declaration is a matter of discretion. The court will therefore grant a declaration only if satisfied that it is appropriate to do so, and only if satisfied that the terms of the declaration which it is asked to make are appropriate. It will not therefore make a declaration which is imprecise, unclear or overly wide. Nor will it make one on a purely hypothetical or academic matter. Nor, in my judgment, will it make a declaration which could serve no useful purpose. Since the claim for a declaration will, or should, include an indication, express or at least implied, of the purpose for which it is required, the court will wish to consider this and what form of declaration is appropriate for that purpose. It is unlikely to think it appropriate to grant a declaration in a vacuum. It will also be careful to ensure that any declaration which it does make is framed in words which are apt to define, and if necessary limit, its scope.*"

17. Taking the approach dictated by these principles, it is self-evident that some of the matters raised in the Amended Cause and the Amended Defence and Counterclaim of the Second and Third Defendants are really no more than steps along the way to a conclusion that can be regarded as serving a purpose. More specifically, the way they are put is often conditional, giving rise to declarations sought on alternative factual bases. I consider that I can only reach such findings as I feel able to reach on the evidence before me and then decide what declarations can properly be made on that basis. In other words, I cannot make one declaration based on my actual findings and a second declaration founded on the basis that those findings might be wrong.

Facts

18. The late RHS, who was born in Tripoli on 18 March 1913, was a successful film producer. Although perhaps not a household name in the same way as other film producers became, the credits of RHS in that capacity do include one film of which I have heard, namely *The Barefoot*

Contessa. RHS also owned broadcasting studios and was a property developer. He generated considerable personal wealth through these activities.

19. RHS had a number of siblings, including a brother, Ever, with whom he was in business. It appears that they later fell out. The first wife of RHS was Dorothea Robinson, with whom he had one son, the Third Defendant. They later divorced. RHS then married the Fourth Defendant, a divorcee, who already had a son, Jacopo Franzan. Before they married, RHS and the Fourth Defendant already had one child together, the Second Defendant.

20. By an agreement dated 8 December 1982 ("the pre-nuptial agreement"), RHS, described as a citizen of France, and the Fourth Defendant, described as a citizen of Italy, both being temporarily present in New York, agreed that their legal rights and interests in property were to remain separate. The agreement was expressed to be subject to the law of the State of New York and recorded that both had benefited from separate legal advice. In respect of inheritance provision Article 1 of the pre-nuptial agreement provided:

> "*1. If the Wife should survive the Husband, the Husband hereby agrees to bequeath to the Wife in his Last Will and Testament the sum of Five Hundred Thousand ($500,000) Dollars.*
>
> *2. Except as specifically provided to the contrary in Paragraph 1 of this Article, the Husband and the Wife each waive, discharge, release and renounce any and all claims and rights which he or she may acquire by reason of the marriage:*
>
> *(a) To share in the estate of the Husband or Wife whether by way of intestate succession, dower, homestead property rights, exempt property, family allowance, community property rights, statutory rights, elective share, forced heirship or otherwise.*"

21. Jacopo Franzan began working for RHS in 1983, which was after he had left university. His work focused principally on real estate issues. After obtaining a MBA and working elsewhere, he resumed working for RHS in 1990. He was aware of the wish of RHS to preserve the assets that had been generated for the benefit of his family, but was not particularly involved in the establishment of the trust that was subsequently used. As far as he was concerned, although the businesses in which he worked, and gradually assumed greater responsibility, were held within the trust, he was working, as before, for RHS.

22. By the early 1990s, a good portion of the assets of RHS were held with Credit Suisse (Guernsey) Limited, having been transferred from Credit Suisse Geneva. Consideration was being given to RHS settling his assets into a trust and Roland Hurni-Gosman, of Credit Suisse, attended a meeting in Rome on 26 July 1993 in order to explain to those gathered, who included Ever, RHJ and another nephew of RHS, Emanuel Arbib, who Jacopo Franzan explains was influencing RHS as to the course of action to take, what the trust entailed and meant. The name of the trust was to be The Roberto Haggiag Foundation and RHS wrote to the managing director at Credit Suisse Trustees (Guernsey) Limited, Mr Clerey, on 13 August 1993. On 31 August 1993, Mr Clerey replied to RHS by way of two letters in terms that had been proposed by RHS. One of those letters set out the rationale for the Foundation and commented on the draft trust deed:

> "*1. We understand that your primary purpose in establishing the Foundation is to ensure that the assets that you will transfer to the Foundation will be dealt with and distributed in accordance with your wishes and not in accordance with any "forced heirship" rules which might otherwise apply to your estate. …*

4. We confirm that the terms of the Settlement, including the powers reserved to you and to the Board [of Protectors] respectively, have our approval and we are entirely content to operate as trustees on the basis of the structure established by the Deed.

5. We are happy for the investment management of the liquid assets held by us as trustee to remain with those who presently carry out this task, and generally to follow any requests that you, and the Board of Protectors after your death, may make in this connection.

6. Should you transfer to the Foundation any significant holdings of shares in private companies, we would expect the affairs of such companies to continue to be dealt with by those who at present do so, subject only to our receiving the particular company's accounts each year and attending its annual general meetings either in person or by proxy."

Mr Le Poidevin points out that it was not unusual for those who were sophisticated business people to wish to be able to make investment suggestions to a trustee, but there was always recognition on both sides that the ultimate decision as to what steps, if any, to take rested with the trustee. Indeed, all the steps that followed that were taken by RHS were fairly typical of those undertaken when settling assets into trust for sound financial planning reasons, especially in the 1990s.

23. By a letter dated 1 September 1993, the solicitor acting for RHS, Peter Goodwin, forwarded the trust deed that had been signed by RHS, together with the initial funds to be settled into the Foundation by RHS, being a US$100 bill. The deed was duly executed and dated 6 September 1993. It was an irrevocable discretionary trust constituted under the laws of Guernsey with a wide class of beneficiaries because the class includes all lineal descendants of the father and mother of RHS then living and to be born during the trust period of 99 years. Clause 6 contained a power of appointment. Clause 7 provided:

> "*IN the exercise of the powers and discretions conferred on them by this Settlement the Trustees shall have regard (but not so as to impose on them any binding trust or obligation) to any wishes expressed by the Settlor in any letter or memorandum addressed to the Trustees and deposited with them*".

Clause 8 provided:

> "*(1) IN default of and subject to any and every appointment made under the power or powers conferred by Clause 6 above the Trustees shall have power*
>
> > *(i) to pay or transfer the whole or any part or parts of the capital of the Trust Fund to or for the benefit of the Settlor during his lifetime; and after his death ...*".

(The references within the trust deed to what will happen after the Settlor's death are all irrelevant because of events that occurred before his death and so I generally make no reference to them.) Clause 13 contained a power to transfer the assets of the trust to another trust or trust. Clause 15 provided:

> "*(1) SUBJECT only to the provisions of sub-clause (3) below none of the powers specified in sub-clause (2) below shall be exercisable by the Trustees during the lifetime of the Settlor unless the Trustees shall first have sought and obtained his written consent*

(2) The powers referred to in sub-clause (1) above are those contained in Clauses 6; 8(1)(i); 11-14; and 24(1) of this Deed.

(3) The Settlor may at any time or times by deed release or restrict the requirement that the Trustees seek and obtain his consent provided for by this Clause either wholly or to the extent specified in any such deed and he shall notify the Trustees forthwith of the making of any such deed

(4) If at any time during the Trust Period there shall be a Board of Protectors in office then subject only to the provisions of Paragraph (6)(a) of Schedule 5 hereto none of the powers specified in sub-clause (5) below shall be exercisable by the Trustees unless the Trustees shall first have sought and obtained the written consent of the Board

(5) The powers referred to in sub-Clause (4) above are those contained in Clauses 6; 8(1)(i); 11-14; and 24(1) of this Deed".

Clause 22 provided for the appointment by RHS of the Board of Protectors. The Board was only to assume office on the death of RHS.

24. Mr Goodwin forwarded the first letter of wishes of RHS to the trustee dated 7 September 1993 under cover of a letter dated 14 September 1993. During his lifetime, RHS expected the trustee to consult with him. In relation to the annual income of the trust, he wished the trustee to support his wife, the Fourth Defendant, and his sons, the Second and Third Defendants, so as to maintain their lifestyles and cater for their reasonable needs. He also wished to ensure that his stepson's ordinary needs were fully met. The importance of maintaining the Jewish faith was added as a condition of giving effect to these wishes. Thereafter, if available, a portion of the income was to be applied to charitable causes and, in the event of there being any surplus, the remaining net income was to be added to the capital of the Trust Fund. He subsequently forwarded documents dated 27 September 1993 by which RHS made provision for the Board of Protectors, reducing the number of persons involved to five, the majority of whom were relatives. Additional beneficiaries were added by way of a deed dated 3 December 1993. The number of members of the Board of Protectors was further reduced by RHS to four by a document dated 7 March 1995. Those four were the Second to Fourth Defendants and Jacopo Franzan.

25. On 2 May 1994, RHS executed a Will. RHS directed that his Will was to be governed and construed in accordance with Guernsey law. After payment of his funeral expenses and debts, he gave all his property to his executors on trust, including making allowance for the possible impact of French inheritance rules, with the remainder of his estate to go to the Foundation already settled. Credit Suisse Trustees (Guernsey) Limited, Emanuel Arbib, the Second Defendant and Jacopo Franzan were appointed as the executors. By a codicil dated 7 April 1997, Emanuel Arbib appointment as an executor was revoked.

26. Credit Suisse Trustees (Guernsey) Limited changed its name to Credit Suisse Fides Limited on 26 May 1994. It changed its name again to its current name, Credit Suisse Trust Limited, shortly thereafter, although I have not been told the exact date. From the material before me, that date must have been after 22 January 1996 and before 9 April 1997, which is a covering letter from Mr Goodwin enclosing a more detailed letter of wishes from RHS to the trustee dated 7 April 1997. In it, RHS suggested making payments in fixed amounts from the income of the Trust Fund to his wife and his sisters and that the residual income be split with percentages being paid to his sons and stepson.

27. The Second Defendant began working for his father, RHS, in 1998, but he had little involvement with matters relating to the trust.

28. RHS changed lawyers in 1999. As a result, Charles Lubar advised RHS from then until the death of RHS approximately ten years later. In his witness statement, Mr Lubar confirms that he explained to RHS the consequences of the assets having been settled on trust and how RHS was able to provide the trustee with a letter of wishes that would offer guidance but not be binding. He also adds that he was aware that RHS had deliberately structured his affairs in such a way as to avoid, so far as possible, having any dealings with the tax authorities in Italy. Mrs Genah concurs with that impression about RHS wanting to avoid anything that would involve an Italian business arrangement.

29. Towards the end of 2000, RHS became concerned about the consequences of any of the beneficiaries of the Foundation being subject to federal taxes in the United States of America. The Second Defendant was aware of these concerns and how it was being proposed to overcome them. This led to a decision by RHS on 26 December 2000 to exclude the Third Defendant and his family from the Foundation. RHS relayed his wishes to the Plaintiff trustee that any such person might be excluded from benefiting under the trust. The Second Defendant, however, considered it unfair to deprive the Third Defendant and his family in this way because, being one of the sons of RHS, the Third Defendant should receive a substantial proportion of the family wealth. RHS eventually agreed and switched his thinking to the creation of two trusts in place of the Foundation. In any event, as Mr Le Poidevin explains, the letter received from RHS was an expression of his wishes and could not be, and was not, treated by the Plaintiff as something that had to be followed slavishly. In this instance, no Deed of Exclusion was even prepared, let alone executed, as a result of this communication from RHS.

