In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2012 No: 165

BETWEEN:

(1) STIFTUNG SALLE MODULABLE
(2) RUTLI STIFTUNG

Plaintiffs

-v-

BUTTERFIELD TRUST (BERMUDA) LIMITED

Defendant

JUDGMENT

(in Court)

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Dates of Hearing: 12-15, 18, 20-22, 25-29 November, 2-6, 9-13, 16-17 December 2013

Date of Judgment: 21 February 2014

Mr. Alexander Layton QC of counsel and Ms. Lilla Zuill, Cox Hallett & Wilkinson, for the Plaintiffs
Mr. Mark Cran QC, Mr. Jan Woloniecki, Mr. Nathaniel Turner and Ms Michelle Ashton, Attride-Stirling & Woloniecki, for the Defendant

I. PRELIMINARY ISSUES

Introductory

1. Lucerne is a picturesque city roughly half the land size of Bermuda with a slightly larger population situated on the shore of Lake Lucerne in north-central Switzerland. Christof Engelhorn, the settlor of the trusts administered by the Defendant, spent his last years there. He was a patron of the arts and both he personally and the Defendant (as trustee of the trusts settled by him) previously sponsored (in part) the construction of a Culture and Convention Centre which houses what is considered to be one of the leading concert houses in the world. The Plaintiffs' case is that the Defendant is contractually bound, under either Swiss or Bermudian law, by a commitment it made in August 2007, as trustee of one of these trusts, to fund the construction costs of an 'Opera House' in Lucerne up to a price ceiling of CHF 120 million (approximately US$ 134.4 million). Alternatively, the Plaintiffs seek equivalent equitable relief either (a) by way of constructive trust, or, (b) on the basis of being the donees of an equitable discretionary power, which it is contended the Court should exercise in their favour on the Defendant's behalf.

2. The 1st Plaintiff ("SMF") is a charitable foundation established under the Swiss Civil Code in the Canton of Lucerne, Switzerland, for the express purpose of planning, constructing and maintaining a "*multipurpose cultural facility in Lucerne*". The 2nd Plaintiff (Rutli) is a philanthropic foundation established in the same Canton by Reichmuth & Co., a private bank. The Defendant ("the Trustee") is the Trustee of the Art I Trust ("the Trust") established in Bermuda by a Deed dated 26 April 1991 by the late Christof Engelhorn the ("Settlor").

3. The present dispute arises out of a commitment made by the Trustee on behalf of the Trust to make a substantial charitable donation which was close to the Settlor's heart and

the decision to "pull the plug" on the relevant funding finally communicated to the Plaintiffs after the Settlor's death on 3 August 2010. The project was conceived and promoted by Michael Haefliger, the Intendant of the Lucerne Festival. From the beginning was both innovative and simple in its broad design. The idea was to construct what was at times referred to as an opera house, which would be home to both opera and other performing art disciplines. Its distinctive characteristic, which would help to enhance Lucerne's already substantial standing as a cultural centre, would be its flexible interior physical design. This would facilitate unique adaptations of the physical relationship between the audience and performers depending on the nature of the production being staged.

4. The project, to anyone who understood it at more than a superficial level, had various levels of complexity to it. Three dimensions of complexity can be mentioned by way of overview. The construction and design aspect involved engineering innovations. Obtaining a site and funding for operational costs required political support and, at least for the site, a referendum. And, thirdly, deciding which artists would share the proposed new space engaged complicated artistic, architectural and political considerations.

The pleadings

The Re-Amended Statement of Claim ("RASC")

5. The Plaintiffs assert claims in contract and in equity in support of the broad allegation that the Defendant as Trustee of the Art I Trust settled by Christof Engelhorn ("the Settlor") on 26 April 1991("the Trust") is obliged to fund the Salle Modulable project up to CHF (Swiss francs) 120 million, of which the global sum CHF 114.25 million is outstanding and due.

6. The introductory averments set out in the RASC are uncontroversial. The Defendant replaced the original trustee as sole Trustee of the Trust on 10 May 1993. The Trust's assets principally consist of the proceeds of sale (either directly or indirectly) of the shares in Boehringer Mannheim GmbH, a German pharmaceutical company. A German national, the Settlor, resided in the Canton of Lucerne from 1997 until his death on August 3, 2010. The living beneficiaries at all material times were Ursula Engelhorn (the Settlor's wife), their daughter Vera and their grandchildren Julie and Philip, children of their son Stefan who predeceased the Settlor. In paragraph 14 the Salle Modulable project is described as:

> "*...a project to construct a modern opera house in or in the vicinity of the City of Lucerne which can provide a flexible space so as to make it possible to configure the stage to particular types of production and so as to be able to*

accommodate opera, musicals, contemporary music, performing arts, chamber concerts, and other musical productions."

7. On 8 August 2007, roughly four years after Michael Haefliger had first shared the concept with the Settlor, the Settlor and his wife wrote to the beneficiaries requesting their support for their wish that a CHF120 million donation to be made by the Trust towards the building costs of the Salle Modulable project. This consent was obtained. It is also alleged un-controversially, that on 23 August 2007 the following letter was written on behalf of the Trust to Rutli:

"*Dear Mr Reichmuth,*

I refer to your recent discussions with Mr. Christof Engelhorn concerning the building of a state of the art concert hall in Lucerne. In this regard as trustee of the Art trusts, we are pleased to confirm our agreement in principal [sic] to help finance the building of this facility up to a maximum investment of CHF 120,000,000.00.

Naturally there are a lot of details and contracts to be drafted and finalized before any funds are advanced. We anticipate, however, that the funds will be advanced in stages tied to the progress of the construction.

We also understand that efforts are being made to secure a commitment from a private or public entity to take on the responsibility for managing and maintaining the facility once it is completed. This is important as our financial commitment is limited to the building of the facility and ends when either the building is complete or the cap of CHF120, 000,000.00 is reached.

We are pleased to be able to participate in this prestigious development and we look forward to working with you to make this a reality.

Yours Sincerely,

Graham Jack

Graham M. Jack CFA, TEP

Managing Director."

8. By letter dated 10 September 2007, Rutli replied in the following terms:

"*Re: Your letter dated August* 23*, 2007*

Dear Mr Jack

Thank you for entrusting us with the task of acting as trustee for the financial commitment referred to in your letter. We shall open a sub-account under the heading 'Salle Modulable'.

*Although the major outgoings will not commence until construction is underway, we nevertheless wish to clarify at this point that the financing includes not only the purchase of a plot of land - if the City and Canton of Lucerne do not make a site available – but also the costs * of the project managers, the feasibility study, the resulting construction estimates and the architectural design competition. You will be receiving all these documents in good time, as you find the existing documentation as an enclosure (English translation).*

As regards the management and maintenance of the facility once it is completed, we are seeking an assurance from the Lucerne Festival Foundation that these costs will be covered by sponsors and/or public bodies in due course. Confirmation on this point must be received from the Lucerne Festival before the first payment is made, in accordance with the above mentioned schedule of payments.

I would be very pleased to have an opportunity to talk to you in person about how our future collaboration can best be taken forward. I shall be in London on October 1 and 2, 2007, as I am every two months. Are you often there? On behalf of countless music lovers, I would like to thank you for your confidence and for your exceptionally generous gift to Lucerne - the City of Music.

Yours sincerely,

Karl Reichmuth

**As a rule, such planning costs prior to the decision to commence construction amount to approx 5 - 10% of the building costs.*"

9. The Plaintiffs aver that those two letters evidenced a binding commitment by the Defendant to pay up to CHF120 million towards the construction of the Salle Modulable and that this agreement was confirmed by the Individual Supplementary Agreement signed by Rutli on 19 September 2007 in Lucerne and by two representatives the Defendant on 30 October 2007 in Bermuda ("the ISA"). The Trustee forwarded the ISA under cover of a letter dated 30 October 2007 from Mrs. Patrice Minors which the Plaintiffs contend set out the Defendant's expectations as to certain procedural aspects of implementing the funding commitment. Thereafter, it is alleged, Rutli acted as the Trustee's agent in approving budgets and the feasibility study on the Trustee's behalf and acting as the public face of the Trustee in relation to the project. The Trustee duly paid the sums claimed and in November 2008 when Mr. Reichmuth met Ms. Michelle Wolffe, these arrangements were confirmed.

10. In April 2008 the Lucerne Festival Foundation and Rutli established SMF to implement the project and the majority of SMF's Board members were nominated by the Settlor. It is averred that from its establishment until December 2010, SMF commissioned various items of preparatory work including site location work and secured strong support for the project from the City and Canton of Lucerne. A one-off payment made to Michael Haefliger for the acquisition of the concept was included in invoices totalling CHF1.5 million paid for preparatory work, which were reported by Rutli to the Trust, and paid by Rutli, in 2008. On 10 June 2010, confirmed by a letter dated 8 July 2010, the Trustee set a year-end deadline for the submission of a feasibility study which was completed on 20 December 2010 and submitted to the Trustee. By a deed of assignment dated 15 December 2010, Rutli assigned all its rights against the Trustee to SMF.

11. The Plaintiffs' first claim is that the Trustee entered into a binding agreement with Rutli and/or SMF (after its establishment) to fund the costs of construction and feasibility and related studies in relation to the Salle Modulable project up to a limit of CHF120 million under Bermudian and/or Swiss law. It is further pleaded that it was an implied term of this contract that the Trustee would do nothing to frustrate or render impossible the completion of the project.

12. A supplementary plea is the allegation that at all material times the Settlor acted as an agent of the Trustee acting with actual authority (under Bermudian and/or Swiss law) ostensible authority (Bermudian law), implied authority (Bermudian and/or Swiss law) and/or apparent authority by acquiescence (Swiss law). The Plaintiffs' primary case is that the contract was governed by Swiss law as the forum with which the contract is most closely connected.

13. Two further equitable claims are asserted in the alternative to the contractual claims. Firstly, it is alleged that the Plaintiffs are the objects of a discretionary power with the right in equity to enforce a trust created in their favour. Secondly, it is alleged that a constructive trust was created by common intention earmarking CHF120 million for the Plaintiffs' benefit.

Re-amended Defence and Counterclaim ("RADC")

14. The RADC robustly denies any suggestion that the Settlor was an agent of the Trust or that the Trust was bound by his requests or wishes. It is also denied that the Trustee agreed or affirmed any agreement between the Settlor and Mr. Reichmuth to the effect that Rutli would assess the merits of any feasibility study. The alleged contract to pay

CHF120 million based on the 23 August 2007 and 10 September 2007 letters was also denied on the grounds of, *inter alia*, uncertainty. It is averred that:

> "*27. In the event, the only contract that was drafted and finalized before any money was advanced (i.e. given) to any legal person was the contract between BTBL, as Trustee of the Art I Trust, and Rutli contained in or evidenced by the signed Individual Supplementary Agreement ("ISA") and the letter of 30th October 2007, referred to below. Further, the only "details" in fact agreed before any money was advanced by BTBL were set out in the ISA and in the letter of 30 October 2007 referred to below...*"

15. It is asserted that the 30 October 2007 letter must be read together with the ISA as constituting a contract and, perhaps most significantly, that under the ISA any further payments by the Trustee were purely discretionary. Alternatively, the Trustee alleges that if any contract did come into existence in August 2007, it was subject to the conditions that satisfactory overall financing was available for the project and adequate provision (public or private) was made for operating expenses. Various averments are made in support of the plea that no contract under which the full amount of CHF120 million was formed as a matter of Swiss law.

16. The RADC also alleges that the contract which was formed, if any, under Swiss law was a mandate contract under which Rutli had various implied duties most notably with respect to supplying the Trustee with information about material developments in the course of the project. It was not a donation contract as the Plaintiffs contended; but if it was, it was subject to the provisos of the ISA and the 30 October 2007 letter. The Plaintiffs failed to comply with those provisos by failing to produce a feasibility study demonstrating the financial viability of the construction and post-construction operation phases. The Trustee's termination of the funding agreement was a discretionary decision which was made in good faith and/or on reasonable grounds.

17. Various alleged breaches of duty by Rutli are pleaded both to justify the termination of the funding and to support the Trustee's counterclaim. They are mostly breaches of contract or breaches of fiduciary duty by Rutli as the Trust's agent in failing to communicate important information about challenges faced by the project in late 2009 on the financial and political fronts. By its Counterclaim, the Trustee seeks to recover:

    (a) the CHF 250,000 paid to Michael Haefliger in or about June 2008;

    (b) the CHF 315,901 paid to SMF staff members as bonuses in 2009;

(c) the CHF 2,010,000 standing in the Rutli account at the end of 2009;

(d) the CHF 250, 000 further payment credited to that account by the Trustee in September 2010.

18. The RADC also denies the equitable claims and contends that the Harbour Funding Agreement (which the Plaintiffs seek to indirectly enforce by way of damages) should be held to be void on public policy grounds. It is also alleged that as the Salle Modulable cannot now be built any monies that would otherwise be payable by the Trustee are held on resulting trust for the Trustee.

19. The Plaintiffs filed an Amended Reply and Amended Defence to Counterclaim and the Defendant filed a Reply to the Plaintiffs' Request for Further and Better Particulars of the Amended Defence and Counterclaim.

Ancillary issues arising in the course of the trial reserved for determination at end of trial

20. Two evidential issues were raised by Mr. Cran in the course of the trial which I reserved for determination after trial. Firstly, complaint was made that Mr. Huwyler's supplemental Witness Statement ("Third Huwyler") responding to allegations of 'minute-tampering' contained impermissible hearsay about the non-availability of Mr. Beck[1]. Secondly, complaint was made about the Plaintiffs' related application to admit a witness statement from Mr. Beck under the Evidence Act on the grounds that he was beyond the seas[2].

21. The first point did not seem to me to be seriously pursued and was of very marginal significance. Third Huwyler paragraph 4 asserts that Mr. Beck was away on holidays on 16 December 2009 based on Lucerne Festival records "maintained" by Judith Brugger and Mr. Beck's own flight itinerary. The flight itinerary dated 29 October 2009 does not prove that Mr. Beck actually travelled to Bangkok and back on the dates in question. The fact of the holiday records do afford some support for Mr. Huwyler's own independent recollection that he took the minutes on 16 December 2009 because Mr. Beck was away even if the records did not constitute evidence of the truth of this assertion. Although this ground for admitting the document was not explicitly advanced, the holiday records

[1] Day 8, pages 236-245.
[2] Day 14 page 1; Day 15 pages 240-241.

appeared to me in light of Mr. Huwyler' s evidence to be clearly admissible under section 27D(1) of the Evidence Act 1905, which provides:

> "*27D (1) Without prejudice to section 27E, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person, whether acting under a duty or not, who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.*"

22. The challenge was nevertheless understandable because it seemed somewhat suspicious, as Mr. Cran contended, that the usual minute-taker was away for an important meeting when apparently incomplete or altered minutes were taken and that Mr. Huwyler' s own diary had a reference to Mr. Beck on 16 December 2009 when the latter was said to be abroad. Be that as it may, it was common ground that Mr. Beck did not take the minutes and the question of whether he could have done so or not in my judgment is of peripheral relevance to the serious allegation that the minutes were deliberately doctored. The merits of that allegation do not materially turn on the availability of the usual minute-taker.

23. I find that the vacation records are admissible either as evidence supportive of Mr. Huwyler' s recollection that Mr. Beck was on holiday on 16 December 2009 or as evidence of the truth of that fact under section 27D(1) of the Evidence Act 1905.

24. As far as Mr. Beck's belated Witness Statement deposing to his being on holiday on 16 December 2009 is concerned, Mr. Layton (albeit informally) sought to admit it under the Evidence Act 1905 on the grounds that the maker was beyond the seas and that the issues he addresses only arose in the course of the trial. Section 27I of the Act and Order 38 rules 21 and 25 to 27 of the Rules apply. I find that the specific point addressed by Mr. Beck only clearly arose in the course of the trial and that, having regard to the marginal significance of his evidence it would be disproportionate to require his attendance for cross-examination. Accordingly leave to admit the statement is granted, albeit with the obvious result that the weight to be attached to the evidence will be adversely affected by the maker's unavailability for cross-examination.

II AN OVERVIEW OF THE EVIDENCE

The Plaintiffs' Fact Evidence: a preliminary review

Hubert Achermann

25. Dr. Achermann became Vice-President of SMF on 14 April 2008 and replaced Jurs Reinshagen as President on 7 June 2011. He qualified as a lawyer in 1977. He worked in-house for KPMG and its Swiss predecessor firm for some 25 years, retiring as Global Lead Partner in 2012. It was clear that his involvement with SMF during the material time period was somewhat patchy, and by his own account he was only a witness because he was now the foundation's President.

26. Dr. Achermann was, unsurprisingly, a generally impressive witness who gave his evidence in a balanced, non-dogmatic and reasoned manner. His intelligence and charm did, under cross-examination, very occasionally give way to anger at the allegations of dishonesty he felt were being levelled at him personally. He also expressed outrage at what he considered to be the professionally disgraceful way with which the Plaintiffs were treated by the Trustee before they eventually "pulled the plug" on the financing. Dr. Achermann's anger was both understandable and misplaced. It was understandable because he was cross-examined extensively about the accuracy of SMF Board Minutes he admittedly had no role in preparing. His anger was misplaced because the 1st Plaintiff chose to call him as SMF's main witness and it was therefore appropriate that he be questioned about matters many of which he had a limited detailed familiarity with. To the extent that it was suggested that he had any involvement with altering minutes, I found no basis whatsoever for any such allegation.

27. Dr. Achermann testified that there was a tacit understanding between he and Mr. Reichmuth as to who the individual donor was (Day 3, 20:12-19).The witness admitted that, as a lawyer, he was keen to discover the legal basis of the funding commitment for the Salle Modulable and that, between 2007 and 2010, he never satisfied himself of the true position (Day 3, 21:18-24). He also crucially stated that he first started focussing on this issue when he heard in late 2009 that Mr. Hamm, the Settlor's son-in-law, was a potential problem for the direction of SMF (Day 3, 27:5):

> "*5 A. I heard in some of the meetings, late 2009, board*
> *6 meetings, when we had our breaks, coffee breaks and so*
> *7 on, from Mr Bicker that Mr Hamm started creating*
> *8 problems, making difficulties, challenging, questioning*
> *9 the direction of the Salle Modulable, and of course*
> *10 I couldn't find out whether this was the truth, but*
> *11 Mr Bicker, being very close to Mr Engelhorn, I thought*

12 that describes -- and he was a very polite man, not
13 badmouthing about others. When he gave us some of the
14 examples of the stories, I trusted that this was the
15 truth or close to the truth."

28. Dr. Achermann implicitly denied that the CHF 11.6 million funding gap identified in the Actori report and the political controversy which erupted about the variant of the project selected by the City Council in late 2009 were major concerns to the SMF Board. The concern was not the availability of funds for the promised donation but rather whether or not the Settlor's family would withdraw their support. He quite convincingly expressed the view that the main impediment to the project's completion was the waning influence of and, eventually, the death of the Settlor (Day 3, 54:9-12):

"*9 A: Had Mr Engelhorn not died, I think there would not have*
10 been this resistance and we would be building the Salle
11 Modulable today."

29. These features of his evidence strongly created an initial impression that SMF did not seriously turn its mind to the legal enforceability of the funding commitment, or its binding nature until such time as it became apparent that there was a risk that the donor's support for the project might be withdrawn, not because the project was not viable, but primarily due to a changing of the family guard.

Marcel Schwerzmann

30. Marcel Schwerzmann was at all material times the Director of Finance or Minister of Finance of the Canton of Lucerne. He explained that there are three levels of government in Switzerland: (1) the City or Commune level; (2) the Canton level; and (3) the Federal level. He was directly elected to the Parliament of the Canton and once elected assigned by the Canton Government to his particular Ministry. Under Mr. Cran's careful cross-examination, this witness provided a textured insight into the Swiss institution of "direct democracy". There are both City and Canton Parliaments. The Canton funds 70% and the City 30%, of a fund held by an organisation called Zweckverband; this body subsidises the Lucerne Theatre. The City and Canton Governments accordingly collaborated as members of a 'delegation' considering the SMF project which contemplated bringing the Lucerne Theatre under the umbrella of the Salle Modulable with the continued support of public subsidies.

31. I found Mr. Schwerzmann to be a credible and straightforward witness, despite the fact that it was obvious that he had a partisan interest in the Plaintiffs' success in the present

litigation. He explained the highly consultative political culture within which the project was being implemented in the following manner:

> "*A. Now it is (inaudible) again about the legal commitment*
> *and the political commitment. I mean, we have later*
> *on -- we had the discussion with -- with member of the*
> *delegation, delegation of the project. And from the*
> *moment we are convinced that the calculation is good*
> *enough, and the gap is very small, and at the end it was*
> *very small, about -- if I remember, 3.something*
> *millions, then we were willing to discuss to fill this*
> *gap.*
> *But that's a further step in Switzerland. In*
> *a direct democracy, you go one step by step. That's*
> *a normal way, because you always have to -- you always*
> *have to take with you all the people who are involved in*
> *this project. And that's -- and that you have to do*
> *step by step, if you will be successful, and we wanted*
> *to be successful. We wanted to have this -- this*
> *building, and we were willing to change our theatre, the*
> *operations of our theatre. We were willing to*
> *re-allocate.*
> *I mean, you know about, as an expertise -- you know*
> *about the cantonal finance, the status of the cantonal*
> *finance. Of course, a gap of 1, 2, 3 millions we are*
> *able to cover, to fill, cover. Let's say cover. Of*
> *course we were able. But on an ongoing process, it is*
> *very important, I say, and say once more, that you have*
>
> *the pressure that we have a real good project, and I'm*
> *now, today, I'm convinced we have a very good project.*
> *And even the fact that we went on, after the trust*
> *has withdrawn the funds, even that fact that we went on*
> *and we planned -- we did further planning, that's*
> *a strong commission -- commitment. That's -- you do*
> *that only when you see the chance, and you -- to realise*
> *it, and when you want to realise it. Otherwise, under*
> *this condition, you would have stopped. But we did not*
> *stop the project because we believe in it.*"[3]

<u>Karl Reichmuth</u>

[3] Day 5, pages 83-84.

32. Karl Reichmuth is the principal of a private bank which bears his name as well as the 2nd Plaintiff. A leading character in the present drama and obviously in general terms an honest and honourable man, Mr. Reichmuth's evidence clearly needed to be approached with considerable care. He revealed himself under searching cross-examination by Mr. Cran to be a man capable of anger and charm, simplicity and sophistication, partisanship and objectivity as well. Proud of his military national service many years ago, he unabashedly clung to the purer values of a passing era in which trust reigned supreme. He scorned the more opaque values of the modern world in which lawyers held too much sway. He was assigned the mission of facilitating the construction of the Salle Modulable by the Settlor, whom he described in his Witness Statement as a wealthy man who lived simply and was devoted to funding the arts in Lucerne. His manner in the witness box made it clear that this was a mission he was still determined to fulfil.

33. A feature of his evidence that I found to be significant was the importance he placed upon trust. Mr. Reichmuth was confident enough to claim to have seen the Trust's balance sheet when in fact he only had reliable information from trusted sources as to the extent of the Trust's assets:

> "*1 Sometimes I prefer to have people whom I trust instead*
> *2 of having a lot of balance sheets which can be forged.*"(Day 6, page 38).

34. This view was reflected to some extent in his admission that he did not take time to scrutinize various documents in preparing for trial and accordingly could not be expected to remember minute details:

> "*5 So it really might be that I haven't had time to*
> *6 read every sentence of the lawyers, because they make*
> *7 a lot of sentences.*" (Day 6, page 19)

35. However Mr. Reichmuth also testified that the way in which he dealt with the Salle Modulable project was influenced by trust:

> "*23 Q. Did you make a note of any of these important duties*
> *24 that you say were handed to you?*
> *25 A. I didn't need to make notes because he knew exactly what*
>
> *1 he did in all trust.*
>
> *2 Q. Mr Reichmuth, you are a banker. You take care, I'm*
>
> *3 sure, to keep notes of important conversations with your*
> *4 clients, or on their behalf or with third parties, which*

5 may affect your clients; correct?
6 A. No. I think really we have such a good relation with
7 our client, and that is also the happiness I have, that
8 we really know our client from A to Z, and not -- we are
9 not in a bank who has thousands of clients. We have
10 might be 1,000 and something. So we really know our
11 clients, and we don't need up to now. Actually they
12 just start now to make that prescription to make notes.
13 Before everything was based on trust, and in
14 Switzerland, as you can ask your Swiss lawyer, it's good
15 enough to have -- what do you say -- agreement, mutual
16 agreement, that you see it's a mutual agreement, and
17 this conduct has gone on for two and a half years....” (Day 7, pages 12-13)

36. It appeared to me to be an offshoot of his reliance on relationships of trust that (a) he found it difficult to conduct business with people he could not establish relationships of trust with, and that (b) he customarily dealt on this level with people of elevated status. In explaining why he considered Mrs. Minors, despite her position as an Assistant Vice-President, too insignificant to deal with as regards important matters, for example, Mr. Reichmuth made the following outburst:

“*18 I was 27 years with Credit Suisse. As more the bank*
19 became American, as more you had an inflation of
20 vice-president, assistant vice-presidents, directors,
21 main directors, general managers, presidents.
22 I really -- the American way to describe what it is
23 doesn't really impress me. So that didn't impress me at
24 all. I just --...

2 I must rather -- and I'm sorry now. I have to explain.
3 I cannot answer just -- because at that time I remember
4 I expressed my -- and that was in Geneva. I expressed
5 my not being very pleased with the work of Mrs. Minors,
6 and she said it's a clerk. And a clerk is no insult.
7 And that's why I treated her as a clerk, but she was not
8 my colleague to really discuss important matters.” (Day 8, pages 61-62)

37. A second general observation on Mr. Reichmuth’s evidence is that he did not appear to me to have a sufficient grasp of detail or detachment to be able to convincingly distinguish between his recollection of events during the contract formation phase in 2007 and his interpretation of those events in light of information obtained through

discovery about the Trust's handling of the "pulling the plug" phase in 2010. An illustration of this tendency is found in the following extract from the trial transcript:

> "*24 Q. I'd like to ask you about the first sentence at the top,*
> *25 please, of the translation on page 198:*
>
> *1 'I told Mr Engelhorn about my impression of the*
> *2 often bookkeeping-based view of Mrs Minors, the only*
> *3 contact person other than him, is both tedious and*
> *4 dangerous in terms of realisation of the vision.'*
> *5 What on earth had Mrs Minors done for you to*
> *6 describe her as bookkeeping-based and that what she was*
> *7 asking you was both tedious and dangerous?*
> *8 A. We just had these documents which show they started to*
> *9 construct points in order to attack the seriousity of*
> *10 our doings.*
> *11 Q. Which documents?*
> *12 A. The ones -- the many emails which came -- which we just*
> *13 discussed a few minutes ago.*
> *14 Q. Her requests for the annual accounts and for an English*
> *15 translation of the budget?*
> *16 A. Because I felt there is something behind it which she*
> *17 hided -- which she was -- what you say, concealing.*
> *18 That was my impression.*
> *19 Q. Why did you take against Mrs Minors so vigorously?*
> *20 A. Actually, since Mr Hamm's visit, things were not going*
> ***22** so well anymore, and we felt that she is being*
> *22 instrumentalised by Mr Hamm.*" (Day 8, pages 201-202)

38. The witness appeared here to be merging his state of knowledge post-discovery about the Trust's contemplating pulling the plug some months before the final decision was made with the way in which he would have viewed comparatively innocuous communications from Mrs. Minors long before Mr. Reichmuth could have been aware of any significant influence of Mr. Hamm on the Trust as regards the Salle Modulable project.

39. A third general observation on the impression Mr. Reichmuth made on me as a witness is that he appeared to be genuinely committed to honouring the relationship of confidence which he had with the Settlor and, by extension, the Settlor's family as well. Despite blaming the Settlor's son-in-law for undermining the Salle Modulable project, Mr.

Reichmuth was unwilling to reveal what Christof Engelhorn himself thought of Mr. Hamm:

> "12 *Q. I think you may have gone slightly off the point. I was*
> *13 asking you what Mr Engelhorn's view was of Mr Hamm.*
> *14 A. This answer to your question without -- I don't want to*
> *15 offence Mr Hamm, but he -- he certainly preferred his*
> *16 real son.*
> *17 Q. You still haven't quite answered my question. You don't*
> *18 want to offend Mr Hamm, and I understand that, but it*
> *19 may be important for the purposes of this case to*
> *20 understand what lay behind the relationship between*
> *21 them.*
> *22 A. You know, we were not really discussing a lot directly,*
> *23 and I don't want that man who cannot defend himself*
> *24 to -- to -- what do you say -- to say he -- he did*
> *25 something which in a family usually don't express.*" (Day 8, page 224)

40. Finally, and connected with the latter point, is the strong moral commitment Mr. Reichmuth displayed towards honouring the last wishes of the Settlor:

> *"18. Q. Legally binding, no, is your answer. Your commitment of*
> *19 28 August to the Lucerne Festival was not legally*
> *20 binding; is that right?*
> *21 A. It's morally binding. It's not a back-to-back in legal*
> *22 sense that I had confirmed it.*
> *23 Q. Dr Achermann's evidence was to the same effect, that it*
> *24 was not a legally binding commitment. What was the*
> *25 difference between your moral but not legally binding*
> *1 letter of 28 August and Mr Jack's letter of 23 August?*
> *2 Why was his binding but yours wasn't?*
> *3 A. Mine is very deeply moral. I think two or three weeks*

4 before he died, Mr Engelhorn said: make sure that my

5 project is going to be done.

6 Now, if that is not morally binding, then you might

7 just have legal aspects, but not human aspects in the

8 whole matter. I'm sorry to say that.

9 Q. Could you answer my question?

10 A. I answered your question.

11 Q. I'm sorry?

12 A. You asked whether it's moral or not, my binding. I'm

13 here for that, not only for the legal binding. The

14 legal binding is back-to-back. But to question whether

15 I have a moral binding or not, knowing that I have been

16 entrusted with it two or three weeks before he died,

17 that's going too far, Mr Cran.

18 Q. I'm sorry, I think you completely misunderstood my

19 question..." (Day 7, pages 19-20)

41. The seemingly hardy, robust and thick-skinned banker had watery eyes as he spoke of the task that the Settlor had entrusted him with only weeks before his death. This adds a further layer of partisanship and increases the need to approach the key aspects of Mr. Reichmuth's evidence with care.

David Staples

42. David Staples was at all material times the Chairman of Theatre Projects Consultancy LLP ("TPC"), a leading international theatre and planning consultancy. His speciality is preliminary design and feasibility studies in relation to art venues. He started discussing the idea of a non-traditional opera house, which the Salle Modulable concept represents, with Michael Haefliger (Lucerne Festival Intendant since 1999) between 2004 and 2005 in Lucerne. In mid-2007, he was contacted by Haefliger about consulting on the project for which a donor had now been found. TPC was retained by the Lucerne Festival

Foundation on the understanding that the SMF would eventually retain the consultancy (as materialised in 2008). He prepared a final design concept for the modular room on October 6, 2010.

43. The 'honorary' native English speaker in the Plaintiffs' otherwise native German-speaking *dramatis personae*, Mr. Staples was the most independent witness despite the fact that he was an unequivocal supporter of the Plaintiffs' cause who would likely be retained to do further work should their claims succeed. His Witness Statement concluded with the following words:

> "*15. I am proud to be associated with Salle Modulable and think it is a good idea and that it would be a great shame if it were not built. I genuinely believe it would be a success and would secure Lucerne's place as a leading cultural centre.*"

44. I viewed him as most independent because his ties with the Lucerne art community appeared to be comparatively tenuous. Moreover, none of his evidence was highly controversial. Not subjected to the intensive scrutiny in cross-examination which most of the Plaintiffs' other witnesses had to endure, David Staples understandably gave his evidence in a straightforward manner and was an entirely credible witness.

Susanne Herrnleben

45. Dr. Susanne Herrnleben, together with her husband Dr. Gerhard Brunner, were retained via Brunner-Herrnleben by SMF to prepare the Overall Concept document which was completed in December 2010 and which formed an important plank of the Plaintiffs' case. She obtained a doctorate in History from the University of Vienna and has worked for over 20 years in the arts sector, currently acting as an agent for artists and as a production consultant. She also teaches and administers the Executive Master in Art Administration course at the University of Zurich.

46. More than perhaps any other 'partisan' witness called by the Plaintiffs, Dr. Herrnleben answered questions in a straightforward manner, freely admitting occasional mistakes and rarely slipping into the role of advocate. Bearing in mind that Mark Cran QC for the Trustee attacked the credibility of her report quite ruthlessly, I was struck by the balanced way in which she gave her evidence. Near the end of a testing cross-examination, she described the function of her report as follows:

> "*A. We were asked to -- to bridge the gap, higher the level,*
> *24 and we knew that Mr Engelhorn refused to pay operational*

costs. That were our parameters and nothing else, and

we were on this way, and we tried this and we tried this and we tried that. And we -- we thought about and we threw away, and I think this is the real normal process coming to a result. You are never on the right way. It's -- there is no one way to hell and one way to heaven. It's always the ways in between." (Day 9, pages 212-213)

47. Dr. Herrnleben's evidence revealed that her report was prepared under considerable pressure of time and relied heavily on information supplied from other sources which could not readily be tested in objective or scientific terms. However, it was also clear that she had considerable expertise in the production and artist management areas which had been brought to bear. She (supported by her husband) left me with the distinct initial impression that her firm's work, while less than perfect and probably not by itself constituting a final feasibility study, was honestly carried out, added value to the project generally and could not be said to be a "put-up job" cynically designed to produce a predetermined result.

Gerhard Brunner

48. Dr. Gerhard Brunner's Witness Statement explains that his consultancy firm, which trades under the name of Brunner-Herrnleben GmbH, is also named 'Werktreue' which roughly means "*faithfulness to the original idea, text or composition*" (paragraph 1). He graduated in Law from the University of Vienna in 1956[4], a date which was belied by his demonstrative and dynamic display in the witness box. After nearly 20 years as a freelance journalist, Dr. Brunner worked as an artistic director and manager in Austria for 25 years before founding his consultancy firm with his wife. He also teaches on the Executive Master of Arts programme at the University of Zurich. He was perhaps overly keen to advocate his own intellectual commitment to the Salle Modulable project and the merits of his firm's distinctive approach to the assigned task.

49. Nevertheless my initial view at the end of his evidence was that Dr Brunner was a generally credible witness with genuinely high artistic standards whose main contribution in preparing the Overall Concept had been to persuade the artist stakeholders to support a new approach to their craft. He crucially refuted the Defendant's thesis that his firm had been hired to achieve the desired result which the more professional and independent

[4] This was the graduation date stated in the witness statement. It should apparently have read "1961".

Actori study could not achieve by pointing out that his study also projected a gap in post-construction operating costs which had to be filled. As Dr. Brunner explained early in his cross-examination:

> "*5.It was a separate task that we tried to fulfil to*
> *6 convince the stakeholders to go along with the whole*
> *7 process. We had to convince the theatre, containing the*
> *8 orchestra, the chorus, all of them to go along with what*
> *9 we suggested to be done.*
> *10 And there are many things changed. But the decisive*
> *11 figure was the figure that we ended up with, a minus.*
> *12 And we took a risk, because it was not a zero, the black*
> *13 zero we were speaking about. It was a minus, and there*
> *14 was no guarantee that it would be covered by city and*
> *15 canton. We had some hints. It might be, but might be*
> *16 is no commitment.*
> *17 And we worked it out, and we ended our basic work*
> *18 from February, midst of February to 5 June, and there*
> *19 were left some questions open. The main question was*
> *20 the chorus question, because we hadn't found a really*
> *21 convincing solution for that. And it stayed over the*
> *22 summer, because the theatre was on vacation and we had*
> *23 no partners to communicate with.*
> *24 And when they came together after the summer, we*
> *25 resumed there, and we found a solution for the chorus,*
>
> *1 which was convincing for us and convincing for the*
> *2 concept, and it was not our idea, I have to confess. We*
> *3 took it from somebody outside."* (Day 12, pages 28-29)

Maurice Lausberg

50. Professor Lausberg is a principal in the cultural consulting company Actori GmbH ("Actori") based in Munich. His professorial title apparently flows from his leadership of a graduate course in Cultural Administration offered by the University of Music and Performing Arts in Munich[5].

51. Despite somewhat aggressive attempts by the Defendant to enlist Professor' Lausberg's support for its cause, he ended up becoming a Plaintiffs' witness, avowedly for more

[5] Actori prepared an initial report in September 2009 ("the Actori Report") which the Trustee contended the Plaintiffs effectively shelved in favour of the subsequent Brunner-Herrnleben Overall Concept. The Plaintiffs' justification for not disclosing the Actori Report entailed criticisms contained in various witness statements. In reality the subsequent report built on the earlier report to a significant extent.

philanthropic than commercial interests. He responded to some of his cross-examination in a somewhat combative and argumentative manner and his avowed disinterest in the contents of the Brunner-Herrnleben Report was not entirely convincing. However, he was in general terms a credible witness.