30. It was in January 2001 that Advocate Howitt was first consulted. Advice was also given to RHS by Mr Lubar as to how best to demonstrate that any new trusts were not regarded as a continuation of the existing trust, which would involve RHS having the assets transferred to him for a minimum period. Mr Lubar notes that his firm's involvement with RHS later diminished during 2004 to them having little or no involvement. The Second Defendant similarly explains that he had little to no involvement with trust-related matters in 2004 and 2005 because of the increased influence exerted by RHJ and their aunt, Dina Haggiag, at that period.

31. In October 2003, RHS wrote to the trustee requesting that the name of the settlement be changed to the United Prod Foundation. The necessary deed effecting that change was executed on 22 October 2003. At around this time, RHS was considering whether a new trust arrangement would be more desirable and he eventually wrote to the Plaintiff on 22 December 2003 inviting it to consider appointing the entire Trust Fund within the United Prod Foundation to him with immediate effect. His stated intention thereafter was to establish two new trusts. The Plaintiff held a meeting on 8 January 2004 at which it resolved:

> "*That pursuant to Clauses 8(1)(i) and 9(1) of the original Trust Instrument dated 6th September 1993 and, having received the Settlor's consent, the Trustee hereby determines to distribute the entire Trust Fund and the Income thereof to the Settlor absolutely;*
>
> *That the Trust Fund be retained by the Trustee on a bare trust for the Settlor pending the Settlement of the assets on two new trusts as detailed in the Settlor's letter dated 22nd December 2003.*"

The letter dated 22 December 2003 from RHS was countersigned by two authorised signatories of the Plaintiff on 8 January 2004. A form used internally by the Plaintiff headed "exercising trustees' discretion" was also completed on the same day and indicates that the entire trust fund was being distributed to the Settlor, RHS, to enable the family's desired reorganisation.

32. On 3 March 2004, Frank Robinson of the Plaintiff confirmed by e-mail to the solicitor acting for RHS, Joan Ingram, that the Plaintiff had taken the action requested and that the assets were by then held on bare trust for RHS.

33. The youngest brother of RHS, Lino, died in May 2004. Both the Second Defendant and Jacopo Franzan consider that this event deeply affected RHS and led to him questioning the structure that he had set up. The wider Haggiag family fell into a camp that was distinct from the immediate family of RHS. That wider group felt that RHS should have shared the fruits of his business success with them more than he had done and were able to exert greater influence over him at this time.

34. On 2 June 2004, a meeting took place between representatives of the Plaintiff, RHS, RHJ and the sister of RHS, Dina Haggiag. At the meeting, RHS wished to revert to there being a single trust structure. As a result of that meeting, on the same date RHS wrote to the Plaintiff as follows:

> "*Please note that it is my wish that the "22nd December 2003 letter" be revoked in its entirety.*
>
> *Further, it is my wish that all beneficiaries who may be citizens or residents of the United States of America, should be able to benefit from the Existing Trust irrespective of any tax or other consequences to them or other beneficiaries as a result of having so benefited.*
>
> *Any tax consequence as a result of a benefit made to such a beneficiary will be borne by that beneficiary.*
>
> *The cost of any tax of other consequence arising to the beneficiary or to any other beneficiary or the trust itself shall be borne by the beneficiary who has received the benefit.*"

RHS also executed a further document re-constituting the Board of Protectors as three persons, comprising Dina Haggiag, RHJ and Pietro Golisano, the attorney of RHS.

35. The Plaintiff sought advice from Advocate Howitt on the ramifications of the change of heart by RHS and his expressed wish to revert to the position before the steps taken in January 2004. Although Mr Le Poidevin suggests that his colleague, Brian Ellis, took the view that any bare trust was brought to an end by the revocation of his earlier wishes by RHS at the meeting on 2 June 2004, the letter to Advocate Howitt dated 7 June 2004 states "*the assets are still held by ourselves on a bare Trust for the Settlor*". As Advocate Howitt explains in his witness statement, at the time he gave his advice he had not seen and so was unaware of the Plaintiff's internal form and the e-mail on 3 March 2004 confirming that the assets were held on bare trust. Accordingly, he offered his views in the alternative: the first scenario being that effect had not been given to the resolutions, which he now appreciates is wrong, or the second scenario being that the trust funds remained with the Plaintiff but held on bare trust for RHS, meaning they could be re-settled by RHS on the trusts of the United Prod Foundation. Advocate Howitt further highlights that the minute of the Plaintiff does not refer to Clause 6 of the trust deed, which confirms that what took place was not an appointment to him, which in any event needed to be effected by way of a deed and it is obvious that no such deed was executed, but instead refers to Clauses 8 and 9. (Advocate

Howitt also gives his view on the way to treat the letter from RHS dated 2 June 2004, but they have been repeated in the submissions made by Advocate Fullman.)

36. As a result of the advice received, the Plaintiff wrote to RHS on 24 June 2004 seeking further direction as to how it should act to give effect to his wishes. Jacopo Franzan provided detailed input to RHS by way of a letter dated 29 July 2004. As he explains, he did so at the request of RHS. He was one of a number of people consulted. He wrote his note in the knowledge that the issues raised were predicated on the assets being held in trust and that the position of RHS was that he could provide a letter of wishes to the trustee, which was not obliged to accept them. There was subsequently a meeting involving Jacopo Franzan, the Second and Third Defendants at which Giuseppe Nemni, who was a friend, confidant and business associate of RHS and was, by that time, heavily involved in advising RHS, instructed them to listen to RHS without commenting. It became apparent that RHS intended to prepare a new letter of wishes.

37. On 25 August 2004, RHS wrote to the Plaintiff setting out his "*further thoughts and determinations concerning the assets that you hold in trust either in my name or for the United Prod Foundation*". He had in mind a new trust structure with the Plaintiff as sole trustee, but with a Board of Advisors involving himself, along with his sons and stepson, RHJ and Luciano Hassan, which was to be distinct from the Board of Protectors, who would be the Second Defendant, Luciano Hassan and a professional yet to be identified. RHS also intended to review the extant letter of wishes.

38. Mrs Genah began working for RHS in October 2004. She had previously had a lengthy career, culminating in being awarded a Stella al Merito del Lavoro by the President of the Italian Republic. She was heavily involved in all of the business dealings, and some personal dealings, of RHS. She considers that RHS confided in her. She was aware that RHS admired the business skills of RHJ but never really trusted him. She has a similar understanding to that of Jacopo Franzan about the wish of the wider Haggiag family to enjoy the fruits of the successes of RHS. When she began working for RHS, Mr Nemni was an important adviser to him.

39. A meeting took place on 30 December 2004. The meeting began in the late morning. RHS, Mr Nemni, RHJ, Luciano Hasson and Dina Haggiag were all present. Mrs Genah formed the view that the document being discussed had been discussed previously. She also described RHS as being both happy and agitated and confused, referring to him having had some health problems. At the end of the meeting, around midday, the Notary was called and RHS signed a document dated 30 December 2004. Mrs Genah understands that his function was just to witness the signature. The document shows that Avv. Alberto Capasso, a Civil Law Notary in Rome, certified that the signature is true and authentic and that the document was signed by RHS in front of him. He completed a Signature Certification, which was written in English, as was the document executed by RHS, although the attached Annex is in Italian, albeit the document contains the promise of an English version of it being provided in due course. I have not seen any such English translation. Mrs Genah recalls that RHJ then opened some champagne and that the original of the document was taken by Mr Nemni, although she believes RHJ also kept a copy. Mr Nemni undertook to inform the wider family about the wishes of RHS.

40. The document dated 30 December 2004 is addressed to The Trustees of the United Prod Foundation. It refers to the letter dated 25 August 2004 and sets out the progress made by RHS. It refers to the expectation that a final letter of wishes will have three classes of beneficiary. The first group were the Fixed Beneficiaries, who would receive an annual distribution and a lump sum after RHS died. There would also be Percentage Beneficiaries. These were the sons and stepson of RHS. It was further envisaged that the Robert Haggiag Charitable Foundation would

receive a percentage of the income. It was further being proposed that RHJ would be added as a Percentage Beneficiary. What was set out in the document was as follows:

> "*In the best interest of the United Prod Foundation I deem as very important that the already significant business and working relationship with my nephew Robert Haggiag Jr be strengthened as much as possible.*
>
> *There it is my wish to have Robert Haggiag Jr included as a Percentage Beneficary with the same status as the beneficiaries mentioned in b) under paragraph "Beneficiaries" here above. My desire is that Roberto Haggiag Jr have the following interest:*
>
> | | *% net income* |
> |---|---|
> | *Robert Haggiag Jr.* | *10%* |
>
> *It is however conditional to the above that Robert Haggiag Jr procures that the owners of shares in Lotte Holdings Ltd (Robert Haggiag Jr's main business holding company) transfer for a US$ 1.- consideration to the United Prod Foundation, shares equivalent to 20% of the outstanding and paid-up capital of Lotte Holdings Ltd. It is anticipated that such transaction will materialize by having the owners of that 20% shareholding transfer those shares to a Trustee with instructions to the latter to recognize the benefits of that shareholding to the United Prod Foundation until the time that those shares will be effectively transferred to the United Prod Foundation. Likewise the status of beneficiary will take effect immediately after the transfer of the Lotte shares to the Trustee. The final transfer will take place as soon as the appointment of Robert Haggiag Jr as a beneficiary, as described above, has become irrevocable.*
>
> *For clarity's sake I want to make clear that Robert Haggiag Jr will not be among those receiving the € 3,000,000 – up-front distribution in June 2005 but will only start to participate in the percentage distributions in October 2006.*"

The document then set out the way in which a reducing percentage of the net income should be retained by the Foundation before moving on to set out how capital distributions should be made in 2015 and every 20 years thereafter of a portion of the Trust Fund as between RHJ and the sons and stepson of RHS in the percentages mentioned. It was said to be valid until the final letter of wishes would be received by the trustee. It also provided a number of general instructions, including:

> "*In addition it is my desire that all assets which at the moment are in a direct or indirect way owned by me and that at the present moment do not fall within the Foundation's perimeter and control be transferred into the Foundation by June 30, 2005.*
>
> *Lastly it is my desire that the Foundation names a Group's Controller/Treasurer. The person I hereby design is my niece Ketty Genah.*"

41. Mr Nemni asked Mrs Genah to assist him in preparing a letter to inform the family of the wishes of RHS. Mrs Genah recalls that it was in general terms. No such letter has been provided in the evidence before the Court. Mrs Genah then began receiving telephone calls from RHS, who had, as usual, gone away for the New Year on holiday, from which she gathered that RHS was having second thoughts. RHS returned from his holiday and wanted to review everything. RHS asked Mrs Genah and Mr Nemni to ensure that the letter of 30 December 2004 was destroyed. Although Mr Nemni assured Mrs Genah and RHS that this had been undertaken, Mrs Genah had her doubts that this had been done, although the original has never been seen by her.

42. It was in January 2005 that Mr Le Poidevin became more involved with the Foundation because his former colleague, Ian Atkinson, left Guernsey. Mr Le Poidevin has maintained involvement ever since and has discussed with others who had conduct of affairs on behalf of the Plaintiff before him what took place to ensure the accuracy of what he has set out in his evidence. He confirms, however, that the Plaintiff had not, at that time, been told of the document dated 30 December 2004 and that this only came to light much later, during the course of proceedings commenced after the death of RHS.