Michael Haefliger

52. Michael Haefliger was the Plaintiffs' 'star' witness; the moving spirit behind the Salle Modulable idea and the donation which forms the subject of the present proceedings, he is also the highly successful Intendant of the Lucerne Festival with a prodigious reputation for fund-raising. Clearly a master of the Lucerne arts and culture universe, Mr. Haefliger appeared to me to find it difficult to distinguish the truth as he would like it to be from the objective truth, a distinction which is obviously important in the court-room but, one suspects, less important in the sphere of commercial promotion. He revealed his promotional instincts at the very beginning of his cross-examination:

> "*7 Q. You've got no orchestra pit.*
> *8 A. Well, we re-arranged it in a way that the orchestra*
> *9 could be on stage, and we did the set design around it.*
> *10 There's actually a DVD which I'm happy to give to you.*
> *11 Q. I shall accept your offer very graciously. Whether you*
> *12 will still want to give it to me at the end of this*
> *13 cross-examination is another matter.*
> *14 A. We are professionals.*"

53. Mr. Haefliger, perhaps baited by Mr. Cran's somewhat sarcastic tones, more than once gave boldly confident answers which were subsequently shown to be clearly wrong. While I attributed this not to dishonesty but to the witness' compulsion to adopt the role of advocate combined with his unfamiliarity with his own witness statements, it soon became obvious that his controversial evidence had to be approached with care. It was easy to imagine that, as the project estimates began to rise beyond acceptable limits, he might not have found it easy to sacrifice the purity of his artistic vision on the altar of financial prudence and pragmatism. And if a take-no-prisoners approach was what he emotionally desired, he would have found a kindred spirit in Mr. Reichmuth. Despite occasionally feigning modesty, Mr. Haefliger was clearly a witness who did not suffer from an under-developed ego:

"Q. Dr Achermann agreed with you that it wasn't a shock, but
13 he said it was a surprise.
14 A. Well --
15 Q. The news about the operating concept.
16 A. I'm different than Dr Achermann. I'm Michael Haefliger.
17 I'm used to deal with these kind of things."[6]

Jost Huwyler

54. Jost Huwyler was Project Manager for SMF between 2009 and 2011. He graduated in Law from the University of Fribourg and obtained a Masters in Law degree from the University of Miami. He spent three years as in-house counsel at the Kulture und Kongresscentrum in Lucerne (the "KKL") and in 2004 founded his own consultancy company. His main responsibility was working on the study completed by SMF in December 2010 albeit that his role was apparently a primarily coordinating one.

55. Mr. Huwyler began his oral evidence in a very straightforward and neutral manner. However, perhaps unsurprisingly after Mr. Cran's insistent and needling questioning, this predominantly moderate man showed a somewhat more combative and partisan disposition before he left the witness box. That said, he was in general terms a credible witness.

Witnesses who did not appear for cross-examination

56. Nicholas Oltramare was not cross-examined. He was for many years a banker and has run his own consulting firm for the last ten years. He admits to being a long-time supporter of the Lucerne Festival. He essentially deposed that he believes that any funding gap attributable to operating expenses and construction costs (in the latter case arising because of the Plaintiffs' need to pay over a portion of any sums recovered under the Harbour Funding Agreement) could easily be bridged by public and private contributions, respectively. He himself would be willing to donate a six figure sum.

57. Robert Stewart, an éminence grise of the Bermudian business community, was a director of Butterfield Bank between 1986 and 2008 (serving as Vice-Chairman from 1998 to 2008). He also was not required to attend for cross-examination although he was available to do so. He has degrees in Law and Economics, and has lectured and written on Economics. He is also a Fellow of the Institute of Chartered Secretaries and Administrators. He worked with the Shell Group of companies for nearly 30 years. He became involved with the Art Trusts in 2002. Between 2002 and 2009 Mr. Stewart was

[6] Day 13, page 184.

an alternate director of Art Mentor Foundation Ltd ("AMFL") and served as a director other entities within the Art Trusts' structure.

58. Mr. Stewart states that pursuant to requests made by the Settlor, the Trust made substantial donations to AMFL and to the Student Mentor Foundation in Lucerne. In 2005, for instance, CHF 50 million was donated to the Student Mentor Foundation. Such donations were made through AMFL which then passed it on to the intended ultimate recipient which was often a Swiss Foundation established by AMFL. He noted that accounting records showed that the Trust made a commitment of CHF 50 million which was not immediately paid over and that the Student Mentor Foundation was credited with interest from the date the commitment was made. In a Witness Statement which contains no argument and is clearly carefully drafted, Mr. Stewart says that the practice was for Dr. Scheuer and Mr. Weinhold to email the Trust with basic information about a gift which the Settlor wished to make to a charitable cause in Lucerne. Although he was not privy to the decision-making process of the Defendant, he believes that the Trustee informally approved these requests without any formal minuted decision. The witness infers this from the short period of time between the receipt of the requests from the Protectors (on behalf of the Settlor) and the date when the trustee communicated its agreement to the proposed donations. Thereafter, AMFL would formally approve the onward donations at formally minuted meetings.

59. Mr. Stewart further deposed that when AMFL established the Swiss Art Mentor Foundation, the Swiss board was staffed with officers whom he understood had been selected by the Settlor. Thereafter, AMFL had no involvement in supervising the implementation of the projects in Lucerne although the witness himself requested and obtained annual reports to enable AMFL to satisfy itself that the funds were being applied towards the intended purposes. In the course of a detailed review of the Trust's previous history of informally approving various donations, he asserts that a letter of intent issued by AMFL in respect of the CHF50 million donated to the Student Mentor Foundation was regarded (as evidenced by AMFL's financial statements) as constituting a binding obligation. As regards the Salle Modulable project, he did not know why the Defendant made the commitment directly rather than through AMFL. However, he understood it to be "*a done deal*". The general culture in relation to the Art Trusts was that the Trustee was content to be passive and was generally to play a "back seat" role. This evidence was most pertinent in my judgment in both demystifying the somewhat informal way in which the Trustee managed the Salle Modulable. It also explained, in light of the fact that other evidence confirmed that Rutli had received monies donated in relation to previous projects, why so much confusion arose in relation to the role Rutli was expected to perform. The Trust's front line representatives on Salle Modulable were seemingly unable to access any institutional memory about how previous projects were managed

and what role Rutli previously played. The case the Trustee advanced in these proceedings on the duties Rutli owed as an agent was, accordingly, difficult to link evidentially to any actual consensus which existed between the parties.

60. Franz Steinegger was also not required to attend for cross-examination. He essentially responded to the Witness Statement of Sacha Wigdorovits to dispute the latter's account of a telephone conversation that occurred in late October 2010. Mr. Steinegger qualified as a lawyer in 1970 but became a politician, at one time leading the Swiss Liberal Democratic Party. In October 2009 he became Chairman of the 'Task Force' working on the Salle Modulable project, a grouping which included representatives of the Lucerne Canton, City, Theatre, Lucerne Symphony Orchestra and SMF itself.

61. His evidence appeared on its face to be of peripheral relevance to the central issues in the case although it is understandable that it was considered necessary to respond to the Wigdorovits Witness Statement.

Witnesses beyond the seas

62. For the reasons set out above, I granted the Plaintiffs leave to have read in under the Evidence Act 1905 (section 27D(2)) the statement of Mr. Benjamin Beck. His evidence was called to rebut the suggestion made in cross-examination of Dr. Achermann that Beck was not on holiday but was available to serve as secretary for a SMF Board meeting the minutes of which were supposedly doctored.

The Defendants' Fact Witnesses: a preliminary review
Dr. Wolfgang Scheuer

63. Dr. Scheuer was the senior Protector from the beginning of the Salle Modulable project in 2007until just before its end in 2010. He was called to the Bavarian Bar in 1966 and in the 1980's was tax adviser to Christof Engelhorn and in that capacity was involved in the establishment of the Bermudian trust structure which was so successful in avoiding taxes that it prompted debate in the German Parliament and resulted in a subsequent change in the law. About ten years younger than the Settlor but far closer to him in age than any of his fellow Protectors, Dr. Scheuer was the main channel for communicating the Settlor's wishes to the Trustee. His greatest partisanship appeared to derive from his concern to protect the integrity of the Trust (which was not directly under attack). His desire to believe that the Settlor would have at all times followed his lawyer's advice to distance himself from any appearance of retained control over the Trust assets gave rise to a need to scrutinise the controversial aspects of his evidence with care. However, he was

unsurprisingly a generally impressive witness who gave his evidence with scrupulous care.

64. As the Trustee moved inexorably towards a formal decision to terminate the funding in 2010, Dr. Scheuer had no difficulty in taking a pro-project line. This indirectly illustrated the subtleties underlying the relationship between members of what might be called the Trust management team. Together with the voluminous documentation recording communications between the Trustees and the Protectors, this witness's spirit of independence in a developing crisis undermined any suggestion that the Protectors were generally merely agents of the Trustee.

Patrice Minors

65. Patrice Minors was at all material times Assistant Vice-President of the Defendant and the primary officer representing the Trust in connection with the Salle Modulable relationship. She has been involved with trust management since 1988 and became registered as a Trust and Estates Practitioner in 1997. She is now employed with the Bermuda Monetary Authority and involved in the regulatory dimension of the trust sector in Bermuda. To a large extent Mrs. Minors was "on trial" as she was at the centre of interactions which gave rise to the present dispute.

66. She gave her evidence in a generally straightforward manner although she was least convincing (perhaps understandably) when being cross-examined about the termination of the funding for the project. During this period (most of 2010) the Defendant had obtained legal advice about the merits of its legal position and the Defendant's witnesses were required to avoid revealing the contents of that advice so as to protect the privilege therein. Mr. Layton alertly pointed out that Mrs Minors, who was admittedly a person of religious convictions, merely affirmed before giving her oral evidence while she had previously sworn an affidavit. This difference of approach was somewhat odd and not satisfactorily explained although at the end of the day it made no difference to the way I assessed her evidence. It is entirely possible that she was uncomfortable about having to give a filtered version of the whole truth to protect the Trustee's privilege, something which from a legal perspective would have sat quite comfortably with any form of oath, but perhaps not from a religious standpoint.

67. The suggestion that her credibility was diminished by the fact that she was receiving expenses from the Defendant for preparing her evidence and attending the hearing was nevertheless somewhat artificial and unfair in circumstances where there was no basis for believing that her position was any different in this regard to other witnesses. Moreover, Mrs. Minors made an important admission against the Trustee's re-amended case by

stating that she did not at the time consider the 30 October 2007 letter she wrote to Mr. Reichmuth had any contractual effect, a very striking illustration of her general honesty as a witness.

68. Mrs. Minors was a generally credible witness whose controversial evidence nevertheless had to be approached with some care simply because it would be surprising if she did not have the entirely natural inclination, whether conscious or sub-conscious, to vindicate her own past actions in this matter. As in the case of Graham Jack, on controversial issues I have generally placed more reliance on an objective reading of the contemporaneous documentation she generated and received rather than her retrospective interpretation of it as a witness.

Graham Jack

69. Graham Jack featured in several roles. A Chartered Financial Analyst and Trust and Estates Practitioner, he was the Defendant's Managing Director from 15 November 2004 until January 1 2008 when he became a Senior Vice-President in the Butterfield Group. He was the primary client relations manager in relation to the Trust from 2004 until he left the Butterfield Group in September 2009. Appointed as a Protector of the Trust on August 27, 2009, he became the Executive Protector when he left the Bank's employ.

70. I did not find the ascent of Graham Jack and the deepening of his relationship with the Trust and its beneficiaries surprising. He appeared to me to be an intelligent, empathetic and loyal man; a younger and more cosmopolitan New World equivalent of Karl Reichmuth, perhaps. He freely disclosed his affection for the Engelhorn family which he described as far more healthy and normal than the wealthy typically are. The suggestion that his evidence was coloured by financial self-interest alone was, to my mind, overly simplistic.

71. While Mr. Jack generally gave his evidence in a careful and straightforward manner, as in the case of Mrs. Minors, his evidence about the circumstances of the termination of the funding perhaps understandably had a somewhat artificial resonance to it. A generally credible witness, his undoubted loyalty to the beneficiaries and the Trust creates an obvious need to approach the controversial aspects of his evidence with some care.

Christian Weinhold

72. Christian Weinhold, after obtaining a degree in Business Economics, worked for Munich Re in New York before returning to Germany to live in a village outside Munich where he became friends with the Settlor's son, Stefan. He became a Protector of the Trust in or

about 2005. Mr. Weinhold gave his evidence in a refreshingly frank and non-adversarial manner and was an entirely credible witness.

Evelyn Schilter

73. Ms. Schilter is a Senior Associate with the Swiss law firm Niederer Kraft & Frey and gave very limited evidence about the Defendant's unsuccessful attempts to enlist the support of Professor Lausberg for their cause. She was a credible witness who gave her evidence in an entirely straightforward manner.

Sacha Wigdorovits

74. Sacha Wigdorovits of Contract Media AG ("Contract Media") was not required to attend for cross-examination. He gave evidence about various conversations, principally a conversation with Mr. Steinegger which he memorialised in an email dated October 27, 2010 to Patrice Minors. The accuracy of this account is challenged by another witness, Mr. Steinegger, who was not required to attend. Much of what these witnesses say is of marginal if any relevance as it relates to a time after the funding "plug" had been pulled.

75. However admitted inaccuracies in press statements issued on behalf of the Trustee at this time may well have stoked the fires of indignation in the Plaintiffs' camp and helped to harden their resolve to bring the present litigation.

Expert evidence on Swiss law

Alexander Jolles-Plaintiffs' witness

76. Mr. Jolles obtained his Law degree from the University of Bern in 1985 and was called to the Zurich Bar in 1988. He worked as a Foreign Associate with the US law firms of Pillsbury Madison & Sutro (San Francisco) and Debevoise Plimpton (New York) between 1989 & 1991. Since then he has been with the Swiss firm of Schellenberg Wittmer (in Geneva until 1993 and thereafter in Zurich) where he has been a litigation and arbitration partner since 1998. His specialisations include arbitration, art law and general civil litigation including contract law. He has taught part-time and published numerous articles and given expert evidence on Swiss law in the US District Court for the Southern District of New York.

77. Mr. Jolles was an impressive witness who gave his oral evidence in relation to the limited number of issues upon which he and the Defendant's expert did not concur in a straightforward and balanced manner.

Professor Felix Dasser- Defendant's Witness

78. Professor Dasser was awarded his Law Degree in 1985 by the University of Zurich where he also obtained his doctorate in 1989. After obtaining an LLM from Harvard University in 1990, he was called to the Zurich Bar in 1991when he also joined the Swiss law firm Homburger as an associate. He became a partner in the firm in 2000 and now heads the firm's litigation and arbitration practice. Since 1999 he has been a Titular Professor at University of Zurich where he teaches and publishes on international commercial dispute resolution and contract law. He regularly serves as an expert witness on Swiss law.

79. He was also an impressive witness who gave his oral evidence on the issues in controversy in a straightforward and balanced manner. As in the case of Mr. Jolles, the Court felt able to discern those opinions which were more clearly supportable from those that were not.

Joint Report of Swiss law Experts

80. The two experts to their credit produced a joint report agreeing many important issues of Swiss law. Their agreed conclusions will be summarised below using the headings adopted in their Joint Report.

Conclusion of Contracts under Swiss law, including Donation Contracts

81. The primary statute law is found in the Swiss Code of Obligations ("CO") as read with provisions of the Swiss Civil Code (CC) dealing with issues such as good faith, abuse of contractual rights and the burden of proof. A contract is formed by the exchange of mutual promises or expressions of intent; there need not be an exchange of equivalent promises or consideration. Under the principle of party autonomy, the parties may modify established types of contract established by statute law by entering into *sui generis* contracts.

82. As far as proof of the formation of a contract is concerned, this requires proof that either the parties subjectively intended to enter into a binding commitment or that such an intention can be objectively inferred based on what a reasonable person in the position of the parties acting in good faith would have intended. The consensus must relate to the essential terms of the contract in question.

83. A donation contract involves the promise of a gift from the donor from his own assets on a gratuitous basis with an *animus donandi* which is accepted by the donee. Acceptance

will be presumed unless the gift is rejected in a reasonable time or subject to a counter-offer. Terms which one party subjectively regards as being essential must be communicated to the other party as such; otherwise, disagreement on terms one party considers essential will not prevent the valid formation of a donation contract. This was an important piece of agreed expert evidence for the purposes of my Swiss law analysis of the facts of the present case. Under Bermudian law, essential or fundamental terms of a contract may be implied, irrespective of whether the importance of the term was actually made explicit by the party relying upon it.

84. Essential objective terms of a donation contract are simply (a) the identity of the donor, (b) the donated property, and (c) the donor's intention to make a gift. It must also be in writing signed by the donor which contains the essential terms.

85. Where non-essential or ancillary terms are omitted by the parties, the Court can fill the gap based on the hypothetical intention of the parties and subject to fall-back rules of interpretation and customary practice.

Contract Interpretation

86. A Swiss court will interpret a contract in order to determine whether the parties entered a binding contract and, if so, the contents of and type of contract concerned. Burden and standard of proof are regarded as part of substantive as opposed to procedural law.

87. A subjective interpretation aims at determining the actual intention of the parties and in this context pre-contractual and post-contractual dealings are relevant. An objective interpretation aims at establishing the intention of a reasonable person in the position of the parties. This was another important piece of agreed expert evidence because of its difference from the common law approach, although how it applies in practice was subject to controversy.

88. The starting point in interpretation is the wording, within its context and the structure of the contract. The contract must be construed as at the date of its creation in light of the purpose of the parties and the history and circumstances surrounding the formation of the agreement. It is presumed that the parties intended a reasonable result.

89. Although the wording used by the parties is the starting point, their actual intentions can supersede even clear words. The Swiss Supreme Court has ruled that a purely literal interpretation of contractual wording is impermissible and clear wording is not necessarily decisive. The common understanding of words usually prevails although a specific meaning which was or ought to have been understood by both parties may apply.

Under the *in dubio contra stipulatorem principle*, ambiguous words may be construed against the author of the words. The *favor debitoris* rule provides that if a contract is ambiguous, a construction less onerous to the debtor may be chosen. The principle of good faith may impose a duty on an addressee to seek clarification of any provisions which are not understood.

90. Overall, and perhaps unsurprisingly bearing in mind the highly internationalised character of Switzerland as a legal and commercial jurisdiction, I found the agreed rules of contractual interpretation to be in general terms similar to the corresponding common law rules applied in Bermuda.

Agency

91. In the absence of an express authorisation, a principal may be bound by the acts of an agent where he knows or ought to know that the agent is holding himself out as being the principal's agent and failed to intervene. Where an agency relationship exists, the knowledge of the agent will be imputed to the principal.

23 August 2007/10 September 2007 Letters

92. It is agreed that the 23 August 2007 letter's form meets the requirements for a valid donation contract to be in writing. The reference to "recent discussions with Mr. Christof Engelhorn" is relevant as regards the history of the letter.

93. It is also agreed that a Swiss court would apply the commonly understood meaning of the term "in principle" (assuming "in principal" to be a typographical error) in the absence of a technical meaning being found. It is doubtful whether a Swiss recipient of the letter would appreciate the common law meaning of the term "in principle". The object of the donation was sufficiently identified and the gratuitous nature of the promise was self - evident. The term "our commitment" suggests a binding commitment.

94. The response to an offer will only constitute a counter-offer if it deviates from the offer as regards any objectively or subjectively essential terms.

95. Third party benefits can be conferred if the third party can be identified at the time for performance.

The ISA

96. The ISA was validly concluded and the pronouns "they" and "them" in connection with the unfettered discretion referred to in the ISA grammatically refer to the Reichmuth family members who made the initial payments into the account (Mr. Reichmuth's evidence, which I accept, was that the reason for this was to preserve the confidentiality of the Trust).

Relevance of the 30 October 2007 and 8 November 2007 Letters

97. It is possible to amend an earlier donation contract by mutual consent. The 8 November 2007 letter could in theory constitute an acceptance of the terms of the 30 October 2007 letter.

98. Donation contracts can be made conditionally upon the occurrence or non-occurrence of a future event. Where the condition is potestative, its fulfilment depends on the will of one party. In the case of a condition precedent, the contract does not become valid until the condition is fulfilled. In the case of a condition subsequent, the contract comes into being immediately but is dissolved if the condition is not fulfilled.

99. On the hypothesis that the 30 October 2007 letter has contractual effect, it is common ground that if a feasibility study established non-viability, this could constitute a condition subsequent.

Article 156 CO

100. If the completion of a condition precedent is prevented by the bad faith act of one party, it is deemed fulfilled. A condition subsequent is deemed not to have occurred if it was caused by the wrongful act of one party. Potestative conditions (e.g. if the Trustee had a discretion as to whether to donate the building costs) are also required to be exercised in good faith by article 156 of the CO.

101. The concept of the lapse of a donation made for a specific purpose exists but is not clearly defined in Swiss law.

Revocation of donations

102. Donations may be subject to a proviso but the stated purpose of a gift would not constitute a proviso independently of the controversial concept of a donation for a specific purpose. Non-compliance with a proviso entitles the donor to compel the donee to comply or to revoke the donation where non-compliance has occurred, *inter alia*, "*for*

unjustifiable reasons": Article 249(3) CO. In the present case this is the only relevant revocation ground.

103. What constitutes "*unjustifiable reasons*" for non-compliance with a proviso depends on the facts of each case and requires the donee to be at fault. However, before the donor can validly revoke the gift, a grace period must first be given. Grounds for revocation of a donation for non-compliance with a proviso can be waived by the donor's subsequent conduct.

Mandate

104. A mandate is a contract for services which requires no special form for its creation and is regulated by Article 394 et seq CO. There is a general duty for an agent to act in the best interests of his principal and to inform the principal of relevant developments (Article 398), the scope of which duty is shaped by the facts of each case. An agent is obliged on demand to produce a proper report and accounting of his activities and to deliver up everything acquired on the principal's behalf during the mandate (Article 400(1)). A mandate agreement can be terminated at any time with immediate effect (Article 404(1) CO) although termination without valid reasons at an inappropriate time may give the injured party a right to seek damages.

Performance claim and due date (donation contracts)

105. The primary remedy for breach of a donation contract is the right to collect the promised gift as a contractual debt. Unless otherwise agreed, performance is due immediately (Article 75 CO).

Damages

106. A breach of contract entitles the aggrieved party to damages measured by the difference between the actual position of the claimant and the position he would have been in had the relevant breach not occurred. Where the injured party has a positive interest he is entitled to be put in the position he would have been in had the contract been duly performed. Where the party has a negative interest, damages aim to put him in a position as if no contract existed.

Alternative claims

107. The alternative claims only arise on the basis that there is no binding promise to make a donation.

108. Liability for breach of trust will arise where:

(a) a qualifying legal relationship exists;

(b) one party creates legitimate expectations for the other party;

(c) the party who creates the legitimate expectations fails to fulfil them in circumstances inconsistent with good faith;

(d) the offending party is at fault in the sense of acting intentionally or negligently; and

(e) as a result the aggrieved party sustains damage.

109. A claim does exist for compensation for breach of a *de facto* contract where no contract actually exists.

Controversial issues of Swiss law

110. I do not propose to set out here all disputes between the experts as to the application of agreed principles of Swiss law to the facts of the present case. Counsel agreed that it was properly for the Court to determine how such principles ought to be applied to the facts found by the Court. For example, whether the standard of objective interpretation to be applied to Mr. Reichmuth should be that of the trusted friend or that of the experienced banker depends on the factual findings made as to the nature of his relationship with the Trustee.

111. On the other hand it is important to identify and ultimately decide those principles of Swiss law which potentially apply where the experts disagree upon the content of the relevant legal rules. The experts themselves, in their Joint Report, identified the following substantive law disagreements:

(a) the link between the standard of proof and rules of contractual interpretation;

(b) the relevance of post-contractual behaviour in relation to objective contractual interpretation;

(c) the significance of words used in a contract relative to other means of interpretation;

(d) the correct approach to determining the parties' understanding of legal terminology used;

(e) the content of the *in dubio contra stipulatorem*, *favor negotii* and *favor debitoris* principles in the context of its application to the present case;

(f) the scope and significance of the duty of the addressee to seek clarification in the present case;

(g) as regards whether or not the agreed conditions for inferred agency are met on the facts, there is a disagreement as to the interpretation of the Swiss Federal Supreme Court case DTF 120 II 197;

(h) whether or not a contract must refer to a third party (even if not clearly identified) in order to confer a benefit on a third party identified at the time of performance;

(i) the scope and application of Article 156 CO;

(j) the principles governing the lapse of a donation made for a specific purpose;

(k) the scope and application of the principles of revocation in relation to a donation contract;

(l) whether as a matter of principle litigation funding expenses are recoverable under Swiss law;

(m) whether Rutli or SMF sustained any damage;

(n) whether liability for breach of trust only arises in relation to negative interests;

(o) the scope of recovery possible for breach of a *de facto* contract.

III: THE CONTRACTUAL CLAIMS

Proper law of the putative contract

112. It is common ground that the governing law of the putative contract falls to be determined by Bermudian conflict of law rules. While the specific elements of the contract were disputed, it was for practical purposes common ground[7] that the central documents evidencing the contract included the following:

(a) the Trustee's 23 August 2007 letter;
(b) Rutli's 10 September 2007 response;
(c) the ISA;
(d) the Trustee's 30 October 2007 letter (read with the related prior telephone conference);
(e) Rutli's 8 November 2007 response.

113. It is the Plaintiffs' pleaded case (see especially RASC paragraphs 28A-28C and 36) that:

(a) the Trustee, which together with the Trust is domiciled in Bermuda, promised to fund the costs of constructing the Salle Modulable including the costs of feasibility studies up to a limit of CHF 120 million;

(b) Rutli was engaged as its agent to be the public face of the Trustee in Lucerne while another entity (SMF, in the event) would be formed to manage the project; and

(c) the Trustee is liable to pay the balance of the CHF 120 million owing under that contract together with litigation funding costs.

114. The Plaintiffs' submissions on proper law are set out at section 5 (paragraphs 231-243) of the '*Skeleton Argument of the Plaintiffs*'. It is submitted that the relevant common law rules are the same as the English common law principles: *Essex Insurance Company-v-Posner* [1997] Bda LR 52 (Meerabux, J). In that case the issue was not controversial, nor is it in the present case (see '*Skeleton Argument for the Defendant*', paragraph 85). The central rules are that the Court in the absence of an express choice of law will seek to identify either:

[7] In other words, 'agreed' documents which arguably evidenced the putative contract, ignoring disputes about which documents had contractual effect.

(a) an implied or inferred choice discerned from the surrounding circumstances; or

(b) the system of law with which the contract has its closest connection: Dicey & Morris, '*The Conflict of Laws*', 11th edition, page 1162.

115. In practical terms, it seems clear that "*the tests of inferred intention and close connection merge into each other*" Dicey & Morris, 11th edition, page 1163. In any event, the Plaintiffs contend that both of these tests point to Swiss law. As regards presumed intent, they rely upon the fact that "[n]*either the contracts nor the use to which the funds were to be put had any connection with Bermuda or with any other jurisdiction outside Switzerland, other than the fact, which was entirely incidental to the substance of the contracts, that the Defendant was located in Bermuda*" (paragraph 235). It is contended that past donations were "*obviously*" governed by Swiss law. As far as closest connection goes, reliance is placed on various pronouncements about the weight to be given to the place of performance of the contract.

116. The Trustee countered that the weight to be attached to this factor varied with the nature of the contract: *Amin Rasheed Shipping Corporation-v-Kuwait Insurance Company* [1984] 1 A.C. 50, 62G-H; however, no authority was cited in the Defendant's Skeleton which illustrated the application of this principle to the facts of the present case in a manner implied by the relevant submission.

117. The putative contract contended for by the Plaintiffs has the following key elements to it:

(a) a commitment by the Bermuda-domiciled Trustee made to a Swiss foundation to fund the feasibility studies for the construction of an Opera House in Lucerne, Switzerland and (assuming feasibility) to pay construction costs up to an aggregate of CHF 120 million;

(b) an agreement under the ISA that all payments were to be made by the Trustee by way of deposits in Swiss currency into the sub-account maintained by a Swiss foundation within a main account held with a Swiss bank;

(c) the only formal contractual document signed was the ISA, which was drafted by a Swiss entity (Rutli) and might loosely be described as being in "Swiss form";

(d) the due application of the funds and their onward transmission were to be effected in Switzerland on the Trustee's behalf by its agent, a Swiss foundation based in Lucerne.

118. In the present factual matrix it is difficult to see how the Court can fairly conclude that the contract is most closely connected to Bermudian law or to impute an intention to the parties that Bermudian law was intended to apply. Accepting the Trustee's contention that regard must be had to the character of the key contractual obligations, the pertinent facts still point to the conclusion that the place of performance is a dispositive indicator as to the applicable proper law. The Defendant's Skeleton attached the Privy Council decision in *Bonython-v-Commonwealth of Australia* [1951] A.C. 201 where Lord Simonds observed (at page 221): "*In the present case it is clear that, if it had been provided that payment would be made in London only, that would have been an important factor in determining the substance of the obligation, though other features…could not be ignored.*" Here, the only place of payment agreed was Lucerne.

119. It is true that the form of the ISA comes nowhere near to being as relevant an indicator of proper law as the marine policy in the *Amin Rasheed Shipping Corporation – v - Kuwait Insurance Company* case. But for the reasoning in the latter case to truly assist the Defendant Trustee, the evidence would have to support a finding that its central payment obligation had been agreed to be performed by payment into an account in Bermuda governed by customary Bermudian banking rules. The fact that payment was to be made into a Rutli sub-account maintained by Rutli with Reichmuth & Co Privatbankiers in Lucerne adds to rather than detracts from the other connections with that forum.

120. This fortifies my view that the Plaintiffs' submission that Swiss law (strictly, the law of the Canton of Lucerne) is the proper law of the contract is sound and I so find, having accepted Mr. Layton's eloquent closing submissions on this important issue:

> "13 *So, my Lord, I do urge on your Lordship an*
> *14 internationalist spirit. Putting yourself in the*
> *15 application of Bermudian conflict of law rules involves*
> *16 divorcing yourself from the preconceptions of Bermudian*
> *17 domestic law, looking at what these connecting factors*

18 are, looking at it from a neutral mid Atlantic
19 perspective and weighing them up.
20 When you do that, we say that the overwhelming
21 preponderance is in favour of Swiss law. Indeed, the
22 contrary seems to us to be very difficult to comprehend."[8]

Findings: controversial issues of Swiss law (all claims)

121. It seems convenient to deal at this juncture with the controversial issues of Swiss law identified above before proceeding to record my factual findings in relation to the contractual claims. As the overwhelming majority of these issues are linked to the contractual claims, the few issues touching upon non-contractual claims are considered as well at this juncture.

The link between the standard of proof and rules of contractual interpretation

122. This dispute between the experts seems somewhat technical as they agree that burden and standard of proof form part of substantive Swiss law so that both Swiss rules on contractual interpretation and burden of proof apply. However, it is material to decide whether Swiss law does or does not impose a higher standard of proof for contract claims than other claims as Professor Dasser opines. Mr. Jolles did not appear to me to be challenged on his assertion that Professor Dasser cited no authority in support of this point. The only authority cited in paragraph 16 of his Reply Report (Exhibit 14, S 3, TAB 37) does not support the contentious proposition and was not referred to by Mr. Woloniecki either in cross-examination or argument.

123. I accept Mr. Jolles' evidence that the same burden of proof which applies to civil claims generally applies to contract claims under Swiss law.

The relevance of post-contractual behaviour in relation to objective contractual interpretation

124. Issue was fully joined on the question of whether the Swiss Supreme Court would consider post-contractual behaviour as relevant to an objective contractual interpretation. It was common ground that the doctrinal or principled position was that post-contractual behaviour was irrelevant. The difference was a nuanced one, however. Mr. Jolles did refer to a case where the Supreme Court affirmed the strict legal principle but "*then sought comfort in looking at the post-contractual behaviour*" to support his proposition that the bar on recourse to post-contractual behaviour in the context of objective interpretation was not cast in stone.

[8] Day 24, page 75.

125. In my judgment the strict legal position in practice (as opposed to the law as debated by theoreticians) was not seriously in doubt. I accordingly accept the evidence of Professor Dasser (as summarised in paragraph 9(2) of the Joint Report) on this issue. This was not a finding I was keen to make. It is difficult to avoid seeking vindication for one's objective judgments as to the content of an agreement in evidence of how the parties interpreted the contract in practice.

The significance of words used in a contract relative to other means of interpretation

126. In their Reports, Mr. Jolles insisted that the wording used by the parties was not afforded a higher rank than other interpretative tools whilst Professor Dasser contended wording was accorded primacy. Under cross-examination by Mr. Woloniecki, however (Day 10, pages 72-74), Mr. Jolles appeared to me to agree that the Swiss Supreme Court would indeed be guided by the wording used by the parties absent "*reasonable grounds*" (his interpretation of "*raisons sérieuses*") for departing from "*du sens littéral du texte adopte par les intéressées*"[9]. I find that the experts did not to any material extent disagree on this issue.

The correct approach to determining the parties' understanding of legal terminology used

127. Mr. Jolles' position was that unless both parties understood or should have understood legal terminology, a special legal meaning would not be assigned to legal terms used by non-lawyers. The Swiss Supreme Court took an even more restrictive view of foreign legal terminology. Professor Dasser opined in his First Report that there was a presumption that parties understood legal terms in accordance with their technical meaning. It did not appear to me that the authority he cited in support (Exhibit 28, B2/337) was translated or referred to at trial, perhaps because it was initially cited in error. Mr. Jolles' position was in broad terms supported by the text translated at S3-TAB 17 and I prefer his evidence on this issue.

128. This is an important finding because applying this rule seriously undermines the Trustee's case that the 23 August 2007 letter should be construed in a common law sense as signifying an intention not to make a binding commitment.

The content of the *in dubio contra stipulatorem*, *favor negotii* and *favor debitoris* principles in the context of its application to the present case

129. Mr. Jolles contended in his Reports that (a) the first rule applies generally and could apply to the 23 August 2007 letter, (b) the second rule militated in favour of a

[9] BGE 129 III118 S. 122 paragraph 2.5: B2/260.

binding agreement being found to exist in cases of doubt, and (c) the third principle only now applies to general terms and conditions. Professor Dasser adopted opposing positions in each case. Under cross-examination by Mr. Woloniecki, Mr. Jolles:

(a) conceded that he agreed with Professor Dasser 98% on the first rule's application: it was rarely applied[10] otherwise than in respect of general conditions and never in relation to negotiated contracts;

(b) did not fortify the unsupported bare assertions made in relation to the second issue in his First Report; and

(c) was not challenged or effectively challenged on his initially plausible view that the *favor debitoris* rule only applies when a contract has already been found to exist, and cannot be deployed to resolve doubts about the existence of a contract.

130. I find that there was ultimately no material dispute about issue (a), accept the evidence of Professor Dasser on issue (b) and prefer the opinion of Mr. Jolles on issue (c). In considering the application of these principles below, I found no need to construe the 23 August 2007 letter against the Trustee on the grounds of ambiguity in light of the unambiguous terms of the ISA into which it was incorporated by reference together with the 10 September 2007 letter from Rutli.

The scope and significance of the duty of the addressee to seek clarification in the present case

131. Mr. Jolles contends that the duty of good faith creates not just an obligation for an addressee to seek clarification but may also oblige the maker of a statement to ensure he is understood. Professor Dasser argues that if a statement is unclear it is for the recipient to seek clarification. It does not seem to me that the related authorities were translated or the subject of cross-examination. In essence, the difference between the experts on this issue falls to be resolved in accordance with the way in which this Court applies the substantially agreed duty of good faith to the facts as found by the Court. However, I accept the general purport of Mr. Jolles' evidence and find that it is hypothetically possible for the duty of good faith to be breached by the party making a communication failing to make himself understood, for instance where he knows or ought to know that the communication will be misunderstood. Having said that, I did not in the event regard the application of this rule as relevant or required.

[10] The case example he relied upon was a documentary letter of credit considered in DFT 87 II 234: S3/TAB 23.

As regards whether or not the agreed conditions for inferred agency are met on the facts, what is the correct interpretation of the Swiss Federal Supreme Court case DTF 120 II 197?

132. The experts disagreed in their Reports on the interpretation of a leading Swiss Supreme Court decision on inferred agency (S3-TAB 38). Putting aside the application of the decision to the facts of this case, Mr. Jolles contended that the restraint adopted by the Swiss Court towards inferring agency outside the ordinary course of business was influenced by the unique facts of that case and, in effect, was quite flexible. Professor Dasser opined that the decisive consideration was whether or not the principal's conduct constituted an objective declaration of authorisation to third parties. However, under cross-examination, Mr. Jolles agreed: "…*the focus is never on the agent because the agent does not have the power to decide whether he wants to bind the principal or not. So the focus is always on the principal, and the question, the relevant question is: did the principal engage in any acts or omissions that could have been understood as granting authority to the agent?*" (Day 10, pages 20-21). This formulation of the key test is supported by the authority in question and, essentially, represents common ground. The disputed application of this principle to the facts is, by common accord of counsel at trial, for the Court and not for the experts.