43. On 20 January 2005, Mr Le Poidevin took a telephone call from RHS and RHJ. At that time Mr Le Poidevin thinks he had had no prior contact with either of those people and he was only just getting up to speed about the trust arrangements. During that telephone conversation RHJ explained that the promised work considering how the trust structure could helpfully be re-organised had been completed and that a letter of 10 pages, along with a four-page letter of wishes would be forwarded to the Plaintiff shortly thereafter. RHS then forwarded the documents under cover of a letter dated 26 January 2005, which was received two days later by the Plaintiff. The document enclosed, signed by RHS and dated 26 January 2005, was in most parts identical to the document dated 30 December 2004. Mrs Genah identifies the other signature on the document as that of Mr Nemni. One difference was in relation to the percentage of the shares in Lotte Holdings Limited that RHJ was to procure be transferred into the United Prod Foundation in return for US$1. The figure had been increased to 29%. Apart from that change, the passage about RHJ becoming a Percentage Beneficiary that I have already quoted was unchanged. There was no Signature Certification by a Notary on this document. Mrs Genah was not involved in the preparation of this document.

44. There was another telephone conversation between RHS, RHJ and Mr Le Poidevin on 24 February 2005 to discuss whether the proposals made in the letter of 26 January 2005 were likely to be acceptable to the Plaintiff. The Haggiags asked Mr Le Poidevin what the position was in relation to the assets that had been in the trust fund, wishing to know whether they were held for RHS personally or whether the United Prod Foundation had been resurrected. Mr Le Poidevin agreed to look into this and revert to them. All of this is recorded in a file note dated 28 February 2005. As promised, the Plaintiff sent a letter (where the copy I have seen is undated, but which refers to a telephone conversation having taken place "*yesterday*" and which Mr Le Poidevin confirms was sent on 25 February 2005), in which he explained that the position remained unchanged from what had been described the previous summer. Mr Le Poidevin noted that no action had been taken by RHS to clarify the position. He repeated that RHS could "*resettle the assets under new Trusts, but that the interim period will be unresolved unless directions of the Guernsey Court are sought to obtain a definitive decision*".

45. A meeting took place in London on 26 May 2005 at the offices of Morgan Lewis & Bockius, the firm of Mr Lubar and Ms Ingram. Mrs Genah and Mr Nemni were also present. According to Mrs Genah, this was the first occasion on which the full implications of the trust and its consequences became known to her, although she appreciated that RHS was already well aware of these and understood them. She further explained that RHS had not wanted RHJ present at this meeting. The discussion ranged over the proposed arrangements for a new trust. They were different from those set out in the letter of RHS dated 26 January 2005 and a handwritten endorsement was made on that letter by Mr Robinson that it was to be ignored as a result of the later meeting. Mrs Genah considers that the absence of any reference to the document dated 30 December 2004 at this meeting was because RHS believed it had been destroyed, as he requested, by Mr Nemni. There followed a meeting of the Plaintiff on 28 June 2005 at which it resolved to appoint Mr Nemni as a facilitator on its behalf as trustee of the United Prod Foundation in accordance with the terms of a proxy form.

46. On 25 October 2005, Advocate Howitt gave to the Plaintiff his opinion on two questions. The first was whether a foreign judgment declaring a trust such as the United Prod Foundation invalid for failing to respect forced heirship rules would be recognised by this Court. Advocate Howitt referred to section 11A(a) of the Trusts (Guernsey) Law, 1989, as amended, which clearly provides that such a trust (or any disposition into it) is not invalidated by any foreign rule of forced heirship. His view was that the Court would be required to give effect to that statutory provision. On the question as to whether a trust might be treated as a nominee arrangement for the settlor, he was unable to identify any case law or statute providing an answer. He considered that the issue could well turn on whether the foreign court had jurisdiction over the assets in question.

47. On 14 November 2005, the Plaintiff executed a deed of appointment, exercising the power of appointment contained in clause 6 of the trust deed of the United Prod Foundation by which it irrevocably appointed the entire Trust Fund "*if and to the extent that it is not presently held upon trust for the Settlor absolutely*" to RHS absolutely. The recitals to that deed include:

> "*D) By resolution of the trustee committee of the Trustees made on 8th January 2004 the Trustees resolved to distribute the entire Trust Fund and the income thereof to the Settlor*
>
> *E) Notwithstanding the resolution referred to above no distribution of the Trust Fund to the Settlor has been made and doubt has arisen as to the effect of the resolution referred to above and, in particular, as to whether the Trust Fund (and the income thereof) continues to be held by the Trustees on the terms of the Settlement or whether it is held for the Settlor absolutely*
>
> *F) In order to resolve the doubt referred to above, the Trustees wish to exercise their power of appointment under clause 6 of the Settlement in the following manner.*"

Advocate Howitt was involved in drafting the relevant documents required to reflect the uncertainty that existed over the status of the assets previously held on the trusts of the United Prod Foundation. Mr Lubar was also consulted and explains in his witness statement that "*By this method, it meant that if the UPF was still in existence with assets, those assets were passed to RHS and then to TFT. Alternatively if the UPF did not have assets, then nothing would be lost by the transfer to RHS.*"

48. On the same date, at a meeting in Guernsey, RHS and the Plaintiff executed the trust deed of the Translux Financing Trust. This Settlement is also a discretionary trust constituted under the laws of Guernsey. The amount initially settled was US$100. Many of the provisions are similar to those that appeared in the trust deed of the United Prod Foundation. There was, however, now a Board of Advisors and the provisions relating to the Board of Protectors had been modified. In both cases, the members of those Boards were not to assume office until the death of RHS. Clause 6 contains a power of appointment. Clause 7 uses identical wording about letters or memoranda of wishes. Clause 8 has been modified to contain a general power to pay capital to beneficiaries, rather than being confined, during his lifetime, to have power to pay some or all of the capital to or for the benefit of RHS. The consent provisions in clause 15 are broadly similar, although the powers of the Plaintiff to which they attach have been slightly changed, although they still cover Clauses 6 and 8.

49. RHS also wrote to the Plaintiff on 14 November 2005 authorising and instructing it to hold the funds held for him, which he described in the following terms:

> "*Pursuant to a resolution of the trustee committee of Credit Suisse Trust Limited made on 8th January 2004 and/or a deed of appointment dated this 14th day of November 2005 you hold the Trust Fund of the First Settlement (and any income of the Trust Fund not otherwise dealt with) on trust for me absolutely*",

upon the trusts of the Translux Financing Trust. The Plaintiff agreed to accept those funds as an addition to the Trust Fund of the Translux Financing Trust. By a deed of gift that day, RHS settled further assets of his into the Translux Financing Trust. By a deed of addition, the Fourth Defendant, Dorothea, the former wife of RHS, and Jeanne Audibert were added to the class of beneficiaries. RHS nominated Mr Nemni and Arbib Haivito to the Board of Protectors as the two non-beneficiary members and indicated that he would nominate a third member in the near future. (Mr Le Poidevin has explained that both of them attended the meeting at which all this documentation was executed.) Finally, RHS provided to the Plaintiff a letter of wishes, also dated 14 November 2005, albeit that there remained some gaps in how he envisaged the Plaintiff might wish to act in respect of some family members. That letter of wishes emphasised "*the critical importance [RHS] attach[es] to preserving and enhancing the Haggiag name and [his] family's traditions*" and that "*it has always been [his] strong will that [his] descendants should be (and continue to be) members of the Jewish faith*". The primary position RHS took was that:

> "*During my lifetime, I would expect you to consult with me on all matters relating to the Trust. In any event, as you are aware, the Trust Deed requires you to obtain my agreement before exercising any of your principal powers and discretions.*"

50. With the creation of the Translux Financing Trust and the appointment to RHS of any assets in the United Prod Foundation, the Plaintiff regarded the United Prod Foundation, and so all the documents it had received in respect of it, as no longer being operative. The Plaintiff has completed an internal trust termination form dated 27 July 2006 recording the date of disposal of mandate and termination of the trust as 14 November 2005.

51. Mrs Genah was nominated by RHS to the Board of Protectors, and confirmed her willingness to accept appointment, on 7 March 2006.

52. On 20 March 2006, RHJ sent to RHS a letter expressing his unhappiness at the way in which their relationship had deteriorated. As Mrs Genah explains, there had been a general cooling between them in 2005, Mr Nemni had become much more involved in matters with RHS and become a confidant and the Teodora property fund was being put together which would result in RHJ having significant personal wealth. She cannot point to any one reason that led to this situation but feels it was something that just happened during that year. In his letter, RHJ referred to news that had come to him, though not directly from RHS, that RHS considered their business relationship to be at an end, and the lengthy talk they had had, but with nothing being resolved. RHJ had heard that other ventures were being pursued by RHS, but keeping him (RHJ) in the dark about them. That letter included:

> "*I have reflected at length, dear Robert, and unfortunately I now have to agree with you that our common path has come to an end. Since we both agree, I am ready to discuss the best way for us to arrive rapidly at an amicable division, with the least damage possible to our assets. At the same time, I'm sure you'll agree, we need to come up with guidelines for whatever ongoing joint ventures we may have, also with a view to minimising our responsibilities to third parties.*"

RHS replied on 27 March 2006, thanking RHJ for his assistance in the previous two years and suggesting that he may have misinterpreted certain aspects of what had happened.

53. In 2007, the Teodora fund was sold. One consequence of this, as noted by Jacopo Franzan, was that RHJ obtained considerable personal wealth and so felt independent from RHS. Their relationship had already deteriorated, particularly when RHS had been unable to remain a director of a company known as Camfin, which ultimately owned Pirelli, because of the stance taken by RHJ, and also in relation to a property transaction in Montenegro, but the position of RHJ appeared to Jacopo Franzan to change following the Teodora sale. Mrs Genah has confirmed that the episode involving RHS having to cease being a director of Camfin had left RHS angry with RHJ because he had expected RHJ to respect his wish, in the time remaining to him, to remain on the board.

54. The Second Defendant was more involved by RHS in what was happening in 2006 and 2007, which coincides with the time when the relationship of RHS and RHJ had cooled. He recalls that the antipathy of RHS arose from the various incidents to which Mrs Genah also referred. The Second Defendant considered that RHS should not cease completely working with RHJ and so asked if he could be authorised to try to broker a suitable agreement. By a letter dated 19 June 2007, RHS conferred on the Second Defendant powers to negotiate with RHJ for the re-launching of one of the companies in the trust structure, which led to heads of agreement dated 3 August 2007 being signed. Those heads of agreement were not progressed further.

55. During 2008, RHS had in mind conferring on the Second Defendant a high degree of involvement with the assets in the trust, possibly even arranging for him to become the owner of them. This led instead to the notion of re-constituting the Board of Protectors so that the Second Defendant would be a member, and that the Second Defendant would have a "golden share" enabling him to veto any proposal with which he did not agree. RHS later confirmed his wishes in a letter to the Plaintiff dated 22 October 2008. This was a letter that the Second Defendant had been instrumental in having signed and was apparently kept by him in a locked drawer in Rome, as he explained to the solicitors used by RHS, and by then by him, in an e-mail on 18 November 2008. In a further e-mail on 8 December 2008, he explained that Mrs Genah had read the letter to RHS before RHS signed it. There was follow-up on these developments at a meeting attended by Mr Le Poidevin with Morgan Lewis & Bockius on 9 December 2008. When the Second Defendant returned with RHS to Rome around Christmas 2008, he forwarded a copy of the letter dated 22 October 2008 to the solicitors who in turn forwarded a copy to Mr Le Poidevin.

56. RHS died on 27 February 2009.

57. On 5 March 2009, at a meeting in Guernsey, Mrs Genah, accompanied by the other two members of the Board of Protectors, explained some of the background of recent events to Mr Le Poidevin. She referred to RHS having been blind for 2 years. She indicated that the Second Defendant had been on at RHS to sign documents and that he had produced the letter dated 22 October 2008 dealing with matters that RHS wished to discuss with the Third Defendant. The written summary of that meeting records concerns that RHS had not been in sufficiently good health at the time of signing the document to do anything other than try to keep the peace among his relatives. The Second Defendant was surprised and upset that the Board of Protectors were not prepared to recognise him as a new member in accordance with his late father's wishes. On 25 March 2009, the Second Defendant wrote to Mr Le Poidevin confirming his formal acceptance of nomination to the Board of Protectors by RHS. This dispute over the effect of the letter of 22 October 2008 resulted in proceedings being commenced before this Court.

58. On 13 March 2009, Advocate Simpson wrote to the Plaintiff indicating that he represented a number of members of the beneficiary class who had an interest in the Translux Financing Trust, although Advocate Simpson explains in his witness statement that he does not recall having written that letter. RHJ was one of those persons and the group included four of the sisters of

RHS. There was subsequently a meeting on 2 April 2009. As well as Mr Le Poidevin, Amanda Johns of the Plaintiff was in attendance. In her witness statement, she explains that she took a contemporaneous note, which was then typed up. That note records that Advocate Simpson explained that he had gained some knowledge of the position of the trust from RHJ. Advocate Simpson regards the note of the meeting as an accurate record and does not recall any discussion about Lotte Holdings Limited. At the time, Advocate Catherine Moore, then a trainee solicitor at Ogier, was assisting Advocate Simpson. As she explains in her witness statement, she has no independent recollection of these events and is reliant on the meeting note to refresh her memory. She has no reason to believe the note is inaccurate. The note does not refer to Lotte Holdings Limited and she similarly does not recall any mention of that company. Ms Johns also confirms that the question of Lotte Holdings Limited was not raised at that meeting. She further confirms that the Plaintiff never received any indication or proposals in respect of the shares in Lotte Holdings Limited. Mr Le Poidevin also confirms that there was never any indication given by anyone that the requisite shares in Lotte Holdings Limited were being held by an intermediary as part of this process or that they were ever readied to be transferred to the Plaintiff and so into the Translux Financing Trust.

59. On 18 March 2009, all three of the members of the Board of Protectors (Mrs Genah, Mr Nemni and Mr Arbib) wrote to the Plaintiff confirming that each agreed to act as a member of the Board of Protectors. In separate letters the same day, they each made a nomination of the person to be successor member of that Board in their respective places.

60. The uncertainty about the status of the Second Defendant in relation to the Board of Protectors was brought by the Plaintiff before the Court by way of an application for directions. The Respondents were the Second Defendant to these proceedings, and the three members of the Board of Protectors who had been nominated by RHS. Those proceedings were resolved amicably in February 2010. The trial had commenced, but by way of an Order dated 19 February 2010, the current Plaintiff (as Applicant) was authorised to implement the Terms of Compromise agreed and the application was withdrawn. In this manner, the Second Defendant became a member of the Board of Protectors and clause 22 of the Translux Financing Trust deed was modified to reflect that "*he shall have a power of veto (so that no decision can be made by the Board of Protectors without his approval).*" There were consequential amendments also made to Schedule 5 to the deed.

61. On 5 March 2010, the Plaintiff informed Mr Nemni that the Second Defendant had been accepted as a member of the Board of Protectors of the Translux Financing Trust and that the Second Defendant had a power of veto as set out on Clause 22(1)(ii)(a) of the trust instrument. Mrs Genah resigned as a member of the Board of Protectors in 2010.

62. The Justice de Paix du District de Nyon issued an Attestation d'exécuteur testamentaire on 24 August 2010. It refers to the Will of RHS dated 2 May 1994, by which the Second Defendant was appointed executor. On 13 September 2012, a Certificat d'héritiers was also issued by the Justice de Paix. This document recites the approval of the Will on 24 August 2010 and the requisition for the certificate presented by the heirs on 20 and 21 October 2010 and then certifies that RHS left as his sole heirs the Second and Third Defendants. In his witness statement, Andrea Gamba of Bär & Karrer AG, the Swiss lawyer instructed to act for members of the family of RHS, explains that the other persons named in the Will (the Plaintiff, Jacopo Franzan and Emanuel Arbib) renounced their appointments as executor. (Of course, Emanuel Arbib's appointment as executor had been revoked by the 1997 codicil.) In order to obtain the Attestation and Certificat, the Justice de Paix was provided with the Will, the 1997 Codicil and the pre-nuptial agreement. The Second Defendant has confirmed that he took these steps to obtain probate in Switzerland because that was the country regarded as being where RHS was resident.

He has also explained that one of the steps required was to determine which assets of RHS had not been settled into the Translux Financing Trust and so fell within the estate. Mr Lubar has indicated that he was also actively involved in the process of obtaining probate in the Canton of Vaud. The Fourth Defendant confirms in her witness statement that she has received the amount bequeathed to her under the Will.

63. On 20 December 2010 steps were taken by the corporate director of Lotte Holdings Limited, and its members, to wind up that company voluntarily. The liquidator appointed, TC Directors (Channel Islands) Limited, gave notice of the passing of the required special resolution on 21 December 2010. The General Meeting of the shareholders was held on 31 December 2010, at which the liquidator presented its accounts and thereafter notice was given to the Registrar of Companies pursuant to section 400(2) of the Companies (Guernsey) Law, 2008. Accordingly, Lotte Holdings Limited was dissolved three months later.

64. Proceedings were commenced by the Plaintiff against Mr Nemni, which were tabled on 26 November 2010 as against Mr Nemni, and were commenced shortly thereafter against the current Second to Fourth Defendants, who did not contest, and indeed supported, the relief being sought against Mr Nemni by the Plaintiff. In turn, Mr Nemni commenced proceedings against the Second to Fourth Defendants in the Tribunale di Roma, suing them in their alleged capacities as the heirs of RHS. The Plaintiff's action against Mr Nemni was to recover monies said to have been misappropriated by Mr Nemni from the Translux Financing Trust. He had been a trusted fiduciary agent of the Plaintiff and, as I have already mentioned, appointed as a proxy, under a power of attorney dated 14 November 2005, but it was alleged against him that he had then abused that position. Judgment was delivered on 18 November 2011. Mr Nemni had not participated in the trial. Declarations were made and Mr Nemni was ordered to pay to the Plaintiff for the benefit of the Translux Financing Trust a significant amount of money.

65. RHJ commenced proceedings in the Tribunale Civile da Roma by way of an Atto di citazione (or Writ of Summons) dated 11 September 2014 against (in the order listed) the Fourth, Second and Third Defendants and the Plaintiff in these proceedings. The Plaintiff entered its Comparasa di Constituzione e Riposta (or Memorandum of Appearance and Defence) on 5 March 2015. The Fourth and Second Defendants acted similarly on 10 March 2015. They all opposed the relief sought by RHJ. For the purposes of this judgment, I do not need to descend into any detail about the allegations made in those proceedings, or comment further on the rather colourful language used by those acting for RHJ in the Atto di citazione, in particular when describing the legal system in Guernsey. It suffices to summarise the position as being that RHJ invited the Italian court to find that the United Prod Foundation and the Translux Financing Trust could not be recognised by the Italian legal system, and that the deed executed on 30 December 2004 gave rise to an *associazione in partecipazione* pursuant to article 2549 of the Italian Civil Code. Various procedural stages followed with the parties (although not the Third Defendant, who considered he had not been served) filing their written arguments. RHJ also threatened further proceedings in Italy. However, by way of an agreement, the terms of which are confidential, the parties who have engaged in action in Italy and before this Court managed to resolve their differences and reach terms under which these Italian proceedings are not being pursued further.

66. Finally, the Fourth Defendant, in her representative capacity, offers her view that it is important for all the beneficiaries of the trusts RHS established as settlor to know that they are valid and have been operated properly. In her view, any disputes relating to the trusts and to the estate of RHS only serve to expend valuable trust assets. All concerned will benefit from the certainty and finality if the declarations sought are made.

Expert evidence

67. I have had the benefit of expert evidence relating to the document dated 30 December 2004. The Plaintiff's expert, Sergio La Via, briefly expanded upon his witness statement, and the expert for the Second to Fourth Defendant, Domenico Scordino, was not called to give oral evidence because there was agreement that the relevant principles on which both experts opine were clear from their respective statements. I accept that both can properly be regarded as experts before this Court, even though both acted in the Italian proceedings. Both explain that, where possible, they have made use of English translations of the Italian Civil Code provided in Beltramo's book.

68. In relation to the Notary's involvement with the document dated 30 December 2004, article 2703 of the Italian Civil Code provides:

> "*A signature that has been authenticated by a notary or by another authorized public official is treated as having been recognized. The authentication consists of a certification by the public official that the signature was written in his presence. The public official must previously verify the identity of the person who makes the signature.*"

69. However, according to article 54 of Italian law no. 89 concerning notaries, dated 16 February 1913, notarial documents have to be written in Italian. Because the signature certification on the document dated 30 December 2004 is not written in Italian, the experts agree that it is of no effect or validity under Italian law. In any event, even though the signature is genuine, its notarisation merely confirms that it is genuine and does not give any special status to the document dated 30 December 2004. It is, at its highest, an unofficial or private document which happens to have had the signature on it witnessed.

70. Article 1335 of the Italian Civil Code states that "*an offer, acceptance, their revocation and any other declaration directed to a given person are deemed to be known at the moment they reach the address of the person to whom they are directed*". Accordingly, any contractual proposal must be unequivocally and directly addressed to the counterparty to the agreement. The document dated 30 December 2004 is not addressed to RHJ, to whom it would need to be addressed if it were to be regarded as an offer of an *associazione in partecipazione*.

71. By article 2549 of the Italian Civil Code an *associazione in partecipazione* is defined as "*In a contract of association in participation, the associating party grants the associated party a participation in the profits of his enterprise or one or more transactions, in return for a specified contribution.*" Further, article 1325 provides generally that:

> "*The requisites of the contract are: 1) agreement of the parties, 2) causa, 3) objet, 4) form when prescribed by law, under penalty of nullity.*"

By way of elaboration, article 1346 provides that "*The object of the contract must be possible, lawful, determined or determinable*". Accordingly, any proposal for an *associazione in partecipazione* needs to specify precisely the business in respect of which the offer is being made. The document dated 30 December 2004 does not identify any business of RHS that could be the object of the contract. There is also a requirement that the offeror proposes to share the profits of a business and the document dated 30 December 2004 does not do so. Instead, it refers *inter alia* to the making of capital distributions which is an alien concept to an *associazione in partecipazione*. By reference to article 2550, which provides that "*unless otherwise agreed upon, the associating party cannot grant participations in the same enterprise or in the same transaction to other persons without the consent of the parties who have previously become associated*", Avv. La Via points out that the other beneficiaries, who must be regarded as already involved in the alleged partnership, would need to consent to the introduction of RHJ into it.

72. Turning to the time during which an offer remains open for acceptance, article 1328, Italian Civil Code provides that "*an offer can be revoked until the contract is concluded*". In order to be revoked, the counterparty must know that the offer has indeed been revoked. Because RHJ knew about the document dated 26 January 2005, it is clear that he was aware that the document dated 30 December 2004 had been superseded and so revoked. Similarly, the document dated 26 January 2005, because of its references to the United Prod Foundation, was revoked when the Translux Financing Trust was created and the United Prod Foundation terminated, all of which was known to RHJ.