133. As will be seen below, I did not find (save as regards the admitted agency of the Protectors at the 28 January 2010 meeting) that the Trustee did anything which might be construed as suggesting that the Protectors or, still less, the Settlor, was an agent of the Trustee.

Whether or not a contract must refer to a third party (even if not clearly identified) in order to confer a benefit on a third party identified at the time of performance

134. The dispute here was whether or not a contract must refer to a perhaps imperfectly identified third party to confer a benefit on a third party who could be identified at the date of performance. Professor Dasser opined that such prior reference was essential. Neither Mr. Jolles nor Professor Dasser appeared to me to be cross-examined on this issue and the Professor's supporting Exhibit 83 was not translated. On analysing paragraph 266 of Mr. Jolles' First Report, he accepts that the intention to confer a benefit on a third party must be found in the relevant contract. The difference of principle recorded in the Joint Report at paragraph 40 appears to me to really centre on how the contract is construed. The significance of the point is further obscured by the fact that if SMF cannot rely on the assignment of Rutli's rights, Rutli remains a party to the present action in any event. However, I eventually found that it was clearly contemplated in the contractual documentation that there would be third party project managers to whom monies donated by the Trustee would be paid by Rutli.

The scope and application of Article 156 CO

135. A potentially significant difference between the experts was the law relating to the agreed principle that where one party prevents another in bad faith from complying with a condition, the condition is deemed to have been fulfilled by the innocent party. The difference between the experts as to the scope of the principle (as opposed to its application to the facts) was a highly nuanced one, turning on Professor Dasser's insistence that the principle was to be applied with restraint and Mr. Jolles' contention that it may not be applied too extensively. Under cross-examination by Mr. Layton (Day 11, pages 84-87), Professor Dasser agreed that the dispute between the experts was more presentational than substantive.

136. On balance, I find that the formulation of the principle governing the exercise of the principle is better expressed not as one of restraint, but rather an approach of proportionality shaped by the applicable facts including (as Professor Dasser argued) the need to take into account the uncertainties inherent in the relevant condition and the right of the parties to pursue their legitimate interests. The Swiss Supreme Court's actual language "*il faut se garder d'interpréter trop largement*"[11] is nevertheless (as Mr. Jolles correctly opined) expressed in somewhat lighter cautionary terms than the term "restraint" suggests.

The principles governing the lapse of a donation made for a specific purpose

137. The experts agree that the principles governing the general concept of a donation for a specific purpose are unclear. Unsurprisingly, they differ on how the principles governing lapse would be applied. Mr. Jolles doubted the application at all to the present case, partly because the concept itself is doubtful and partly because, if it does exist, there is a requirement that the purpose must be in the donee's own interest. Professor Dasser disagreed in both respects. Under cross-examination by Mr. Layton, however, Professor Dasser effectively conceded that his views on this issue reflected the law as he contends it ought to be, as opposed to the law as established either by the Code or case law on it. The traditional way in which the practical issue of lapse has been dealt with is through Articles 249 and 250 on revocation, which was conceptually different from the failure of a central purpose (Day 11, pages 48-49).

138. In these circumstances, I am bound to find that there is no clear legal basis for applying the undeveloped Swiss law concept of lapse of purpose to the facts of the present case. Further and in any event, I find that the admittedly incomplete evidence about the NTI project is sufficient to prove that the very broad concept to which the donation contract relates is still alive and may possibly be realised.

[11] Urteilskopf, 133 III 527, Plaintiffs' Swiss Authorities TAB 63.

The scope and application of the principles of revocation in relation to a donation contract

139. The dominant principle, that where a donee wrongfully fails to comply with a proviso as contrasted with a condition the donor may revoke the gift and that what constitutes the requisite fault is dependent on the facts, was agreed in the Joint Report. It was also agreed that notice must be given by the donor with a grace period and that revocation must occur within one year of the party learning of the ground for revocation. Two disputes of law were identified in the Joint Report: (a) whether revocation can be effected implicitly, and (b) whether additional matters subsequently coming to a party's notice can be relied upon to justify a revocation at trial. Issue (a) appeared to me to fall away at trial because Mr. Jolles' central response in his Second Report at paragraphs 188 and 191 did not appear to me to be challenged at trial. Firstly, he contended that although revocation could be effected implicitly, fairness generally required an opportunity to be given to remedy the breach of proviso relied upon, so that express notice of revocation was normally required. Secondly, his opinion that Article 8 of the CC imposes a burden on the donor to prove revocation has occurred did not appear to be contested either.

140. Under cross-examination by Mr. Layton, Professor Dasser opined that under the general law no reasons had to be given for terminating a contract hence no case law on issue (b) existed save for employment and tenancy cases, a context where reasons for termination had to be given. However, he conceded that if additional grounds for revocation were discovered after an initial grace period, a further grace period would have to be given to address these further concerns. He also accepted no authority existed which supported his proposition that, absent a further grace period being given, additional grounds could still be relied upon at trial despite forcefully defending his position on this issue (Day 11, pages 88-95).

141. I find that these two original disputes are not in substance differences of principle but rather disagreements as to the extent to which the agreed general principles are properly engaged depending upon what facts are found by this Court in relation to the revocation issue. As is explained in further detail below, I found that the Trustee acquired no revocation rights because:

(a) the breaches of proviso complained of were not committed;

(b) to the extent that any breaches may be said to have occurred, they were not attributable to the Plaintiffs' fault; and/or

(c) no or no fair opportunity to remedy any such breaches of proviso were extended to the Plaintiffs before the purported revocation occurred.

Whether as a matter of principle litigation funding expenses are recoverable under Swiss law

142. Whether or not litigation funding expenses are recoverable as a matter of Swiss law is another substantive area of dispute in relation to which it is agreed no explicit statutory provision, case law or even academic authority exists. Should a first instance court in Bermuda applying Swiss law in effect make a ground-breaking determination as to the scope of Swiss law? There is a difference between applying established principles to novel factual situations and being asked to establish a new principle altogether.

143. I am in any event unable to accept Mr. Jolles' view that litigation funding expenses would be viewed as part of the substantive law of damages if they were not recoverable as part of ordinary litigation costs. His contention may be arguable but is negated by Professor Dasser's more plausible view that this head of loss would be treated as part of general litigation costs to be determined by the procedural law of this forum.

Whether Rutli or SMF sustained any damage

144. The dispute over whether the Plaintiffs can recover damages if they cannot recover the balance of the donation as a gift seems a somewhat academic difference as their best case for compensation under Swiss law appears to me to be that sums are owed as a debt under a donation contract. It is at first blush difficult to see how the Court would find that no monies are recoverable as a debt under a donation contract but that corresponding sums are still potentially recoverable as general contractual damages.

145. In the event, I found that on the facts there was no need for this controversy to be resolved.

Whether liability for breach of trust only arises in relation to negative interests

146. It is agreed that the general rule is that breach of trust relief is limited to restoring the parties to the position they would have been in if the relevant relationship had not occurred. Mr. Jolles appears to me in his First Report to rely solely on academic opinion in the non-contractual context to support the proposition that more generous "positive" relief would be available. This suggests "gross negligence" would be required. In his Reply Report, Professor Dasser appears to accept that such positive relief may very exceptionally be granted, depending on the facts.

147. In light of my primary findings on the contractual claims below and the fact that the Plaintiffs only appeared to me to contend that any trust claims fell to be determined under Bermudian law, I see no need to resolve this dispute between the experts.

However, if I was required to decide this issue I would find that the requisite factual basis for this claim was not established by the Plaintiffs.

The scope of recovery possible for breach of a *de facto* contract

148. I accept Professor Dasser's view that recovery for breach of a *de facto* contract would only be possible in respect of past services rendered and not for future performance. No such damages are sought. The possibility of finding a *de facto* contract in the absence of an actual contract is an implausible outcome which has no practical significance in the context of the present case.

Findings: was a valid donation contract formed and, if so, on what terms?

149. The key legal requirements for the creation of a valid donation contract under Swiss law are a written promise by the donor to make a gift made in circumstances where the presumption that the donee has accepted the gift is not displaced by positive evidence of a rejection or a counter-offer. The existence of the contract can be proved by reference to either the subjective intentions of the parties or based on the objective good faith understanding similarly placed reasonable persons would have. It is also a requirement that the parties to the contract be identified.

150. It is true that the contractual documentation fails to identify which of the Art Trusts will be the source of the funds. This point was mentioned but not seriously pursued by the Trustee, but for completeness it warrants brief mention here. I would in any event have rejected any suggestion that the donor was insufficiently identified for the purposes of meeting the essential requirements for a valid donation contract. The Trustee was clearly identified as the legal person promising to make the donation "*as trustee of the Art trusts*" in the 23 August 2007 letter. Which trust was actually to be the ultimate source of the gift was in essence a matter of internal administration rather than a matter of factual or legal substance in the context of the present case where Rutli's primary role was to project itself in Lucerne as the source of the funds and the parties' overt intention was to shield the underlying Trust from public view. Professor Dasser did not opine that this requirement of Swiss law was not met on the facts of the present case

Subjective intent of parties

151. I am unable to find that the Trustee subjectively intended to enter into a donation contract either when issuing the 23 August 2007 letter or when signing the ISA on 30 October, 2007. It is true that Dr. Scheuer considered that a final decision to make the gift (subject to feasibility) had been made before the letter was sent. However, he was merely

a Protector. It is at best unclear that Mr. Jack in August and Mr. Jack and Mrs. Minors in October consciously intended to make what amounted to a binding promise under Swiss law. They did not take legal advice, either under Bermudian or Swiss law, at this stage. The 23 August, 2007 letter was written in terms which, from a Bermudian law perspective, was inconsistent with a binding commitment. It was hastily issued to facilitate an announcement in Lucerne but did not avert to the important feasibility condition and the fact that the preliminary costs would have to be paid in any event. These matters were only understood after Rutli's 10 September 2007 letter was received, a letter which can be described as a counter-offer. I accept their evidence to the effect that they (Jack and Minors) did not view the ISA as a document of any great legal significance.

152. It is obvious that Mr. Jack and Mrs. Minors realised by the time they signed the ISA that they were agreeing to pay the preliminary costs and might have to fund the construction costs and that the Trust was undertaking a strong moral commitment to pay such costs if the project proved feasible. It is also obvious that they subjectively agreed with Rutli what the purpose of the donation was, albeit in somewhat fluid and imprecise terms. The Trust's 30 October 2007 letter spoke of the Trust's commitment being formalised after feasibility was determined, which suggests that Mrs. Minors did not appreciate the Swiss law significance of her execution of the ISA. The Plaintiffs have failed to prove that the Trust's key agents had the necessary subjective intent to create a valid donation contract. Reliance was placed on the unchallenged evidence of Robert Stewart about how previous donations were handled by the Trust in the past. The administrative approach was previously quite different (the Trustee interposed a subsidiary company between itself and the donee) and involved different personnel; I was unable to infer from these previous transactions any subjective intention to enter a binding commitment on the part of Jack and Minors in 2007 in relation to the Salle Modulable project. Their "laid-back" approach and failure to obtain legal advice is more consistent with the view that they subjectively felt they were not bound at that stage to make the full donation than it is with the contrary position. The post-contract conduct was even more ambiguous in terms of shedding light on their subjective intent. It was in the round very clear that they intended to fund the preliminary costs but quite unclear whether they considered themselves bound to fund the construction costs if feasibility was established.

153. One subsequent internal transaction effected by the Trustee did in a general way potentially support a finding that Jack and Minors did at the time of the ISA subjectively believe they were bound. This was the Deed of Addition of Beneficiaries dated 6 November 2007, which added to the class of Trust beneficiaries the following which would potentially have included Rutli and (subsequently) SMF: "*Any registered charity*

and non-profit making entity proposed by the Trustees and consented by the Protectors other than one which is an Excepted Person (as defined in the Trust)." The Trustee's refusal to waive privilege in the instructions given to Appleby in relation to the drafting of this Deed combined with the somewhat unconvincing manner in which both Jack and Minors dealt with this issue under cross-examination strongly suggests that this Deed was drafted with a view to the recipients of the Salle Modulable monies being designated as beneficiaries of the Trust. But this would be entirely consistent with the subjective view, which I believe the Trustee's agents did have, that there was a binding commitment as regards the preliminary costs and only at that stage a reasonable prospect that the project as a whole would proceed.

154. To the extent that Mr. Layton sought to suggest that a reference to "promissory note" (and "deed") in a remittance record for payment of an Appleby bill rendered around this same time was a reference to the 23 August 2007 letter, I entirely accept Mrs. Minors' evidence that:

> "*12 A. I never referred to, I never deemed the letter to be*
> *13 a promissory note anyway. So I would never even have*
> *14 used that terminology, if indeed it was a reference to*
> *15 it."*[12]

155. Although Mr. Reichmuth claimed to rely more on trust than lawyers' "sentences" and appears only to have focussed on the legalities of the gift once things started to fall apart, on balance I find that he did when signing the ISA subjectively believe he was confirming a binding donation contract under Swiss law. It seems reasonable to infer such a belief from his unchallenged extensive involvement with charitable gifts governed by Swiss law, not to mention his previous dealings with the Trust and his mistaken assumptions about the ability of the Settlor to direct the Trust. It is also noteworthy, as the ISA itself records, that Mr. Reichmuth's own family made the initial donation (CHF 45,000) into the sub-account he established for the trustee to pay into for the purposes of the project.

Objective intent of the parties

156. I find that reasonable persons in the position of the Trustee's signatories and Mr. Reichmuth as Rutli's agent would have considered the signing of the ISA confirmed the formation of a donation contract. Although the distinction appears to me to be of limited significance in light of the facts as I find them to be, Mr. Reichmuth as the recipient of the promise should be judged by the standard of the trusted friend and adviser of the

[12] Day 18, page 83.

Settlor rather than by the standard of the experienced banker. The preponderance of the evidence points clearly to the conclusion that his involvement was not in a professional banking capacity but in the informal capacity of someone whom the Settlor trusted and who was personally committed to the Salle Modulable project as evidenced in part by his family's own contribution to the 'donation account'[13]. The donated monies were not to be paid to his bank but to his charitable foundation, albeit that the monies were envisaged to be deposited into Reichmuth Bank.

157. While there is room for considerable argument about the effect of the 23 August, 2007 letter (either standing by itself or as read with the 10 September 2007 response), the following wording in the ISA (which was signed by two representatives of the Trust under the nomenclature of "*DONOR*" and by Mr. Reichmuth on behalf of Rutli) read in a straightforward manner clearly evidences a binding commitment by cross-reference to the August and September letters:

> " *Salle Modulable, Lucerne*
>
> *The funds standing in this account may be used only in accordance with the Rules Governing the Use of Funds Entrusted to the RUTLI ENDOWMENT, Lucerne. Under no circumstances can funds be repaid to Butterfield Trust or to any donor. At the time of opening of this sub-account, the donors contemplate the funds being used in particular for the following charitable purposes:*
>
> *Help finance the building of this facility up to a maximum investment of CHF 120'000'000.00 including the purchase of a plot of land –if the City and Canton of Lucerne do not make a site available-also the costs of the project managers, the feasibility study, the resulting construction estimates and the architectural design competition. The funds will be advanced in stages tied to the progress of the competition.*
>
> *So agreed by: (see letters of Butterfield Trust, dated August 23rd 2007 and Rutli dated September 10th 2007.*"

158. In my judgment the ISA confirms that a binding commitment was made (in the terms set out in the 23 August 2007 and 10 September 2007 letters) by the Trustee on 30 October 2007 when its two representatives signed the agreement. Not only are the parties and the object of the donation clearly identified, with no legal questions arising about the gratuitous nature of the promise. The purpose of the donation was also adequately

[13] Under cross-examination he explained that the initial donation was a matter of public record and the Trustee did not make the initial donation to conceal its involvement from public scrutiny.

described in the ISA itself rendering irrelevant any imprecise descriptions in the original 23 August 2007 letter. There was quite clearly a meeting of the minds in general terms on the question of what the purpose of the donation was and I accept Mr. Jolles evidence (1st Report, paragraph 45) that Article 18(1) of the CO applies to this issue:

> "*When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.*"

159. The notion advanced at trial that the 30 October, 2007 letter which forwarded the signed ISA could be read (together with the previous telephone conference and Rutli's subsequent 8 November 2007 response) as supplementing this agreement in a legally binding way is undermined by the following considerations:

(a) Patrice Minors did not subjectively consider her letter to have legal effect;

(b) I accept Mr. Reichmuth's evidence that he did not at the time consider the 30 October 2007 letters as recording more than procedural expectations.

160. Accordingly bearing in mind that the 30 October 2007 letter (1) accompanied the ISA signed for the Trustee by two signatories, (2) was signed by Mrs. Minors alone (who either believed that two signatures were required to legally bind the Trustee or did not view her correspondence as having contractual effect[14]) and (3) did not by its terms purport to qualify the agreement recorded in the ISA in any way, I find that objectively viewed the 30 October 2007/8 November 2007 letters did not create a binding agreement as to the additional matters contained therein. Alternatively, if I were required to find that a contract was created I would find that the relevant additional terms did not constitute conditions the breach of which would entitle the Trustee to terminate the contract.

161. On the other hand the 30 October 2007 letter does constitute credible evidence of the Trustee's understanding of the procedural framework within which the parties would operate going forward and the status of the project as at the date the ISA was signed. It also confirms that by that point a clear commitment to make donations on a conditional basis had been made by the Trustee. But, at this point both the Trustee and Rutli clearly had only a vague sense of how the preliminary phase would actually work in practice,

[14] Day 18 pages 9, 68.

which further undermines the notion that this letter reflected the mutual understanding of firm contractual terms.

162. I place such weight on the ISA in evidential terms because the prior picture was ambiguous in various respects. The 23 August 2007 letter was produced in such haste that an important aspect of the ultimate agreement, the need to carry out feasibility studies, was not mentioned. The commitment was expressed from the Trustee's perspective in qualified terms ("*in principal*") and it was unclear when (if at all) the Trustee formally accepted what might arguably be characterised as the counter-offer contained in the 10 September 2007 Rutli response. It also seems doubtful that Graham Jack as a sole signatory had actual or apparent authority to enter into a CHF120 million commitment on the Trustee's behalf. The ISA was a more formal document executed on the Trustee's behalf by two signatories. And it expressly declared that the previous correspondence referred to therein was "agreed". This put to bed any question of the 10 September 2007 counter-offer not being accepted; and as a Swiss law contract being objectively construed, all arguments about what an in principle agreement meant in Bermudian or common law terms when the 23 August 2007 letter was originally written became wholly irrelevant. Even if the Trustee's agents subjectively believed when signing the ISA that no binding donation commitment was being made, I am unable to find that Mr. Reichmuth would have understood this based on the term "in principal" in the 23 August 2007 letter or otherwise when he received the executed ISA document. In returning the ISA which was primarily designed to administer funds the Trustee was expected to donate towards the Salle Modulable project, from a Swiss law perspective the Trustee was effectively declaring: "Lucerne, we have lift-off".