73. As regards the time during which any offer could be accepted, article 1326, paragraph 2, Italian Civil Code provides that "*the acceptance must reach the offeror within the time set by him or within that ordinarily necessary according to the nature of the transaction or usage*". In addition, article 2946 provides "*Except in cases where the law provides otherwise, rights are extinguished by prescription after the lapse of ten years*". Avv. Scordino considers that the reference in the documents to any distribution to RHJ as a Percentage beneficiary commencing in October 2006 demonstrates that acceptance of the terms had to be given by that time. Avv. La Via suggests that an Italian court might even conclude that a period of only six months from the date of the offer was reasonable for any acceptance. Both agree that the requirement for acceptance within a reasonable time is why any offer cannot be regarded as having been open-ended, which is not permissible anyway as a result of the decision of the Court of Cassation dated 21 June 2013 (No. 15709). Further, the conduct of RHJ in sending his letter dated 20 March 2006 to RHS, and later putting Lotte Holdings into liquidation, demonstrate his rejection of any proposals in those documents. The Italian principle *protestatio contra factum nihil relevat*, being akin to *res ipsa loquitur* suffices to prove this. In any event, because the definition of an "*entrepreneur*" in article 2082, Italian Civil Code is "*a person who engages professionally in an economic activity organized for the purpose of production or exchange of property or services*", once RHS died, it was impossible for him to be an entrepreneur, albeit that article 1330 provides that a proposal made by an entrepreneur, as so defined, does not lose its validity if the entrepreneur dies "*except in the case of a small enterpriser or when it appears otherwise from the nature of the transaction or other circumstances*". The definition of a small entrepreneur in article 2083 points away from that applying to RHS, but the nature of the business involved in any proposal for an *associazione in partecipazione* is such that Avv La Via considers it would mean it was incapable of being accepted after the death of RHS.

74. In relation to the manner by which the steps required to evidence acceptance are performed, article 1326, paragraph 4, Italian Civil Code provides that "*when the offeror requires a specific form of acceptance, the acceptance is ineffective if given in a different form*". On the basis that RHJ was required to procure the transfer of a percentage shareholding in Lotte Holdings Limited under the terms of the document dated 30 December 2004 (or the document dated 26 January 2005), nothing other than procuring such a transfer would suffice. In particular, issuing proceedings in Italy was not complying with the manner of acceptance specified. Because the last paragraph of article 1326 provides that "*an acceptance that does not confirm to the offer is equivalent to a new offer*", anything purporting to be acceptance by RHJ outside of what RHS had required would be treated as a counter-offer to RHS. Moreover, once Lotte Holdings was dissolved and so ceased to exist, RHJ rendered acceptance of any proposal for an *associazione in partecipazione* on terms that he contribute a specified shareholding in Lotte Holdings Limited impossible to perform. If nothing else, this was a rejection of any such proposal.

Discussion

75. Many of the facts I have set out are derived from the documents I have reviewed. In some instances, the witnesses have given their recollections or impressions. The facts are really not in

dispute anyway and my determination is much more about what conclusions or consequences I consider result from those facts. I will tackle the various issues raised in what may appear to be an illogical order but I have chosen those areas as much as anything by starting with the easiest. I can also make a number of general comments about the case before turning to each of those areas.

76. I have noted the shifting alliances within the Haggiag family over the years. This may well have had an impact on the approach the Plaintiff has taken in relation to the trusts. However, those historical differences do not have any specific impact on how I now understand the relationships to operate. It must be hoped that the peace brought about last year by the settlement of RHJ's disputes will lead to a period of stability. Mr Le Poidevin notes in his witness statement that there were a number of reasons why the Plaintiff's action for declaratory relief was commenced although largely resulting from the challenges made by RHJ, including some going to the very validity of the trusts of which the Plaintiff is and was the trustee, and which need to be addressed. Even though that challenge has gone away, the Plaintiff (through Mr Le Poidevin) considers that:

> "*Given the history of these Trusts, and the family enmities which have endured into the second generation, the Trustee is concerned that the issues which formed the matters in dispute in this Claim, once having been raised, should now be dealt with and finalised once and for all.*"

I understand that sentiment, which is why I have been persuaded that a series of declarations can properly be made so as to assist the Plaintiff, in particular, in the future administration of the Translux Financing Trust.

77. One further preliminary comment about the evidence, especially that of Mr Le Poidevin, is that I consider that too often it strayed from being a factual account of what had happened and descended into argument. His oft-repeated mantra that the Plaintiff "*is entitled to a declaration*" over-states the case; there is plainly no legal entitlement to a discretionary remedy. The Plaintiff's position would have been easier to understand if the evidence had set out what has happened without there being a running commentary on the arguable consequences of that, which I believe should properly be provided by way of Counsel's submissions.

The Will of RHS

78. Perhaps the most straightforward issue raised in this case relates to whether or not RHS died intestate and who his heirs are.

79. I have seen a copy of the Will RHS executed dated 2 May 1994. Insofar as it is relevant, I have also seen a copy of the codicil dated 7 April 1997. More importantly, I have seen the Attestation d'exécuteur testamentaire dated 24 August 2010 issued by the Justice de Paix du District de Nyon. In the absence of any argument indicating otherwise, the fact that probate was granted to the Second Defendant as the only named executor wishing to accept office by a Swiss judicial officer satisfies me that RHS did not die intestate.

80. Having regard to the Certificat d'héritiers issued by the Justice de Paix on 13 September 2012 (and also from considering the terms of the Will of RHS), the two persons who can properly be described as the heirs of RHS are the Second and Third Defendants. In particular, I have noted that the Justice de Paix has had regard to the terms of the pre-nuptial agreement by which the Fourth Defendant renounced her entitlement to participate in the estate of RHS, save for his requirement to make provision for a specific bequest in her favour. He did so, and I accept the evidence of the Fourth Defendant that she has received the amount of US$500,000 from the estate. Although I have not received any evidence as to the effect of the pre-nuptial agreement as

a matter of law in the State of New York, its terms appear to me to be clear and likely to be effective to produce the result recognised by the Justice de Paix in Nyon.

81. It is questionable what additional benefit there is to the Plaintiff, or to the Second to Fourth Defendants, in this Court making the declarations sought in this regard. The documentation issued by the Justice de Paix in Nyon will either satisfy some other court or it will not. It seems unlikely that a declaration of this Court will add anything. However, in the event that one of the other beneficiaries were to act in a manner that concerns the Plaintiff and challenge the succession position relating to RHS, thereby causing unnecessary or avoidable expense, and possible uncertainty, within the Translux Financing Trust, I am persuaded that a simple declaration does serve some purpose, particularly in the way it could potentially be utilised by the Plaintiff. Accordingly, I am prepared to declare that, when RHS died on 27 February 2009 he left a Will dated 2 May 1994, and so was not intestate and, further, that that Will has since been proved before the Justice de Paix du District de Nyon with the consequence that the only heirs of RHS are the Second and Third Defendant, which means that the Fourth Defendant, in accordance with the terms of the pre-nuptial agreement, is not one of the heirs of RHS.

Effect of 2004 and 2005 documents

82. The next topic I can deal with relates to the effect, if any, of the documents dated 30 December 2004 and 26 January 2005. It was the Atto di citazione of RHJ in the Italian proceedings that sought to present the document dated 30 December 2004 as the basis for his claim to be entitled to share in the wealth of RHS, including the wealth that he argued should not have been recognised as now being within the Translux Financing Trust. As a result, the Plaintiff has sought some comfort in the form of declarations confirming that it did not have that effect. This is the area where the expert evidence on Italian law has focused and my conclusions reflect that evidence.

83. The first issue in relation to the document dated 30 December 2004 is that it was not received by the Plaintiff at that time. I accept the evidence of Mr Le Poidevin on that issue. As a consequence, Clause 7 of the deed in respect of the United Prod Foundation was not complied with because the letter was not deposited with the trustee. Accordingly, it is not a letter of wishes to which the Plaintiff could have regard. Indeed, it is quite clear that a person who does not know the existence of something cannot be criticised for not taking any steps in relation to that something.

84. If only by way of comparison, the document dated 26 January 2005 <u>was</u> deposited with the trustee. From its content, it is readily recognisable as a letter, or memorandum, of wishes provided by RHS to the Plaintiff in respect of the United Prod Foundation. In accordance with Clause 7 of the trust deed, this meant that the Plaintiff was bound to have regard to its terms but was not obliged to follow the wishes contained in it. In that regard, the position is as set out in *Lewin on Trusts*, 19th ed., para. 23-055, which contains a simple summary of the legal position which is equally applicable in Guernsey:

> "*A settlor's letter of wishes is relevant to the exercise of trustees' dispositive and administrative powers and discretions. It is well established that a settlor's wishes are a relevant consideration in relation to the exercise of such powers and discretions which the trustees are entitled to take account. And it is the better view that the trustees are bound, as well as entitled, to take them into account though not necessarily to follow them, and certainly not to follow them slavishly without the trustees reaching their own independent decision on the exercise of their powers and discretions. But, whether or not there is a duty to take a settlor's letter of wishes into account, and while circumstances*

vary and the weight given to the letter will vary from case to case, the letter will undoubtedly form an important part of the trustees' consideration of the exercise of their powers and discretions. And the fact that in a particular case trustees invariably follow a letter of wishes, in itself, neither shows that the trustees have done anything wrong nor calls the integrity of the trust into question. The letter may, taken with other circumstances, give rise to an exceptionally strong claim for a beneficiary favoured by it to be considered. In some cases, the settlor's wishes may be the only consideration taken into account by the trustees."

85. As a result of the experts' evidence, the conclusion I can properly reach is that the document dated 30 December 2004 (and the same reasoning applies to the document dated 26 January 2005 *mutatis mutandis*) did not result in an *associazione in partecipazione* between RHS (or anyone else for that matter) and RHJ. Advocate Edwards, on behalf of RHJ, confirmed as much. There are many reasons why this is the only conclusion available. They range from the fact that the document was not addressed to RHJ, but was addressed to the Plaintiff, through to the confirmation from RHJ that he did not take any steps to procure the transfer of a 20% or 29% shareholding in Lotte Holdings Limited to the Plaintiff as trustee. In short, I accept each of the bases on which the experts give their opinions that the documents could not be treated as establishing a contract with RHJ. From reading the documents, it is quite apparent that the subject-matter was dealing with assets held by the Plaintiff on trust for the beneficiaries concerned and so could not be construed as falling with article 2549, Italian Civil Code because there was simply no offer to share in anything, whether the profits of an identifiable enterprise or one or more transactions. RHJ was, of course, already within the beneficial class of the United Prod Foundation and so the Plaintiff could have taken whatever decision it wished in exercise of its powers, subject only to obtaining written consent from RHS.

86. When the Plaintiff received the document dated 26 January 2005, I take the view that it was not only a letter of wishes for the purposes of Clause 7 of the trust deed but also capable of constituting the prior written consent from RHS for the purposes of Clause 15 had the Plaintiff decided to give effect to its terms. Because the document dated 30 December 2004 was not received by the Plaintiff at the time, and indeed the original has apparently never been produced, whether or not it was destroyed by Mr Nemni, it could not have any of these effects. The status, though, of the document dated 26 January 2005 being the prior written consent of RHS must, in my view, mean that the only consent provided by RHS to the Plaintiff to deal with RHJ as a Percentage Beneficiary was conditional upon RHJ procuring the transfer into the United Prod Foundation of the 29% shareholding in Lotte Holdings Limited mentioned therein. The evidence shows that that did not happen. Advocate Edwards has confirmed, on behalf of RHJ, that RHJ did not procure the transfer of this shareholding. In those circumstances, the condition precedent to the giving of consent by RHS was not satisfied with the consequence that there had been no prior written consent from RHS. This prevented the Plaintiff acting in the manner suggested in that document.

87. This is a topic, however, in respect of which I am not prepared to make any declarations because I am not persuaded they serve a useful purpose. As I understand the arguments of RHJ, he was asserting a personal relationship from which he was entitled to benefit. He has openly admitted before this Court through Counsel that neither document had the effect for which he had contended in the proceedings in Rome. Those proceedings have been settled and I was informed that they cannot be resurrected by RHJ. There has been no suggestion that these arguments can be raised by anyone else. That is because they were personal to RHJ. In those circumstances, I am not persuaded that anyone in the next generation of the Haggiags can seek to develop any argument that would have an impact on the administration of the Translux Financing Trust and so

the Plaintiff and the Second to Fourth Defendants cannot be given any greater protection through the making of a formal declaration than they already have from what has occurred and the facts and analysis I have already set out. Although I appreciate it is part of the historical factual matrix, it does not follow that there must be any declaration about documents that were, as I have said, either of no effect or of short-lived effect in relation to a trust that has now terminated, and was so terminated more than a decade ago.

Consequences of 8 January 2004 decision

88. A further reason why I decline to make any declarations about the documents dated 30 December 2004 and 26 January 2005 is that I do not think that the Plaintiff has discharged the burden of showing that there were any assets in the United Prod Foundation at that time to which they could apply.

89. It is now acknowledged by the Plaintiff that the entire assets of the United Prod Foundation were held on a bare trust for RHS as a result of its resolution on 8 January 2004 to distribute the entire Trust Fund and the income thereof to the Settlor absolutely pursuant to Clauses 8(1)(i) and 9(1) of the trust deed. This was done as a result of receiving the letter from RHS dated 22 December 2003, which I consider is another example of a document that was treated by the Plaintiff both as a letter of wishes and as the prior written consent of RHS to a course of action. The position that the assets were held by the Plaintiff on a bare trust was confirmed in Mr Robinson's e-mail of 3 March 2004. Although Advocate Fullman has submitted that the revocation of those wishes at the meeting held on 2 June 2004 should be treated as the re-settling of the assets then held on bare trust back into the United Prod Foundation, the documentation thereafter does not support that outcome. For example, on 24 June 2004, having taken advice from Advocate Howitt, the Plaintiff sought further direction from RHS as to how it should act to give effect to his wishes. The implication is that it did not feel confident that there had been a re-settling of the assets on the trusts of the United Prod Foundation. Subsequently, in the letter sent by Mr Le Poidevin to RHS on 25 February 2005, he indicated that the position remained as it had been the previous summer and repeated that RHS could "*resettle the assets under new Trusts, but that the interim period will be unresolved unless directions of the Guernsey Court are sought to obtain a definitive decision*". In the meantime, RHS had written to the Plaintiff on 25 August 2004 giving his further thoughts about the assets, referring to them being either in his name or in the United Prod Foundation. Had RHS been clear that the assets had been re-settled or that he wanted that to be the position, I take the view that he would not have written in these alternate terms. Finally, the documentation prepared for execution on 14 November 2005 when the Translux Financing Trust was being established quite properly sought to cover the possibility that the assets were in the United Prod Foundation or they may already have been held for RHS absolutely.

90. Analysing the position in January 2004, upon taking the resolution it did, the effect of the letter of RHS dated 22 December 2003 must be that, as prior written consent, it had served its purpose. As such, as prior written consent, it was incapable of being revoked because action had been taken in reliance on it. If regarded as a letter of wishes, it was capable of being revoked, in the sense of no longer being the expression of wishes of RHS when administering the United Prod Foundation to which the Plaintiff was obliged to have regard. However, in the absence of any assets being held by the Plaintiff on the trusts of the United Prod Foundation, its purported revocation as a letter of wishes was meaningless. The language of revocation is, in my view, not capable of being equated to the language of a direction from RHS to the Plaintiff to hold the assets on the trusts of the United Prod Foundation and I have seen nothing suggesting that the Plaintiff had resolved to accept the assets on that basis. It is apparent from other decisions to accept funds into the Foundation that have been produced that this was an act that the Plaintiff would have taken had the assets been re-settled in the manner now suggested by it. I regard the

absence of any written minute or resolution as supporting my impression that RHS did not take the steps required to re-settle the assets that were held on bare trust for him into the United Prod Foundation.

91. I have been shown the financial statements in respect of the periods ending 31 December 2004 and 24 November 2005 which show that significant assets were supposedly held in the United Prod Foundation but I am not persuaded that these documents override the concerns I have expressed about the absence of any obvious step taken by RHS to end the bare trust and re-settle the assets on the trusts of the United Prod Foundation. I accept that these documents do support the view within the Plaintiff that the United Prod Foundation had significant assets within it on the dates in question, but I also note that the financial statements for the period ended 31 December 2004 were only signed on 10 November 2005, which was just days before the creation of the Translux Financing Trust. In those circumstances, I consider that this was a tidying up exercise just in case it were ever found that the assets had been re-settled by RHS, rather than being a clear indication that this had taken place more than a year earlier.

92. For these reasons, I do not feel able to make any declaration (see, eg, the second declaration in the final section of the Annex to this judgment) that the assets held by the Plaintiff on bare trust from 8 January 2004 were re-settled into the United Prod Foundation from 2 June 2014 (or indeed any date thereafter).

93. In circumstances where I feel unable to make a finding that the assets previously held by the Plaintiff on the trusts of the United Prod Foundation were held once again on those trusts, it follows that the documentation received from RHS purporting to relate to the United Prod Foundation, including the letter of wishes dated 26 January 2005, fall to be considered in a slightly different context. The documents might still be regarded as documents within the ambit of the United Prod Foundation, albeit that there were no assets held on those trusts at the time, or they might have been construed by the Plaintiff as attaching to the wishes of RHS in respect of assets then held on bare trust for him. In reality, it matters not because of what then happened when the Translux Financing Trust was established because it is quite clear that the documentation was prepared in such a way that any earlier uncertainty was resolved. The United Prod Foundation was terminated and any assets appointed pursuant to Clause 6 of the trust deed to RHS absolutely, which he promptly settled into the Translux Financing Trust. Any assets held by the Plaintiff on bare trust for RHS were settled into the Translux Financing Trust. In this fashion, the new post-14 November 2005 regime crystallised in such a way that all the assets that had been in the United Prod Foundation were held by the Plaintiff under the trusts of the Translux Financing Trust. As importantly, there is no suggestion in the documents dated 30 December 2004 and 26 January 2005 that RHS was asking the Plaintiff to deal with the assets in such a way that RHJ and RHS were entering into contractual relations by way of any partnership or otherwise. As I have already noted, the document dated 30 December 2004 could not have any such effect because it was not seen by the Plaintiff at that time and was only seen after 14 November 2005. I am satisfied from what Mr Le Poidevin says in his evidence that the document dated 26 January 2005 was received and treated by the Plaintiff as a letter of wishes from RHS complying with Clause 7 of the trust deed. In any event, as a letter of wishes (and arguably also as prior written consent), at the meeting on 26 May 2005, the Plaintiff was informed by RHS, and so noted on it, that the document dated 26 January 2005 was to be ignored. In effect, having previously been deposited with the Plaintiff, as required by Clause 7, it had been revoked, or withdrawn, from being further considered as a letter of wishes for the purposes of Clause 7.

The validity of the trusts

94. One of the pervasive features of the declarations sought by the Plaintiff (and to a lesser extent by the Second and Third Defendants) is the comfort that will be provided by declarations as to the validity of the Translux Financing Trust and also the United Prod Foundation (see, eg, the first and sixth declarations in the final section of the Annex to the judgment). Some of the terminology used in the declarations sought is derived from the wording used in the Hague Convention on the Law applicable to Trusts and on their Recognition (concluded on 1 July 1985). No doubt this is being done because of the way in which the Italian proceedings of RHJ relied on certain provisions of this Convention. However, before turning to international law, I consider it appropriate to apply domestic Guernsey law.

95. When both trusts were established, the applicable Guernsey legislation was the Trusts (Guernsey) Law, 1989, as amended. The policy letter of the States Advisory and Finance Committee leading to the enactment of that Law (Billet d'État No. IX of 1988, p. 244) stated that enacting a formal Trusts Law would enable extension to Guernsey of the Hague Convention. The Government of the United Kingdom extended the Convention to Guernsey by way of a notification on 28 April 1993. In doing so, a reservation in respect of the second paragraph of Article 16 was made and a declaration under Article 20 was also made, as set out in the Note from the Ministry of Foreign Affairs of the Kingdom of the Netherlands dated 13 May 1993, which was registered on the records of this Island on 19 June 1993 (see Ordres en Conseil, Vol. XXXIV, p. 438). As a result, it is apparent that the terms of the 1989 Law were designed to comply with the Convention.

96. Section 1 of the 1989 Law provided:

> "*A trust exists if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate-*
>
> *(a) for the benefit of another person (a "beneficiary"), whether or not yet ascertained or in existence;*
>
> *(b) for any purpose which is not for the benefit only of the trustee.*"

97. Within Part II of the 1989 Law, as amended, there was a series of provisions applicable only to a Guernsey trust, which was defined in section 73(1) as "*a trust the proper law of which is the law of Guernsey*". As I have said, both the United Prod Foundation and the Translux Financing Trust are declared to be Guernsey law trusts. It seems easiest to set out the provisions relating to creation and validity extensively:

> "6. (1) *A trust other than a unit trust may be created by oral declaration, by an instrument in writing (including a will or codicil), by conduct, or in any other manner whatsoever. ...*
>
> *(3) No technical expressions are needed for the creation of a trust.*
>
> *7. (1) Any property may be held on trust.*
>
> *(2) A trustee may accept property to be held on trust from any person.*
>
> *8. (1) A beneficiary shall be-*
>
> *(a) identifiable by name; or*
>
> *(b) ascertainable by reference to-*

(i) a class; or

(ii) a relationship to another person, whether or not living at the time of the creation of the trust or at the time by reference to which, under the terms of the trust, members of a class are to be determined.

(2) The terms of a trust may provide for the addition of a person as beneficiary, or for the exclusion from benefit of a beneficiary.

(3) The terms of a trust may impose an obligation upon a beneficiary as a condition of benefit.

(4) A settlor or trustee of the trust may also be a beneficiary thereof. ...

11. (1) Subject to subsections (2) and (3), a trust is valid and enforceable in accordance with its terms.

(2) A trust is invalid and unenforceable to the extent that-

(a) it purports to do anything contrary to the law of Guernsey;

(b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Guernsey;

(c) it has no beneficiary identifiable or ascertainable under section 8(1), unless it is created for a charitable purpose; or

(d) the court declares that-

(i) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty;

(ii) it is immoral or contrary to public policy;

(iii) its terms are so uncertain that its performance is rendered impossible; or

(iv) the settlor was, at the time of its creation, incapable of creating such a trust.

(3) Where some of the terms of a trust are invalid but others are not-

(a) if the terms cannot be separated, the trust is invalid;

(b) if the terms can be separated, the court may declare that the trust is valid as to the terms which are valid.

(4) Where a trust is partially valid, the court may declare what property is and what property is not to be held subject to the trust.

(5) Property as to which a trust is invalid shall, subject to any order of the court, be held by the trustees for the settlor absolutely or, if he is dead, for his personal representative. ...

11A. (1) Where a person (the "settlor") creates a Guernsey trust, or during his lifetime makes any transfer or disposition of property or any interest therein to a Guernsey trust-

(a) neither the trust nor the transfer or disposition is invalidated by any foreign rule of forced heirship or by reason of the fact that the concept of trusts is unknown to or not admitted by the law of a jurisdiction other than Guernsey;

(b) the settlor shall be deemed to have had capacity to create the trust or to make the transfer or disposition if he had capacity to do so under-

(i) Guernsey law;

(ii) the law of his domicile or nationality; or

(iii) the proper law of the transfer or disposition.

(2) In subjection (1) "foreign rule of forced heirship" means any rule of law of a jurisdiction other than Guernsey which, in order to protect or give effect to the rights of any person or class of persons to inherit, succeed to or share in the settlor's property or any interest therein on his death, purports to remove or restrict the settlor's right to encumber, alienate or otherwise deal in his property or any interest therein during his life-time and includes any judicial or administrative order of a jurisdiction other than Guernsey intended to enforce or implement any such rule.