Principal terms of the contract

163. I find that the ISA as read with the 23 August 2007 and 10 September 2007 letters unambiguously evidences an agreement by the Trustee to fund the preliminary costs and construction costs up to a limit of CHF 120 million subject to a condition subsequent that if the project was not feasible the contract would be dissolved. Feasibility was not only mentioned in the ISA itself. The 23 August 2007 letter made it clear that operational viability was of fundamental importance:

> "…*We also understand that efforts are being made to secure a commitment from a private or public entity to take on the responsibility for managing and maintaining the facility once it is completed. This is important as our financial commitment is limited to the building of the facility and ends when either the building is complete or the cap of CHF120, 000,000.00 is reached…"*

164. Rutli's 10 September 2007 response dealt with the issue as follows:

> "*Although the major outgoings will not commence until construction is underway, we nevertheless wish to clarify at this point that the financing includes not only the purchase of a plot of land - if the City and Canton of Lucerne do not make a site available – but also the costs* * *of the project managers, the feasibility study, the resulting construction estimates and the architectural design competition. You will be receiving all these documents in good time, as you find the existing documentation as an enclosure (English translation).*
>
> *As regards the management and maintenance of the facility once it is completed, we are seeking an assurance from the Lucerne Festival Foundation that these costs will be covered by sponsors and/or public bodies in due course. Confirmation on this point must be received from the Lucerne Festival before the first payment is made, in accordance with the above mentioned schedule of payments.*"

165. Although the latter letter may be read as suggesting that operational viability would be confirmed before any payments were made, it was common ground that operational viability was in substance expected to be demonstrated before construction costs were incurred-after feasibility studies had been completed. Rutli's response both clarified that preliminary costs had to be paid before the construction phase and implicitly agreed that operational viability was an important contractual term. What was probably intended to be confirmed at the outset was the goal of ensuring that operational costs would be covered by other funding sources. For what it is worth, the 23 August 2007 letter referred to a foundation being found to operate the facility while the 10 September 2007 letter also referred to unidentified "*project managers*". These were both effectively references to the subsequently formed SMF; Graham Jack did not appreciate initially that the project included the feasibility phase. Neither party considered the precise legal entity which would be the ultimate beneficiary of the gift to be significant. However, the Trustee (based on its institutional knowledge of previous Art Trusts projects) and Rutli (based on Karl Reichmuth's personal knowledge of previous Art Trust projects in Lucerne and discussions with the Settlor in the summer of 2007 about the Salle Modulable project) in my judgment had a tacit understanding that some form of charitable foundation would in due course be established to manage the project. Rutli in any event thanked the Trustee for its "*exceptionally generous gift to Lucerne - the City of Music*".

166. The ISA in addition to confirming these donation terms incorporated by reference the Rutli Endowment Rules seemingly formulated in 2001. It is obvious that some of the Rules were not engaged in practice in relation to the present project but the following rule was in my judgment fundamental:

> "*The Board of Trustees* [of Rutli] *shall satisfy itself by appropriate means that all funds made available to beneficiaries are used properly and cost-effectively. The Board of Trustees shall from time to time carry out evaluations of the projects it funds.*"

167. Mr. Reichmuth did not appear to me to explicitly base his assertion that the contract envisaged that Rutli would make a final determination on feasibility on another clause in the Rules that contemplated that Rutli might itself employ experts to carry out feasibility studies. But the general tenor of the Rutli Rules, which emphasise the autonomy of Rutli in ensuring donated monies are properly spent, does to some extent explain why he would feel that such an agreement was reached. Rutli's standard terms and conditions clearly contemplated that once monies were received by Rutli, Rutli would ensure that it was properly spent. In the Salle Modulable context, however, this rule cannot be sensibly read as having exclusive application to Rutli as regards an assessment of the continuing feasibility of the pre-construction phase of the project for the purposes of triggering the donor's conditional obligation to remit additional funds to the sub-account.

168. Reasonable persons in the positions of the parties would have understood that the Trustee expected to satisfy itself of capital costs and operating costs feasibility before moving on to funding the construction phase. Similarly, it must have been agreed that during the construction phase an assessment of feasibility by the Trustee would continue because it was agreed that donations would be made in stages.

169. A straightforward reading of the contractual documentation in its context points firmly to the conclusion that the Trustee reserved to itself the right to determine in good faith whether the project was feasible enough to justify completing the promised donation and remitting more than CHF 100 million. The 23 August 2007 letter was issued on an expedited basis before the Trustee had an opportunity to fully inform itself of the details of the project and was expressed in cautious terms. It contemplated paying for the construction in stages after various further contracts had been signed. The 10 September 2007 response from Rutli clearly signalled that "*major outgoings*" would not be required until the construction phase and agreed that, in effect, viability would be confirmed "*before the first payment is made*". Can this phrase only sensibly be read as referring to the first of the "*major outgoings*" or construction costs, not the first of the payments

towards preliminary expenses? It makes no sense that the Lucerne Festival would have been able to provide "confirmation" that operating costs would be covered before being able to assess what those costs were likely to be. Alternatively, the Rutli letter might perhaps be read as referring to confirmation "in principle"(in the common law sense) being given before any funds were advanced that the project was proceeding on the basis that alternative funding support had to be found to cover operating expenses which the Trust would not bear.

170. I find that it was common ground at the latest by 30 October 2007 when the Trustee signed the ISA that the Trustee was only willing to fund the construction of the Salle Modulable if it was satisfied that it was both feasible to construct the building and to operate it thereafter based on an aggregate construction donation of CHF 120 million and independently funded operating costs. The 30 October 2007 letter (which Rutli never expressly dissented from) recorded Mrs. Minors' understanding that, *inter alia*, the Trustee would give preliminary approval for the feasibility study prior to approval by the City, Canton and people of Lucerne and after approval in Lucerne "formalise" the Trustee's commitment. It is true that, as regards evidence of subjective intent, this letter undermines the suggestion that Mrs. Minors regarded the Trustee as making a binding commitment at that stage. But, as regards an objective analysis of the evidence, this confirms the mutual understanding the parties had when they signed the ISA confirming the agreement recorded in the 23 August and 10 September letters in one important respect: namely, that approval by the Trustee of the final feasibility study (combined with political approval in Lucerne) constituted a condition subsequent for the promised funding of the construction costs.

171. In light of his 8 November 2007 response to this letter, Mr. Reichmuth's evidence that he saw no relevance at all to the 30 October letter must be roundly rejected. It is still plausible in all the circumstances, including Minors' own corresponding views on this issue, that Reichmuth did not view the 30 October 2007 letter as itself having contractual effect or otherwise modifying the essential elements of what had been formally agreed.

172. It is true that the reference to formalising the Trustee's commitment as the final step can be construed as evidence that the Trustee considered no binding commitment would be made until the final political hurdle had been overcome in Lucerne. Although Mr. Reichmuth did not take issue with this point in correspondence (he generally paid little attention to details by the Trustee's own account[15]), it beggars belief that the parties subjectively agreed that the Trustee's final substantive commitment should be postponed in this manner. Construing the contract objectively, it seems obvious that no reasonable

[15] Graham Jack, Day 20, pages 62-63.

person in the position of Mr. Reichmuth on behalf of Rutli by 30 October, 2007 would have understood the Trustee to have signed the ISA on such a provisional basis, even if the position was ambiguous when the 23 August 2007 letter was first hastily issued.

173. In addition, I find that no reasonable person in the position of Mr. Reichmuth on behalf of Rutli consummating a transaction governed by Swiss law would have understood that the Trustee was entering into a binding commitment to pay up to an estimated CHF12 million in preliminary costs on terms that those costs might at its sole election be thrown away even if the project was demonstrated to be feasible. If the Trustee wished to pursue the project on the basis that the donation promise could be withdrawn even if the project was proven to be feasible (either before or, more bizarrely still, after a referendum), this improbable intention and/or expectation ought to have been made explicit in the contractual documentation or, at the very least, in the 30 October 2007 letter. In the absence of evidence of a subjective meeting of minds in this respect, the Trustee is bound by an objective interpretation of the contractual documentation in its context. It was agreed that Swiss rules of contractual interpretation presume that the parties intended a reasonable result. In addition, I rely in this regard on the following extract from Part II of the Joint Report of Experts as reflecting the agreed position under Swiss law:

> "*Subjectively essential terms of a contract, which in the eyes of one party constitute a 'conditio sine qua non' for the said party to enter into the contract, must be communicated to the other party in a manner by which the other party actually understood or constructively should have understood that the term was subjectively essential; otherwise, disagreement in respect of a subjectively essential term will not prevent the contract from entering into force (Article 2(1) CO)*…"

174. It is primarily the parties' subjective intentions as regards the formation of a donation contract which are (as regards the Trustee) in doubt. From a lawyer's standpoint it is at first blush difficult to comprehend how the Trustee could have entered into such a substantial arrangement without seeking legal advice and framing the arrangement in more carefully-crafted legal terms. Such a reaction, however, would reflect in part vain assumptions about the importance of the law and in part a view highly coloured by hindsight. It is important to have regard to the conditions which existed when the contract was concluded, unfiltered (as far as is humanly possible) by images of the way in which the contract unravelled two years later.

175. The contract was concluded at the request of the Settlor and with the consent of all beneficiaries in circumstances where if the Trustee had explicitly sought to reserve an unfettered discretion to repudiate the gift even if feasibility was established, the Settlor's strong support for the project might well have calmed anxieties in Lucerne about technical, legal considerations. The arrangement was not an arms-length and potentially adversarial commercial transaction; it was a charitable donation from a Trust established for charitable purposes. And the relevant funds were being advanced to a project that was to be overseen by Mr. Reichmuth, a trusted friend of the Settlor, following in very broad terms a pattern which had been adopted in respect of substantial donations in the past.

176. These practical contextual considerations fortify the conclusion reached by a somewhat abstract literal reading of the introductory portions of the ISA (upon which the experts were agreed) to the effect that the discretion to make further payments to the account refers only to the initial donors and not to the Trustee. And, most significantly, these considerations support the conclusion that the 23 August and 10 September letters construed together with the ISA (and all objectively read) do evidence a binding donation contract subject to a condition subsequent of viability under Swiss law.

177. The ISA contained two other significant terms of the arrangement, the second of which has already been mentioned. Firstly, it provided that under no circumstances would funds received by Rutli be returnable to the Trustee or any other donor. Secondly, it contemplated via the Rutli Rules that Rutli would ensure that monies donated were properly spent. As far as preliminary expenses and construction costs are concerned, the combination of these two provisions read with the early contractual correspondence speaking of payment in phases clearly implies that it was agreed that the Trustee would retain the right to monitor to some extent how the donated funds were being spent-in particular before being asked to remit further monies. It was clearly never contemplated that once feasibility was initially demonstrated the Trustee would be obliged to make the balance of the donation in a lump sum. Instead, it was explicitly agreed in the 23 August and 10 September letters that payment for the construction phase would take place in stages.

178. Although at an early stage Mr. Jack considered remitting all of the estimated preliminary costs in a lump sum, this idea was rejected when Dr. Scheuer on 22 October 2007 suggested waiting for Rutli to request specific sums of money[16]. At some subsequent point the parties agreed that Rutli would provide annual estimates of preliminary expenses and the Trustee would advance funds for Rutli to hold and pay in its discretion. The 30 October 2007 letter inaccurately envisaged that a composite estimate for the feasibility study would be provided by Rutli and then paid. The parties

[16] E2 1646.

expressly agreed through the ISA that donations once made would be non-refundable and it is impossible to believe that this straightforward contractual term did not reflect the subjective intentions of the parties concerned. Graham Jack admitted that he was aware of this clause[17]. Construing the donation contract as a whole in a holistic way, having regard to its purpose and assuming the parties intended a reasonable result, this simple yet significant ISA clause points to an ancillary term which may be inferred by the Court (as opposed to an essential condition expressly agreed) that the Trustee retained the right to assess on an ongoing basis:

(a) whether further payments for preliminary expenses should be made having regard to a high-level view of how monies were being spent and the apparent viability of the project during the preliminary phase. For instance, the Trustee must have had the right to carry out from time to time a rough and ready assessment of whether the preliminary costs estimate of 10% of the total construction costs was likely to be met or exceeded ;

(b) whether further payments should be made having regard to a high-level view of the viability of the project during the construction phase (i.e. whether the project could still be completed within the original construction estimate and the within the limits of the initial commitment made by the Trustee); and

(c) in either case, whether further payments should be made having regard to a high-level view of the operating feasibility of the project.

179. I find that the Trustee only had an implied right to form a high-level view for two principal reasons. Firstly, as noted above, because the express terms of the ISA gave Rutli primary responsibility for ensuring the due application of donation monies once received by Rutli. Secondly, an important part of the contractual context was the anticipation that (a) SMF or a similar charity would be formed in Lucerne to manage the project, with the Trustee adopting its customary "back seat" role, and (b) the Trustee would be relieved of more onerous monitoring responsibilities by ensuring that persons trusted by the Settlor would be involved in the project management vehicle. Appreciating that the post-contractual conduct of the parties is not strictly admissible to prove what the parties objectively agreed, like the Swiss Supreme Court in one of the cases referred to by the experts, I draw some moral vindication from the fact that Mr. Reichmuth in February

[17] Day 20 pages 106-110.

2008 sought to vindicate his primary expense monitoring rights by reference to the fact that SMF would in part be run by persons nominated by "*some of your beneficiaries*"[18].

180. At this stage, mention can conveniently be made of the agreed legal principle that in the absence of an express term specifying within what time feasibility had to be shown, a term should be implied to the effect that feasibility had to be demonstrated within a reasonable time. There was no agreed time so the parties must be deemed to have agreed that the donee would have a reasonable time within which to demonstrate that was viable to move on to the next payment phase, both before and after construction commenced. Again, under Swiss law, the experts agreed that where the Court "filled the gaps" in a contract to supplement expressly agreed terms, the status of such implied terms were ancillary rather than essential in nature. Such terms would be provisos rather than conditions subsequent or precedent giving rise to different remedies for breach.

181. Throughout much of the trial the concepts of "feasibility" or "viability" were discussed in somewhat one-dimensional and rigid terms. It was clearly a fundamental term of the contract that the gift would only be completed if the Salle Modulable project could be completed within the limits of the gift in terms of (a) preliminary and construction costs and (b) post-construction operating costs. This gave rise for a need for the Trustee to monitor in a high-level way the running account in conjunction with construction estimates when they became available and the political process to the extent that public funding was expected to contribute to post-completion operating costs.

182. It was or ought to have been self-evident to all concerned both that the project might have to be stopped at any stage because it was clearly not viable and that there was a need to provide sufficient time for the various elements of the project to be adjusted and adapted to afford the donee a fair crack of the feasibility whip. The condition subsequent required a nuanced approach on all sides to the preliminary phase in particular with sufficient room being allowed to the project managers to enable complicated plans to be refined and revised but with sufficient controls being applied by the donor to ensure that it did not get into a position whereby it felt compelled to "pour good money after bad" and increase its gift to resolve unforeseen contingencies. The context was, moreover, not an arms' length commercial one; the aim of the project was philanthropic and the important elements of location and operational costs required political support in the context of a direct democracy within which, the evidence suggests, achieving political results slowly by consensus is valued more highly than rapid results achieved by the deployment of raw political power.

[18] E3/2063.

183. Against this background, I find that the contract did not implicitly envisage the donor being able to make a peremptory determination at a time of its choosing that the project was no longer viable. Nor did the contract implicitly envisage that if it was wrongfully terminated by the donor, the balance of the monies which were potentially payable would automatically become due. For a variety of reasons which it is not for present purposes important to articulate, this project was approached both by the Trustee and Rutli in the early stages in an extremely informal manner with neither party apparently concerned that each lacked a firm grasp of the project details or a clear sense of how it was likely to unfold.

184. What was Rutli's role? Rutli was not empowered to enter into any contracts on the Trustee's behalf but merely to be the vehicle through which donated monies were funnelled into the Salle Modulable project. It was also, by common accord, to be the "face" of the donor in Lucerne. Once money was received by Rutli and paid into the account, the gift was complete, subject to Rutli's obligation to apply the funds pursuant to the ISA. The written documentation was silent as to remuneration for Rutli although similar services had been provided to the Trust in the past. Mr. Reichmuth explained that he customarily charged a percentage fee on the sums received into the sub-account, and did so in the present case based on discussions with the Settlor[19]. To some extent Rutli was prior to the establishment of SMF the face of the ultimate donee as well. It consummated the donation contract, being the recipient of the 23 August 2007 letter and the counterparty to the ISA which, in addition to confirming the sub-account arrangements, confirmed that an agreement was embodied in the referenced correspondence between Rutli and the Trustee. Mr. Jolles considered it to be obvious that the recipient of the binding promise contained in the 23 August 2007 letter was Rutli[20]. But in light of his First Report (at paragraph 264 *et seq*), I also accept that it is possible for an existing recipient of a donation promise to accept the promise on behalf of an as yet unidentified 'ultimate' donee. The gift in this case was clearly for the ultimate benefit of a third party, albeit one which was only obliquely referenced. In light of past dealings in similar matters, the finding that the parties implicitly contemplated such an ultimate beneficiary, albeit a third party not specifically identified from the outset, can quite easily be justified.

185. The duties of Rutli in terms of accounting and reporting will be dealt with in more detail when the issues of termination and the Trustee's Counterclaim are considered below. However, it is worth noting at the outset that it was inherently inconsistent for the Trustee to contend that Rutli undertook extensive reporting obligations in circumstances

[19] Despite this inappropriate fee negotiation mechanism, Rutli's charges were disclosed in subsequent annual accounts and seemingly never questioned by the Trustee until the present litigation.
[20] Day 10, page 93.

where the written contract the parties signed was silent as regards Rutli's entitlement to any fee.

Summary: principal terms of contract

186. For the avoidance of doubt I base all of the above conclusions primarily on a construction of the contemporaneous documentation and the substantially agreed background facts and without recourse to the various aids to interpretation which are tools for resolving ambiguities. Nor have I found it necessary to resolve the various conflicts between the witnesses with respect to their disputed subjective intentions at the time. Much of this evidence bordered on argument and I considered it to be a generally unreliable guide as to what Jack, Minors and Reichmuth (in particular) actually thought at the time.

Findings: why was there was not only a contract of mandate under Swiss law

187. It follows that I am bound to reject the Trustee's case that the only contract entered into was a contract of mandate. In my judgment it is not properly open to the Court in light of the fact that the Trustee signed the ISA in the capacity as "DONOR" and expressly confirmed that the 23 August and 10 September 2007 letters reflected "agreed" terms to find that only a mandate or agency contract was consummated between the Trustee and Rutli.

188. My view of the facts and the essential elements of the contract is aligned with Mr. Jolles' views on the legal characterisation of the relationship between the parties rather than Professor Dasser's. In particular, his "only a mandate" conclusion was based on a factual premise which I reject; namely, the notion that no binding commitment would arise until the formalisation of the Trustee's commitment after the referendum in accordance with the 30 October 2007 letter (Second Dasser, 176).

189. The most significant feature of the contract which was concluded was the promise by the Trustee to fund the construction of the Salle Modulable, unless it turned out not to be feasible, and in any event to pay for the preliminary costs of determining feasibility. Incidental features of the contract dealing with the mechanics of implementation of the dominant purpose included the arrangements for:

(a) monies to be paid into the Rutli sub-account; and

(b) Rutli as "trustee" to monitor on the expenditure of the donated monies in accordance with the 10 September letter and the Rutli Rules which were both

incorporated by reference into the ISA. The opening paragraph of the said letter read as follows:

> "*Thank you for entrusting us with the task of acting as trustee for the financial commitment referred to in your letter. We shall open a sub-account under the heading 'Salle Modulable'.*" [emphasis added]

190. In my judgment, the fact that a contract designed for a primary or dominant purpose contains subsidiary operational elements which engage other legal concepts does not as a matter of general principle change the dominant character of the legal relationship. A mortgage does not cease to be a mortgage because the mortgagee requires the mortgagor to take out life insurance which the mortgagee himself is authorised to issue. It is agreed that under Swiss law the parties are not bound by rigid contractual categories and so I see no reason why a similar approach should not appertain in relation to a donation contract under Swiss law.

191. Mr. Jolles opined that a Swiss Court would view the ISA as constituting both evidence of and implementation of the pre-existing agreement evidenced by the earlier correspondence and might view the fronting arrangement as an ancillary mandate agreement. Oddly, he appeared to ignore the functions contemplated by the ISA itself. Professor Dasser opined that the dominant relationship was that of mandate based on the 10 September letter and the ISA. He also opined that the Swiss courts would lean towards avoiding viewing the arrangements as an innominate contract and would seek to classify the contract as one predominant type or another. On this classification issue, the expert reports were somewhat unhelpful because the opinions were clouded by somewhat stilted and partisan views of the evidence. Neither expert posited a definitive inflexible principle; Jolles suggested a Swiss court might find that both a donation and ancillary mandate contract existed; Dasser implied that the only choice facing a court would be to choose one category or another in view of a reluctance to confront the difficulties of determining the rules applicable to a species of contract which was neither fish nor fowl.

192. I have found that the ISA itself both (a) evidences an agreement which had not clearly been entered into on the basis of the 23 August and 10 September correspondence alone, and (b) evidences an agreement on supplementary implementation matters which are consistent with an ancillary mandate agreement. The "trustee"[21] and sub-account and expenditure monitoring obligations which were also formally (and very superficially) memorialised under the ISA for the first time were clearly subservient and/or ancillary to the dominant commitment made by the Trustee to pay (potentially) up to CHF 120

[21] The experts agree that this term used by Mr. Reichmuth is meaningless in Swiss law terms.

million towards the construction of the Salle Modulable building. To my mind, it is irrelevant that the ISA form would perhaps ordinarily be designed primarily to document the sub-account arrangements. In the present case, by happenstance, it is also the only clear documentary evidence that the parties viewed the quoted correspondence as constituting an agreement between them which reflected mutually understood terms.

193. In my judgment, the most straightforward way to view the contractual arrangement consummated in 2007 is as a donation contract made subject to conditions and/or provisos which could have been but were not embodied in a wholly separate agency or mandate contract. This conclusion appears to me to be most consistent with what the parties objectively agreed when they signed the ISA. The Trustees would donate money to be received by Rutli in Lucerne; project managers in Lucerne would investigate the feasibility of the project; Rutli would pay for preliminary expenses with funds remitted by the Trustee and ensure that such expenses were reasonable; the Trustee would ultimately satisfy themselves that the project was indeed viable before committing to the most substantial expense of funding construction costs. Having regard to what the parties expressly agreed and the nature of the dominant contract, however, it should make no difference to the core legal and factual analysis if one 'strips out' the agency functions from the donation contract and regards them as being an ancillary mandate contract.

194. The main rationale for Professor Dasser's somewhat artificial analysis of the facts as reflecting a mandate agreement and none other appeared to me to flow from instructions designed to elicit support for the availability of the principal's power to terminate the mandate at will. The duty to account imposed on Rutli under either a mandate or donation contract would in my judgment be shaped by what the parties expressly agreed and the relevant factual matrix. Under cross-examination by Mr. Layton, Professor Dasser conceded that the monies remitted by the Trustee to Rutli and applied towards preliminary costs could (despite his preferred characterisation of the relationship) be viewed as a donation or a series of donations (Day 11, page 82).

195. The difficulties which surrounded identifying precisely what Rutli was contractually required to do may well flow from the fact that the Salle Modulable project was handled by the Trustee in an administratively unprecedented or at least somewhat novel manner. Mr. Stewart's evidence suggests that the established practice of the Trust for previous Art Trust donations was to use an operating subsidiary company managed by the Trustee to interface with a Lucerne-based entity which the Trustee was involved in setting up. The precise role played by Rutli in previous donations is unclear; but it seems likely it was a far more limited role than Rutli was expected to perform here. There was insufficient explicit briefing on the Trustee's part to effectively communicate to Rutli any subjective intentions it had for the breadth of agency functions contended for at trial. The

evidence strongly suggests that, in the early stages at least, each party had inconsistent expectations of the other in relation to how the donation was to be administered. One example will suffice to support this conclusion.

196. The 30 October 2007 letter from Mrs. Minors to Mr. Reichmuth supposedly recorded the parties' understandings reached in an earlier telephone call about the procedural aspects of the project as between the Trustee and Rutli. On 11 January 2008 Reichmuth wrote Minors requesting a remittance of CHF 1.5 million to cover certain specified expenses. She forwarded this to the Protectors by email dated 30 January 2008 complaining that it appeared Rutli did not appreciate "*the importance of adhering to the steps that have been recommended by the trustees*". The following day Christian Weinhold suggested that Mrs. Minors talk to Mr. Reichmuth, agree that monies will be forwarded promptly but also emphasising the "*necessity for proper documentation with costs estimates, budgets, timing of project steps and expected payments and accounting of costs incurred.*" That conversation took place on 8 February 2008 and was described by Mrs. Minors in an email to the Protectors as "*unnecessarily tense*". He complained she wanted him to be a bookkeeper when, in her opinion, he was merely being asked to adhere to the 30 October letter. She sought (and subsequently obtained) approval to remit the funds and noted Reichmuth's desire to meet the Trustees to "*crystallize the relationship*"[22].

197. Firstly, it is noteworthy that even in January 2008, Mrs. Minors did not consider that the 30 October 2007 letter contained more than recommendations which it was expected Rutli would follow rather than terms and conditions of a contract. More fundamentally, however, there was nothing in the 30 October letter which speaks to the need for the sort of information suggested by Christian Weinhold at the preliminary expenses stage. The following two bullet points dealt with the issue of payment:

(1) "*Rutli Endowment will submit to Butterfield Trust (Bermuda) Limited the estimated cost for the feasibility study for consideration and subsequent payment*";

(2) "*It is at this stage* [i.e. after approval of the project by the authorities in Lucerne, post-feasibility study] *that Butterfield Trust (Bermuda) Limited will require Rutli to produce a budget documenting the various phases at which money will be required. Once approved, payments will commence.*"

198. The only mention of a budget and identification of payment phases contained in the 30 October letter was made in relation to construction costs. The letter appeared to

[22] E3/1901, 1938, 1957 and 1990.

envisage that the feasibility study was a single item of work comprising the totality of the preliminary costs and for which a composite estimate could be given. In fact, Rutli had explained in its 10 September 2007 that the best global estimate was 5-10% of the gross construction estimated price and that various preliminary costs including the costs of feasibility study. The 30 October letter did not deal in any comprehensible way with the payment procedures for preliminary costs at all. There was no meeting of the minds and false expectations on each side as to what the arrangement required. This was possibly attributable to the fact that both the Trustee and Rutli were improvising in the context of a novel project for which neither party had a clear blueprint to work from and spoke different languages. But these problems were doubtless exacerbated by the fact that Mr. Reichmuth was heavily influenced by the less formal nature of the role he had played in relation to past donations when other parties were charged with administrative details which he considered he was too senior a person to be troubled with. Rutli sought to clarify the range of payments which were required at the preliminary stage and to explain that a new 'Salle Modulable' Foundation, comprising members of the Lucerne Festival, would have charge of the actual project, in a letter dated 26 February 2008[23].

199. The only concrete tasks which Rutli had contracted to perform at this point was receiving donation monies and ensuring that the monies were duly applied for the purpose of the donation. These functions were in my judgment ancillary to the primary donation contract; not features of what was primarily an agency or mandate agreement. The high degree of congruence between this legal characterisation and how the parties interpreted the contract in practice is perhaps best illustrated by the fact that in 2010 after the Settlor had been publically linked with the project, the Trustee decided to by-pass Rutli and deal directly with SMF. This reflected the financial and legal reality that the substantive contractual relationship was that which existed between the donor and the donee.

Agency issues

200. The question of whether or not the various alleged agents had apparent authority to bind the Trustee in connection with the donation contract falls to be governed by the governing law of that contract: 'Skeleton Argument of the Plaintiffs', paragraphs 358-360. Actual authority is governed by the law applicable to the relevant agency agreement.

201. The Plaintiffs submitted that the evidence demonstrated that the Trustee acquiesced in a situation whereby Mr. Reichmuth in particular (and Mr. Haefliger as well) were led to believe that the Settlor and Dr. Scheuer were agents of the Trustee. Dr. Bicker is said to have had actual authority. As indicated above, I adopt the Swiss law

[23] E3/2053.

test of apparent or implied authority propounded by Mr. Jolles in substantial agreement with Professor Dasser: "*So the focus is always on the principal, and the question, the relevant question is: did the principal engage in any acts or omissions that could have been understood as granting authority to the agent?*"

202. Applying this test to the facts of the present case generally, there is no credible evidence of any acts or omissions by the Trustee which "*could have been understood as granting authority to the agent*". The Plaintiffs' case on this issue is internally inconsistent and legally incoherent; carefully analysed, it amounts to little more than lawyering on stilts.

203. An agent is someone who is authorised by a principal to act on his behalf and at his direction. In attempting to make out their case that the Trustee entered into a binding commitment because the Settlor wished them to make a binding commitment, the Court was invited to construe the established *modus operandi* of the Trustee as being passive and supine and invariably following the Settlor's wishes. Mr Reichmuth admitted under cross-examination that he was most familiar with Liechtenstein trusts. Based on those vehicles, he viewed the role of the protectors and the settlors as follows:

> "*8 Did you know what protectors of a trust are,*
> *9 Mr Reichmuth?*
> *10 A. Yes.*
> *11 Q. What are they?*
> *12 A. If the trustee doesn't do his job, the protectors*
> *13 should -- should change the trustee. That is my main*
> *14 understanding of the protectors. That the will of the*
> *15 one who made the settlement, the settlor, is going to be*
> *16 fulfilled.*
> *17 Q. Who told you that?*
> *18 A. That is normal.*
> *19 Q. You think it's normal?*
> *20 A. Right. At least in Liechtenstein you even have the*
> *21 settlors can take back the money. I don't know whether*
> *22 that is in Bermuda law.*
> *23 Q. I see.*
> ***24** A. But the settlor in Liechtenstein has practically all*
> *25 power.*"[24]

204. On the other hand, in seeking to meet the allegations advanced in the Counterclaim of failing to adequately inform the Trustee of project developments, the

[24] Day 6, page 44.

Plaintiffs sought to rely on the supposedly active involvement of the Settlor in the project as evidence that information received by the Settlor could be imputed to the Trustee as his principal. This analysis of the facts implies that that the Trustee caused Reichmuth and others to believe that the Settlor was acting under the Trustee's direction; not that the Trustee was acting at the Settlor's direction. For example, in the Plaintiffs' Skeleton Argument (paragraph 345(xiii), reliance is placed on Patrice Minors' 28 April 2010 note:

> "*…the perception is that CE is the key person by KR and others. Major concern. Conversation with CE on tax exposure must be held with him.*"

205. This note, sensibly read, evidences a concern on the part of the Trustee that persons in Lucerne were making a false assumption that the Settlor exercised impermissible control over the Trust inconsistent with his having relinquished control over the trust assets; not an awareness or appreciation that he was an agent of the Trustee. Looking at the picture globally, I find it is more likely that persons such as Messrs. Reichmuth and Haefliger and other representatives of the Plaintiffs in Lucerne were in general terms more influenced by popular perceptions about the artificiality of trusts into viewing the Trust as being controlled by the Settlor rather than the other way around.

206. The position of the Protectors, I accept, is not quite as straightforward. Mr. Reichmuth clearly viewed the Protectors as controllers of the Trustee through their power to change the trustees. In Third Haefliger (paragraph 72), however, it is asserted with respect to the 1 April 2010 meeting with Dr. Scheuer: "*I agree with the Plaintiffs' assertion that Dr. Scheuer was acting on behalf of the Defendant at the meeting. I understood that he was the Defendant's agent in respect of the project.*" This sounds more like an enthusiastic witness eagerly agreeing with his lawyer's suggestion than a genuine recollection of the role Mr. Haefliger assumed Dr. Scheuer played in relation to the Trust. It is also inconsistent with his previously asserted naivety about trusts in the same Witness Statement, admittedly describing his state of mind in July 2007:

> "*I am a musician and have little understanding or knowledge of trusts…Mr. Engelhorn mentioned that Dr. Scheuer was one of the protectors of the trust. I did not know what this meant but it was clear that Mr. Engelhorn reposed trust and confidence in Dr. Scheuer. Thus I believed that the Defendant followed Mr. Engelhorn's instructions…* "[25]
> [emphasis added]

[25] Third Haefliger, paragraph 4.

207. This suggests, more plausibly, that Dr. Scheuer was perceived by Haefliger as the Settlor's man rather than the Trustee's man; yet a further "instrument" of control by the Settlor over the Trust. It was therefore difficult for the Plaintiffs to lay a credible foundation for the primary proposition that the Protectors (Dr. Scheuer in particular) held themselves out as agents, to use the common law phrase, let alone the more difficult secondary proposition that the Trustee allowed this to happen. Whether or not it was apparent to Mr. Haefliger at the time, the Trustee conceded that on the specific occasion of the 1 April 2010 meeting, Dr. Scheuer was representing the Trust.

208. As a practical matter if ever one of the protectors was held out by the Trustee as acting as its agent in relation to any significant matter, a record would likely exist of any information received from the Plaintiffs being passed on to the Trustee. In such circumstances no need to rely upon the elaborate doctrines of imputed knowledge arising from implied agency would arise. I am bound to reject the proposition that in regard to the Salle Modulable project generally, any of the Protectors were permitted by the Trustee to imply to either of the Plaintiffs that they were an agent of the Trustee in relation to the project generally.

209. A final note with respect to Dr. Scheuer in relation to the agency issue. He was a tax lawyer involved in setting up the Settlor's tax structure; a man of considerable precision with a restrained passion for protecting the integrity of the Trust. It is inherently improbable that he would have conducted himself with strangers to the Trust in a way which gave a misleading impression of the capacity in which he was acting.

210. The position of Professor Dr. Dr. Bicker is somewhat different. He was another "Settlor's man" who was appointed to the SMF Board on 8 May 2008. Dr. Bicker's company UB Cominvest AG was engaged by Art Mentor Foundation Ltd ("AMF"), the subsidiary company used by the Trustee in respect of other Trust projects, to provide consultancy services in relation to the Salle Modulable project. The fee was CHF 50,000 per annum effective January 1, 2008, although the contract, governed by Bermudian law, was concluded on 12 May 2009 (the "Consultancy Agreement"). The consultant's duties were to represent AMF in the Salle Modulable project, to manage the interaction between Rutli and SMF, and "*to advise the Foundation on all issues with respect to the Project*".

211. The Consultancy Agreement on its face expressly envisaged that the consultant would be represented by Dr. Bicker and that he would (in effect) be the agent of AMF in relation to the Salle Modulable project. Christian Weinhold confirmed to Patrice Minors on 28 January 2009 that part of Dr. Bicker's role was to "*explain the budgets and funding needs of this project in detail…*"[26] Dr. Bicker in an email dated 22 March 2009 to Mr.

[26] E4/2916; Christian Weinhold, Day 22 page 28 lines 5-11.

Reichmuth stated: "*I have been seconded by the Art Trust to the Foundation board of Salle Modulable*…"[27] This confirms the express agency relationship formalised as between Dr. Bicker's company and a company controlled and funded by the Trust but in substance recognised by the parties as a relationship between Dr. Bicker and the Trust[28]. Mr. Weinhold in the course of his forthright evidence explained that as a practical matter, Dr. Bicker was unlikely to be (and was not) a source of detailed information, in effect considering himself to be far too grand to condescend to such a lowly level of reporting duties[29]. Be that as it may, the Trust had an indirect contractual right to obtain 'inside' information about the project from Dr. Bicker. The mere fact that they were unable to or elected not to efficiently exploit this relationship in my judgment is irrelevant to the question of whether an agency relationship existed. By 10 September 2010 when the parties were in the throes of termination, Mrs. Minors doubted his loyalty but accepted in an email to Christian Weinhold that "*Mr. Bicker unofficially represents the Trustee on the SMF board.*"[30] Dr. Bicker's 22 March 2009 email to Mr. Reichmuth, incidentally, would have only served to reinforce Reichmuth's February 2008 conviction that the Trustee would have an important direct source of information on the SMF Board which minimized his own reporting role.

212. The Trustee's attempts to discredit the evidence on this issue were unconvincing. Reliance was also placed on my contrary interlocutory finding made on the basis of limited information in the context of discovery. Based on all the material presently before me, I have no hesitation in reaching the contrary conclusion at this stage. However, it remains to consider the submission that as a matter of Bermudian law any knowledge Dr. Bicker acquired should not be imputed to the Trustee in any event ('Closing Skeleton Argument of the Defendant at Trial', paragraphs 4-14).