(3) This section applies-

(a) whenever the trust, transfer or disposition in question arose or was made;

(b) notwithstanding any other provision of this Law."

98. Having regard to this suite of provisions and the evidence given in this case, I see no reason at all to question the validity of either of the trusts. Mr Le Poidevin has confirmed that the assets held upon the trusts of both trusts sequentially were not regarded by the Plaintiff as forming any part of its own estate. They were created by instruments in writing. The beneficiaries were identified or identifiable, in the sense of being ascertainable. The United Prod Foundation was a fairly usual discretionary Guernsey trust and the Translux Financing Trust falls into the same category and is now subject to the Trusts (Guernsey) Law, 2007, which has repealed and replaced the 1989 Law, as amended. Insofar as anyone complained about RHS avoiding some of his assets (had they been retained as personal assets) being subject to forced heirship rules, section 11A clearly shows, as Advocate Howitt had advised, that the validity of the trusts or any dispositions made into them, was unaffected by such rules.

99. I do not regard the content of Clause 15 of the trust instrument in respect of both trusts as creating problems for the validity of either trust. It is reasonably common for the exercise of a trustee's powers to require the consent of another. Usually that person is described as a protector, or the consent requirement relates to a board of protectors. The number of persons involved does not, it seems to me, much matter. In these trust deeds, the board of protectors only became operative on the death of RHS. Prior to the death of RHS, it was RHS himself who needed to provide prior written consent before the Plaintiff could exercise any of the powers specified in Clause 15(2).

Although RHS was not described as a protector, his powers, and so his duties, were the same as if he had been labelled in that fashion. Again, it is not wholly unusual for a settlor to become the original protector of a trust.

100. The general summary set out in *Lewin* is indicative of the view that I think would be taken here of those powers:

> "***29-045*** *If the protector holds an office under the trust, it will ordinarily be impossible to construe the power or powers as beneficial: the protector will be there for the protection of the beneficiaries and his powers will be fiduciary. The nature of the power, e.g. to appoint trustees, will confirm its fiduciary nature. It will therefore attract both rules applicable to fiduciary powers and rules applicable to non-beneficial powers, whether or not fiduciary, such as that against a fraud on the power.*
>
> ***29-046*** *The fiduciary character of a protector of that kind has important consequences:*
>
> *(1) The court has jurisdiction to remove a protector for good cause, at any rate where that step is necessary to prevent the trusts from failing or where a protector's continuance in office would prevent the proper execution of the trusts. The test for removing a fiduciary protector has been equated with that for removal of a trustee.*
>
> *(2) It has also been held, by analogy with the court's power to appoint a trustee, that the court could appoint a protector where there was none and the trusts were not workable without a protector.*
>
> *(3) The power to appoint a new fiduciary protector has itself been held to be fiduciary.*
>
> *(4) Disclosure of information and access to documents may be sought both from and by a fiduciary protector.*"

101. The effect of Clause 15 is to provide a check and balance to the exercise of the powers conferred on the trustee. In the same way that RHS had no ability to require the Plaintiff to do anything in the administration of the trusts, because the Plaintiff was not obliged to give effect to his expressed wishes, the Plaintiff could not oblige RHS to give the required consent and nor could it act without having obtained it. The relationship was one of mutual co-operation before any of the specified powers of the trustee could be exercised. In relation to the Translux Financing Trust, Clause 15(6) provides:

> "*<u>For</u> the avoidance of doubt the Board of Protectors may consent or refuse to consent to the exercise of the Trustees of the aforesaid powers but shall have no authority itself to exercise any of such powers independently including without limitation the power to modify abrogate add to or substitute any of the provisions of this Settlement.*"

This shows that the Board of Protectors, including the effect of the Second Defendant having a "golden share", did not give the Board any authority of its own to take decisions. There was a power of veto, under which the powers could only be exercised if there was agreement from both sides. In the event that there was a stalemate, the supervisory jurisdiction of this Court could have been invoked and this Court would consider *inter alia* whether the stalemate was preventing the proper execution of the trusts. Accordingly, the inclusion of Clause 15 in both trust deeds has not, in my view, invalidated the trusts.

102. Because the 1989 Law gives effect domestically to the provisions of the Hague Convention, there is strictly no need to refer to the Convention's provisions. Indeed, the 1989 Law (and now the 2007 Law) operates more broadly than the Convention, which is applicable only to trusts created voluntarily and evidenced in writing (article 3). However, it is readily apparent from referring to just a few of the provisions of the Convention, that the position is that the trusts should be treated elsewhere as being valid in accordance with the laws of Guernsey.

103. By article 2 of the Convention:

> "*A trust has the following characteristics –*
>
> *a) the assets constitute a separate fund and are not a part of the trustee's own estate;*
>
> *b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;*
>
> *c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.*
>
> *The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.*"

I am satisfied that I have seen nothing that points away from the United Prod Foundation (formerly The Roberto Haggiag Foundation) and the Translux Financing Trust complying with these characteristics. Article 6 provides that "*A trust shall be governed by the law chosen by the settlor*", which in each case was expressed to be the law of Guernsey. Because there has been an express choice of law, the provisions of article 7 filling any gap through implication, including by reference to the situs of the assets of the trust, is not engaged. Accordingly, because article 8 provides that "*The law specified by Article 6 … shall govern the validity of the trust, its construction, its effect, and the administration of the trust*" and then specifies a list of matters all of which are governed by Guernsey law, the analysis I have already undertaken by reference to the provisions of the 1989 Law is applicable to the consideration as to whether the terms of the Convention have been satisfied. As a consequence, article 11 provides that "*A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust*" and that must *prima facie* be the conclusion that would be reached elsewhere by reference to Guernsey law criteria. I feel unable, though, to comment on whether in some other State the effect of article 13 ("*No State shall be bound to recognise a trust the significant elements of which, except for the choice of applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved*") would be produce any different outcome.

104. Having indicated that I am satisfied that the United Prod Foundation appears to me to have been validly created and, at least as far as the materials I have seen goes, been administered by the Plaintiff in accordance with the 1989 Law, the next question is whether I should make such a formal declaration, whether in the form of the first paragraph in the final section of the Annex or in some other form. This again turns on whether there is any useful purpose in doing so. I am conscious that this Court has a duty to do the fullest justice to the Plaintiff to which it is entitled and so there is a fine balance between following the findings I have made with a formal

declaration and leaving matters as they stand, namely with those findings having been set out but not translating them into any formal relief.

105. I have taken into account that the United Prod Foundation was terminated more than a decade ago. Insofar as the Plaintiff has expressed its wish for there to be a binding declaration about such historic events in order to remove any possibility of challenge, I am not persuaded that this is a good enough reason to make the type of declaration the Plaintiff invites me to make. Further, as I have indicated, I have been unable to conclude that assets were held on the trusts of the United Prod Foundation after 8 January 2004, but I am not going to make any declarations about that period anyway. I suspect that it is now too late for anyone to attempt to make any complaint about the events before 8 January 2004 (or even before 14 November 2005). However, if they do have some argument that can properly be advanced, it seems best to me to leave that possibility open rather than to attempt to preclude that happening by making the broad type of declaration the Plaintiff seeks. In my judgment, what I have already set out should suffice to give the Plaintiff the level of comfort it seeks.

106. The position in respect of the Translux Financing Trust is, in my judgment, different. As matters stand today, the Plaintiff holds significant assets on these trusts and so is entitled to a more formal level of comfort in respect of them. Moreover, because this is where the assets that might be subject to any challenge are to be found, I consider that the Plaintiff is indeed entitled to some formal relief in respect of its current position. I am satisfied that there is some useful purpose in making the type of declaration sought by the Plaintiff in relation to the Translux Financing Trust.

107. I do not, however, think that I can properly make a declaration by reference to the Hague Convention on the basis that this is a domestic Court applying domestic law. As I have already stated, the 1989 Law gave effect in Guernsey law to the terms of the Hague Convention. For that reason, as a matter of Guernsey law, validity of a trust under the terms of that Law (and now the 2007 Law), ought to have the effect internationally to which I have briefly referred, but I feel unable to make such a positive declaration. I take the view that the declaration can cover the aspects suggested by Advocate Fullman, and supported on behalf of the Second to Fourth Defendants by Advocate Greenfield, but by reference to Guernsey statute.

108. Having circulated this judgment in draft and invited comments from Counsel on the wording of a declaration to reflect these findings and having received their helpful input to refine the appropriate wording, the form of declaration I consider can properly be made in respect of the Translux Financing Trust is as follows:

> "*The Translux Financing Trust is a trust created by Roberto Haggiag Senior voluntarily and evidenced by a written trust deed dated 14 November 2005, expressed to be governed by and construed according to the laws of the Island of Guernsey, which was validly created in accordance with the Trusts (Guernsey) Law, 1989, as amended, and remains valid under the Trusts (Guernsey) Law, 2007, and that:*
>
> *(i) the consent requirements in Clause 15 of the trust deed, in particular, did not (and do not) prevent the trust from being valid and capable of being properly operated as a Guernsey trust;*
>
> *(ii) the trustee is the Plaintiff, a Guernsey-registered company, which has administered, and continues to administer, the trust from Guernsey;*
>
> *(iii) the assets of the trust have at all times since 14 November 2005 constituted a separate fund and are not part of the Plaintiff's own assets; and*

(iv) the title to those assets has at all times since 14 November 2005 (or such later date as they were received into the trust) stood in the name of the Plaintiff and that the Plaintiff (and not Roberto Haggiag Senior and/or the Second Defendant) has had and has control of them."

Conclusions

109. For the reasons I have given, I am satisfied that it is appropriate to grant some relief to the active parties, especially in the light of the confirmations made on behalf of the First Defendant by Advocate Edwards. However, because the granting of declaratory relief is discretionary, the active parties have still been required to advance positive cases; this is not a situation where the declarations sought could simply be "rubber-stamped" and granted as if by consent. I have concentrated, in particular, on how I see matters progressing within the class of beneficiaries and have not been persuaded that raking over too many historic coals is necessary. The assets that could be subject to any challenge are now held on the trusts of the Translux Financing Trust. The estate of RHS has been, and continues to be, dealt with under the terms of the Will RHS left and decisions reached by Justice de Paix du District de Nyon. These are the areas in respect of which the Plaintiff, and so indirectly the Second to Fourth Defendants, are most likely to have to respond in the event of any questioning of what is now taking place.

110. In these circumstances, the only declarations I am minded to make are those I have indicated in respect of the successoral position following the death of RHS (ie, that he did not die intestate because he left a Will that has since been proved in Switzerland and that the Second and Third Defendants are his heirs, meaning that the Fourth Defendant is not one of the heirs of RHS) and in respect of the original and ongoing validity of the Translux Financing Trust under the terms of Guernsey's legislation.

111. At the conclusion of the trial it was confirmed that the costs of the Plaintiff and of the Second to Fourth Defendants could be taken from the assets of the Translux Financing Trust. Accordingly, that is the order I make in respect of the costs of this action.

Annex

A. The declarations sought by the Plaintiff in paragraph 3 of its Amended Cause are as follows:

3.1 That the United Prod Foundation (being a trust created voluntarily and evidenced in writing) was validly constituted as a trust under, and governed by, the laws of Guernsey and with its centre of interests in Guernsey, and that:

3.1.1 The assets of the United Prod Foundation constituted a separate fund and were not part of CST's own assets;

3.1.2 the title to the assets of the United Prod Foundation stood in the name of CST as Trustee of such trust which owned and controlled such assets:

3.1.3 CST as Trustee had the power and the duty, in respect of which it was accountable, to manage, employ and dispose of the said assets in accordance with the terms of the trust deed of the United Prod Foundation and the special duties imposed on it by law.

3.2 That Roberto Haggiag Senior did not control the assets of the United Prod Foundation from its creation on 6 September 1993 until its determination on 14 November 2005.

3.2A In the alternative to the declaration sought at Paragraph 3.2 above (and if (which is not the Trustee's primary case) both (a) during the period from 8 January 2004 until 2 June 2004 ("the 6 Month Period"), such assets were held on bare trust for RHS and (b) it is found by the Court that RHS was in control of such assets during such period) That RHS did not, apart from the 6 Month Period, control the assets of the United Prod Foundation from its creation on 6 September 1993 until its determination on 14 November 2005.

3.3 That the Document dated 30 December 2004 addressed to CST as the Trustee of the United Prod Foundation ("the Document dated 30 December 2004"):

3.3.1 was not deposited with CST, and therefore was not valid or effective as a Letter of Wishes within Clause 7 of the trust deed of the United Prod Foundation;

3.3.2 would (had it been deposited with CST and if and insofar as the same was of any validity or effect) have been superseded by the Letter of Wishes of 26 January 2005 (which was itself revoked on 25th May 2005);

3.3.3 even if it had been valid and effective and not otherwise superseded, would have been revoked or otherwise ceased to have had effect upon the execution of a new trust deed and a new Letter of Wishes and related documents, which occurred on 14 November 2005;

3.3.4 did not create any rights or obligations whether in the nature of a partnership or an *associazione in partecipazione* under Italian law, or otherwise.

3.3A That CST has correctly acted, and is authorised to continue to administer Translux, on the basis that the Document dated 30 December 2004 was not and is not an offer of a partnership or an *associazione in partecipazione* under Italian law.

3.4 That the document dated 26 January 2005 addressed to CST as the Trustee of the United Prod Foundation

3.4.1 was a Letter of Wishes within Clause 7 of the trust deed of the United Prod Foundation;

3.4.2 as such Letter of Wishes, was a document which did not impose on CST as the Trustee of the United Prod Foundation any binding trust or obligation;

3.4.3 was revoked by RHS on 25 May 2005;

3.4.4 was a document which until revoked contained the expression of RHS' wishes pending the execution of a new trust deed and a new Letter of Wishes and related documents, which occurred on 14 November 2005, whereupon such Letter of Wishes (had it been valid at that time) would have been revoked, alternatively would have ceased to be of any effect;

3.4.5 did not create any rights or obligations whether in the nature of a partnership or an *associazione in partecipazione* under Italian law, or otherwise.

3.5 That at no time prior to 14 November 2005 or at all did RHJ procure the transfer of a 20% or 29% shareholding in Lotte Holdings Ltd to the United Prod Foundation or procure that such shareholding was held for the benefit of the United Prod Foundation.

3.6 That the conditions contained in the Document dated 30 December 2004, alternatively the Letter of Wishes dated 26 January 2005, by which RHJ might have been entitled to become a Percentage Beneficiary (as there defined) were not satisfied prior to revocation of such documents on 25 May 2005 alternatively14 November 2005 or at all.

3.7 That as RHJ did not become a Percentage Beneficiary, because the conditions were not satisfied, he could not have become entitled to a Capital Distribution.

3.8 That the Deed of Appointment, Letter and Deed of Gift all dated 14 November 2005 were valid and effective to transfer the assets of the United Prod Foundation, and other identified assets owned by RHS, to CST as Trustee of the Translux Financing Trust ("Translux").

3.9 That Translux (being a trust created voluntarily and evidenced in writing) was validly constituted as a trust by the deed dated 14 November 2005 under, and governed by, the laws of Guernsey, and remains valid, and:

3.9.1 The assets of Translux have at all times since 14 November 2005 constituted, and constitute a separate fund and were not and are not part of CST's own assets;

3.9.2 the title to the assets of Translux has at all times since 14 November 2005 stood, and stands, in the name of CAST as Trustee of such trust which since such date has owned and controlled such assets;

3.9.3 CST as such Trustee has at all times since 14 November 2005 had the power and the duty, in respect of which it was accountable, to manage, employ and dispose of the said assets in accordance with the terms of the trust deed of Translux and the special duties imposed on it by law.

3.10 That Roberto Haggiag Senior did not Control the assets of Translux from its creation on 14 November 2005 until his death on 27 February 2009.

3.11 That Simone Haggiag does not Control the assets of Translux.

3.12 That Roberto Haggiag Senior (who dies on 27 February 2009 leaving a will dated 2 May 1994 which on 24 August 2010 was proved before the relevant judicial authorities in the Canton of Vaud, Switzerland) did not die intestate.

3.13 That the Fourth Defendant is not an heir of RHS.

In this paragraph, CST is used to refer to the Plaintiff and "Control" is used in the manner defined in para. 1 of the Amended Cause ("*(when used by CST in connection with the assets of either the United Prod Foundation or Translux) means "the ownership or, or power to manage, employ or dispose of, assets (but a consent requirement does not negate control*").

B. The declarations sought by the Second and Third Defendants in their Amended Defence and Counterclaim (at paragraph. 22) are as follows:

(a) That RHS had alienated from himself the assets which he had settled into the United Prod Foundation, and that such assets were under the Control of the Plaintiff (as defined in the Amended Cause and the Preamble hereto).

(b) That the consent requirements in the trust deed of the United Prod Foundation did not prevent such trust being a valid and properly constituted trust under Guernsey law.

(c) That the "signature certification" on the Document dated 30 December 2004 does not amount to a formal notarial authentication.

(d) That the Document dated 30 December 2004 was not provided by RHS to RHJ with the intention of it forming an offer of a contractual relationship, but was provided for onward transmission to the Plaintiff, to whom it was addressed.

(e) That the Document dated 30 December 2004 was not addressed or directed to RHJ, and therefore was incapable of forming an offer to RHJ of any contractual relationship.

(f) That if the Document dated 30 December 2004 constituted a valid offer of any contractual relationship, it was revoked by RHS prior to acceptance of it.

(g) That the Document dated 26 January 2005 was not addressed or directed to RHJ, and was therefore incapable of forming an offer to RHJ of any contractual relationship.

(h) That if either or both of the Document dated 30 December 2004 or the Letter of Wishes dated 26 January 2005 constituted a valid offer of any contractual relationship made by RHS to RHJ, such offer (if then still open) was rejected by RHJ by his letter dated 20 March 2006.

(i) That if either or both of the Document dated 30 December 2004 or the Letter of Wishes dated 26 January 2005 constituted a valid offer of any contractual relationship by RHS to RHJ, such offer was withdrawn and ceased to be of effect either by virtue of the creation of Translux in November 2005 or by virtue of the Letter of Wishes dated 14 November 2005 or by effluxion of time, in particular given that the Conditions were not satisfied and the shares in Lotte Holdings Ltd were never transferred.

(j) That RHJ, by causing the winding up in December 2010 and subsequent dissolution of Lotte Holdings Ltd in April 2011, thereby rendered acceptance of the Conditions referred to in the Particulars of Claim impossible, alternatively at that time rejected any such offer as might then have been open for acceptance.

(ja) That if either or both of the Document dated 30 December 2004 of the Letter of Wishes dated 26 January 2005 constituted a valid offer of any contractual relationship by RHS to RHJ, then such offer was not accepted by the issue or service of the Summons in the Italian proceedings.

(k) That even if Lotte Holdings Ltd was restored to the Register of Companies, its shares could not form "valuable consideration" since such assets as Lotte Holdings had have been distributed in specie to its shareholders, and so such shares would have no value.

(l) That any such contractual offer as is alleged by RHJ could not (if it was then open) remain open for acceptance after the death of RHS.

(m) That RHS did not, and the Second Defendant does not Control Translux or the assets of Translux.

(n) That the fact that there were some consent requirements in the trust deed of Translux did not confer on the Second Defendant Control of the said trust or its assets.

(o) That RHS had alienated from himself the assets which he had settled into Translux (which were not the same assets as had been settled into or held within the United Prod Foundation), and that such assets were under the Control of the Plaintiff.

(p) That the Second and Third Defendants are the heirs of RHS, who died on 27 February 2009 having left a last will dated 2 May 1994.

C. The single declaration sought by the Fourth Plaintiff (principally, it appears, in her personal capacity rather than her representative capacity) at paragraph 8 of her Amended Defence expands upon the final declaration sought by the Plaintiff: That the Fourth Defendant is not and never has been an Heir of RHS.

D. The revised set of declarations proposed by the Plaintiff (and supported by the Second to Fourth Defendants) at the end of the trial are:

1. That the United Prod Foundation ("the UPF") (being a trust created voluntarily and evidenced in writing) was validly constituted (in accordance with the Hague Convention on the Law Applicable to Trusts and their Recognition concluded 1 July 1985) on 6 September 1993 as a trust governed by the laws of Guernsey and with its centre of interests in Guernsey, and that:

    1.1 the assets of the UPF constituted a separate fund and were not part of the Plaintiff's ("CST's") own assets;

    1.2 the title to the assets of the UPF stood in the name of CST as Trustee of such trust which owned and controlled such assets;

    1.3 CST as such Trustee had the power and duty, in respect of which it was accountable, to manage, employ and dispose of the said assets in accordance with the terms of the trust deed of the UPF and the special duties imposed on it by law;

    1.4 the consent requirements in clause 15 of the trust deed of the UPF did not prevent such trust being a valid and properly constituted trust under Guernsey law.

2. That the assets of the UPF were held by CST on bare trust for Roberto Haggiag Senior ("RHS") from 8 January 2004 until 2 June 2004, on which date they were re-settled into the UPF where they remained until distributed to RHS on 14 November 2005.

3. That the document dated 30 December 2004 addressed to CST as the Trustee of the UPF ("the Document dated 30 December 2004") was not deposited with CST, and therefore was no valid or effective as a Letter of Wishes within Clause 7 of the trust deed of the UPF.

4. That neither the Document dated 30 December 2004 nor the letter dated 26 January 2005 from RHS to CST were an offer of a contract nor created any rights or obligations as an *associazione in partecipazione* under Italian law.

5. That the letter dated 26 January 2005 addressed to CST as the Trustee of the UPF was a Letter of Wishes within Clause 7 of the trust deed of the UPF, which was revoked by RHS on 25 May 2005.

6. That the Translux Financing Trust ("the TFT") (being a trust created voluntarily and evidenced in writing) was validly constituted (in accordance with the Hague Convention on the Law Applicable to Trusts and their Recognition concluded 1 July 1985) as a trust by the deed dated 14 November 2005 governed by the laws of Guernsey and with its centre of interests in Guernsey, and remains valid, and:

    6.1 the assets of the TFT have at all times since 14 November 2005 constituted, and constitute a separate fund and were not and are not part of CST's own assets;

    6.2 the title to the assets of the TFT has at all times since 14 November 2005 stood, and stands, in the name of the CST as Trustee of such trust which since such date has owned and controlled such assets;

    6.3 CST as such Trustee has at all times since 14 November 2005 had the power and the duty, in respect of which it was accountable, to manage, employ and dispose of the said assets in accordance with the terms of the trust deed of the TFT and the special duties imposed on it by law;

    6.4 the consent requirements in clause 15 of the trust deed of the TFT did not prevent such trust being a valid and properly operated trust under Guernsey law.

7. That RHS who died on 27 February 2009 did not die intestate (having left a will dated 2 May 1994 and codicil dated 7 April 1997 which, on 24 August 2010, was proved before the Justice of the Peace of the District of Nyon in the Canton of Vaud, Switzerland).

8. That the Second and Third Defendants are the heirs of RHS, and that the Fourth Defendant is not and has never been an heir of RHS.