213. The submission that Dr. Bicker, looking through corporate veils, was not the Trustee's "agent to know" must be roundly rejected. The purpose of the Consultancy Agreement was clearly to remunerate Dr. Bicker out of Trust-derived assets for providing information to the Trustee about the Salle Modulable project. Christian Weinhold felt that the most that could be expected from him was not detailed reporting but strategic input; such input could only be provided if Dr. Bicker monitored events on the project, even if taking only a high-level view. If he was initially put on the Board as "the Settlor's man", he became the Trustee's man as well when he agreed to receive CHF 50,000 a year for sitting on the SMF board. Having sanctioned this agreement, it does not lie in the Trustee's mouth to imply that this arrangement was a sham. The wholly unsubstantiated suggestion that the knowledge of Dr. Bicker cannot be imputed to the trustee because the

[27] E4/3021.
[28] E4/2858.
[29] Day 22, pages 33-34.
[30] E7/5501.

Hampshire Land case principle applies must also be firmly rebuffed. The following formulation of this longstanding principle by Jonathan Sumption QC (as he then was) in argument was accepted by Lord Phillips in the House of Lords case of *Moore Stephens (a firm)-v- Stone Rolls Limited (in liquidation)* [2009] UKHL 39 at paragraph 12:

> "'*There is not to be imputed to a company a fraud which is being practised against it even if it is being practised by someone whose acts and state of mind in the ordinary way are attributed to the company.'* "

214. Rather more nuanced but ultimately clear is the question of the extent to which knowledge ought not to be imputed because, in effect, Dr. Bicker never as a matter of practice passed on any information. The judicial authority relied upon in support of this proposition was *Blackburn Low & Co. -v- Vigors* (1887) 12 App. Cas 531 at 538 (per Lord Macnaghten):

> "*When a person is the agent to know, his knowledge does bind the principal. <u>But in this case I think the agency of the broker had ceased before the policy sued upon was effected.</u> The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word 'agent' leads to confusion. Some agents so far represent the principal that in all respects their actions and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. <u>Other agents may have so limited and narrow an authority both in fact and in common understanding of their form of employment that it would be inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.</u>*" [my emphasis]

215. The cited case was one where the relevant insurance policy which the broker was retained to obtain was in fact obtained by another broker altogether. In these circumstances the relevant agency agreement was regarded as having lapsed altogether. The original agent was not regarded by either party as having authority to receive information for the principal at the relevant time. In the present case, not only did Dr. Bicker enter into the Consultancy Agreement; he sat on the SMF Board and gained access to the information it was envisaged he would gain access to. He was paid by the Trustee for his services. There is no credible basis for this Court finding that, at all material times, neither the Trustee nor Dr. Bicker considered the Consultancy Agreement to have any practical effect.

216. I accept entirely that Mr. Weinhold appears to have viewed the Agreement as a means to reward Dr. Bicker for sitting on the Board. I also find that Dr. Bicker himself clearly viewed his main obligations as being owed to the Settlor as a matter of practice. But I am unable to find that these perceptions were either appreciated or accepted by the Trustee to such an extent as to effectively nullify his agency status. It was open to the Trustee to demand information from him or cease paying him if he refused to comply. It is theoretically necessary, when considering any questions of knowledge said to be imputed to Dr. Bicker, to carefully consider whether the information in question fell within the category of information which he knew or ought to have known he was contractually obliged to pass on. On the facts of the present case, the information the Defendant contends it should have received direct notice of was clearly the sort of information which Dr. Bicker would or should have been expected to pass on to the Trustee, if the Trustee was interested in receiving it. Should the Trustee be able to escape the imputation of such knowledge to an agent it appointed for that purpose simply because it failed at the material time to enforce its rights? In my judgment no.

Was the Trustee's purported termination of the contract valid or invalid under Swiss law?

217. The Trustee's primary justification for termination was that the only contract created was a mandate contract which could be terminated at the discretion of the Trustee. This proposition was based on the Joint Expert Report; I would have upheld it had I found that the only relationship which existed between the parties was one of agency under Swiss law.

218. The Trustee's alternative justification for termination comprises the following principal elements:

(1) Rutli was guilty of a fundamental breach of contract by failing to produce the Actori Report, which was a feasibility study it was required to produce within a reasonable time;

(2) Rutli and/or SMF were not entitled to take a second bite of the cherry and seek fresh feasibility studies;

(3) Rutli's failure to reasonably inform the Trustee about progress, the various reports, the operating costs shortfall, the projected increase in preliminary

costs in the autumn of 2009 constituted breaches of contract which went to the root of the contract;

(4) the 10 June 2010 suspension of termination agreed with SMF had no impact on the right to terminate the trustee's contract with Rutli;

(5) alternatively, the Trustee was entitled to terminate the suspension agreement entered into with SMF because it was conditional upon SMF producing a confirmation of a commitment from the City or Canton in relation to operating costs and SMF made it clear that this condition could not be met in its 17 August and 29 September 2009 correspondence;

(6) in the further alternative SMF and/or Rutli refused to accept the Trustee's purported termination of either the original contract or the suspension contract, and completed the feasibility study (which did not in fact constitute a feasibility study) and suffered no damage;

(7) at all material times, the Trustee acted in good faith.

219. The legality of the Trustee's purported termination of the contract with Rutli and/or SMF turns on the following central questions analysed under the umbrella of governing rules of Swiss law:

(a) were the Plaintiffs (i.e. Rutli and/or SMF) in breach of a fundamental or ancillary term of the contract by failing to establish feasibility in or about October 2009 when the Actori Reports were completed?

(b) were the Plaintiffs (i.e. Rutli and/or SMF) in breach of a fundamental or ancillary term of the contract by failing to disclose to the Trustee the various challenges to achieving feasibility which became apparent in late 2009?

(c) if (a) and/or (b) are answered in the affirmative, was the revocation valid ?

(d) if (a), (b) and (c) are all answered in the negative, is feasibility deemed to have been established because the Trustee terminated the donation contract in bad faith?

Were the Plaintiffs (i.e. Rutli and/or SMF) in breach of a fundamental or ancillary term of the contract by failing to establish feasibility in or about October 2009 when the Actori Reports were completed?

220. I find that the Plaintiffs were not in breach of the implied term of the contract that feasibility be established within a reasonable time because the Actori Reports, which were completed in or about October 2009, revealed an unresolved operating gap. The most pertinent evidence suggests that, compared with the Student Accommodation project sponsored through the Student Mentor Foundation (which appeared to me to be self-evidently far less complex than designing a novel physical space and negotiating how it could most feasibly be used by various artistic stakeholders), it was quite unrealistic to expect the Salle Modulable Project to reach the political approval phase within less than three or four years. The following passage from Mr. Layton's incisive cross-examination of Mr. Weinhold illustrates why I find that (a) no timelines were expressly agreed as essential terms of the contract, and (b) no implied ancillary term that feasibility ought to be established within a reasonable time was in fact breached [31]:

19 "Q. All right. I'm not accepting that these were
20 necessarily reasons at all for pulling the plug, but
21 I just want to ask you about one or two of them.
22 If you look at number 9:
23 "It is understood that the vote by the Canton of
24 Lucerne to fund ongoing operating expenses of Salle has
25 been deferred until 2012/2013. This financial

1 commitment was a prerequisite for our building Salle in
2 the first place. The operational costs are not to be
3 borne by the trust. We are not prepared to be in limbo
4 for another two for three years."
5Firstly, did you consider that there had
6 been a deferral of a referendum?
7 A. Yes, I think that at the outset we had a -- a different
8 idea of the timeline. As the project evolved, so to
9 speak, there were delays, and the referendum was pushed
10 out.
11 Q. There was never a clear date set for a referendum.

[31] Day 22, pages 104-106.

12 A. No.
13 Q. Was there?
14 A. No. So no, it was just an assumption or an expectation
15 that the referendum would happen after, maybe, two years
16 or three years, and then -- I would have to go through
17 the timeline, but there was definitely a perception that
18 the whole -- that the progress would be a bit faster
19 than it actually was.
20 Q. You agreed this project was a more complex and
21 politically sensitive one than the student housing
22 project?
23 A. Absolutely.
24 Q. And here we are in 2010, five years after you had started the student
25housing project, and we were still

*1 a year short of it being ope*ned?
2 A. That is correct. But if you read the first sentence:
3 "I offer the following talking points for your
4 discussion with CE."
5 Q. Yes, I understand that, but I'm just trying to
6 understand how serious these points were:
7 "We are not prepared to be in limbo for another two
8 or three years."
9 What did you understand her to mean by that phrase?
10 A. That for another two or three years we wouldn't know
11 whether this project would come about or not."

221. It is often the case that when major new projects start anticipated completion dates err on the overly optimistic side. But what the parties should be deemed to have intended to be an essential term of the contract in terms of timelines must be shaped by the contractual context; not by vague and whimsical notions on the part of one party which were never communicated to the other party until after a decision had been taken on other grounds to bring the funding to an end.

222. My findings as to the terms of the donation contract and the context in which it arose have been set out above. This was not a commercial relationship; the Trustee's only legitimate goals were to ensure that donations made towards preliminary expenses were not wasted, that the charitable objects of the Salle Modulable could if possible be achieved and, if not, that the unused funds could be preserved for other charitable purposes. The Settlor's wishes could properly be taken into account and this project was one that all parties concerned knew was dear to his heart. Against this background it is unsurprising that no firm timelines were set at the beginning and impossible to infer that

a reasonable time for demonstrating feasibility had expired as early as October 2009 nor as late as October 2010.

223. A common lawyer might be inclined to assume that an essential or fundamental term of a contract can be created purely by implication. That is not the Swiss legal position. While viability was clearly expressly agreed (or at least identified) as a condition subsequent in the contract, completion within a reasonable time was not. The experts agreed that one party's subjectively essential terms had to be communicated to the other party as such (Joint Report, Section II, paragraph 3(10)). There is no or no clear evidence that on or before 30 October 2007 when the Trustee signed the ISA confirming the donation contract, establishing viability within a reasonable time was communicated to Rutli as a "*condition sine qua non*" for the entry into force of the contract. Paragraph 3(11) of the Joint Report accordingly comes into play. Any time requirements are ancillary non-essential matters in relation to which the Court is entitled to fill the gaps, "*taking into account the hypothetical intent of the parties, statutory fallback rules and customary practice*".

224. The significance of the distinction between essential terms and ancillary terms is not germane to the task of identifying the content of the relevant obligations; it is relevant to the consequences flowing from breach. If a condition subsequent occurs (such as viability is not established), it is common ground that the donation contract is dissolved (Joint Report, paragraphs 50-51). On the other hand, if a donation is subject to a mere proviso, the experts agreed that the donor's only unqualified remedy for breach would be to obtain a judgment compelling compliance. The gift could only be revoked (on the facts of the present case) if the non-compliance was for "*unjustifiable reasons*" (Article 249(3) CO). Article 249 (First Jolles, B1/35 n. 172) provides:

> "*Where a gift has been made from hand to hand or a promise to give has been fulfilled, the donor may revoke the gift and claim the return of the object given, provided the recipient is still enriched thereby:*
> ...
> *(3) if the recipient has failed without good cause to fulfil the provisos attached to the gift.*"

225. The experts also agreed that a grace period would have to be given first before invoking any such revocation right (Joint Report, paragraph 59(6)).

226. I find that the ancillary term or proviso requiring the donee to establish viability within a reasonable time had not been breached at all and/or breached without good cause in all the circumstances of the present case either by October 2009 or by 28 October 2010

(when the purported revocation which was initially decided upon on 3 June and suspended on 10 June) was finally formally confirmed by the Trustee. I do not ignore the fact that it is plainly arguable that if SMF (and its driving force Michael Haefliger) had been more willing to dilute the purity and scale of the Salle Modulable concept sooner, a final feasibility plan might well have been produced at an earlier date. But the 'delays' which did occur were as much attributable to the manifest complexities of developing a concept which was acceptable to (a) the artistic stakeholders who would be sharing the building, (b) the politicians and technocrats who had to furnish public funding to cover operational expenses and (c) the body politic which had to approve making available a building site and (possibly) additional funding support.

227. In no way was the Salle Modulable project comparable, in light of the intricate nature and variety of its 'moving parts', to building student accommodation. And the notion that the parties had agreed by necessary implication that the donees must stand or fall by the first version of the concept and operating designs was akin to expecting the lead singer in an opera to perform a new part perfectly on opening night, without any rehearsals.

228. Further and in any event no sufficient grace period was afforded to the Plaintiffs to remedy any delay on 10 June 2010 or thereafter, partly because the Trustee could not reasonably insist (as it did) on SMF producing confirmation of political support in the terms requested before a referendum had taken place. The Trustee's case on this issue would perhaps have been valid in an ordinary commercial contractual context where an unequivocal financial commitment was sought from a commercial lender. On balance I found Marcel Schwerzmann's explanation as to why the letter of comfort provided was the firmest commitment which could be given at this stage to be credible. More fundamentally, however taking into account the undoubted challenges which emerged in late 2009, more time was fairly required in order to ensure that SMF and/or Rutli and/or the Plaintiffs collectively were given a fair crack of the feasibility whip.

Were the Plaintiffs (i.e. Rutli and/or SMF) in breach of a fundamental or ancillary term of the contract by failing to disclose to the Trustee the various challenges to achieving feasibility which became apparent in late 2009?

229. The answer to the captioned question turns on an analysis of whether (a) non-disclosure occurred, and (b) if it did, whether the information which was 'concealed' was sufficiently material to the Trustee's contractual rights to constitute the breach of an essential or fundamental contractual term giving rise to a right to terminate. Putting to one side the technical question whether information received by Dr. Bicker ought to be imputed to the Trustee by virtue of the Consultancy Agreement, it was clear after Mr.

Cran's compelling cross-examination on this issue that full, prompt and timely disclosure directly to the Trustee of the late 2009 challenges did not occur. Whether this amounted to a breach of contract is the crucial question and one which I initially viewed as the most difficult evidential question in this entire case. To analyse this issue in a contextual as opposed to an abstract way, it is necessary to take into consideration the following considerations:

(a) there was no subjective agreement between the Trustee and Rutli as to precisely what information had to be disclosed and when;

(b) the Trustee's general *modus operandi* was to "take a back seat" and only periodically review requests for further funding, relying to a significant extent on the Protectors to funnel feedback from the Settlor and the beneficiaries about the details of the Project to inform the Trustee's own decisions;

(c) the Trustee had access from an early stage to inside SMF information because it paid Dr. Bicker for sitting on the SMF Board and providing information about material developments with the project; and

(d) the only formal written agreement signed by the parties (the ISA) conferred on Rutli the authority to monitor the expenditure of donated funds and was silent on Rutli's own disclosure obligations.

230. It follows that the implied obligation to disclose sufficient information from time to time so as to enable the Trustee to assess viability, as opposed to the essential express condition subsequent that viability be established, was not an essential term of the contract, but merely an ancillary term or proviso. The breach of this proviso would only trigger a right to revoke the gift, or 'terminate the contract' in common law parlance, if Rutli and/or SMF were at fault in relation to the non-disclosure complained of. And before invoking any revocation right, the Trustee would have been required to afford the Plaintiffs a reasonable opportunity to cure their non-compliance with the proviso.

231. Before considering the issues of fault and grace period, it is necessary to determine whether any qualifying non-disclosure occurred. A simple but sufficient, albeit a somewhat technical way, of resolving this issue would be to simply rely on my primary finding that Dr. Bicker was the Trustee's agent to whom the relevant information was disclosed and his knowledge is imputed to the Trustee. But my supplementary and more substantive finding is that no breach of proviso in any event occurred.

232. Actori did a presentation to the SMF Board of Trustees on 7 July 2009 when it was noted that construction costs were CHF 45 million over the CHF 120 million donation and a funding gap of in respect operating costs of CHF 11.6 million was identified. The latter was considered to be the most significant challenge as the construction costs increase was attributable to various user requests which could be modified[32]. At the same meeting Uwe Bicker and Michael Haefliger stated that the letter from Rutli to the Lucerne Festival of 28 August 2007 was sufficient evidence of the binding donation promise. The need to develop alternative funding models was discussed at the next meeting on 13 August 2009 and the SMF Board expressed the wish for "*the donors to be transparently initiated into the process*"[33]. Mr. Haefliger's evidence under cross-examination that the reference to "donors" meant Mr. Engelhorn and not Mr. Reichmuth, as Mr. Cran suggested,[34] was wholly incredible. I base this finding in large part on the witness's own insistence that all concerned knew that the identity of the Settlor could not be revealed. Mr. Huwyler reported that the City Council had on 9 July 2009 made it clear that existing subsidies would not be increased. By the summer of 2009, SMF appreciated that establishing viability was somewhat more problematic than initially hoped and Mr. Haefliger rightly felt that the donors needed to be "kept onside".

233. The importance of identifying additional donors and the need to quickly present a "*realistic operating budge*t" was stressed at the 14 September 2009 meeting. The Minutes of the SMF Board meeting of 26 October 2009 (at paragraph 7) noted the importance of dealing with Mr. Reichmuth on budget matters and the fact that Michael Haefliger reported on a recent meeting with Reichmuth. The Minutes also state:

> "*The Board of Trustees wants to have clear contractual provisions for the promised endowments and the mandate of the SML Foundation. Once they hear back from UB, who will be having a meeting with the Protector, MH and HA will contact Karl Reichmuth. STR* [the Board]*is only willing to assume responsibility if the terms and conditions of the trust are also formally recognised.*"[35]

234. The same Minutes listed various "*media dates*" including the publication of the City of Lucerne Report on 3 November 2009. The concerns about contractual clarity can only have been in part prompted by legitimate concerns on the part of the high-profile

[32] G1/375-376. At the meeting where this report was discussed it seems to have been clear to Actori's clients that SMF needed additional funding generally, perhaps because it was known that the other proposed building users were unable to meet the additional costs. Later the increased building costs would be attributed to the expanded 'campus concept'.
[33] G1/458.
[34] Day 13 pages 224-225.
[35] G1/539.

SMF Board that the project should not be taken forward in a very public way if the funding commitment was not truly solid. There may also have been political concerns, at that point, about the source of the monies as Mr. Haefliger asserted, but the Minutes clearly record a concern about the strength of the funding commitment. It cannot be purely coincidental that this Board meeting took place only three days after Mr. Haefliger met the Settlor on dialysis in the hospital of the St. Anna Clinic on 23 October 2009 and was told that additional capital funding would not be feasible. The Settlor said that Mr. Hamm had said an increase would not be possible for tax reasons. Mr. Haefliger's denial that he was at this juncture concerned about the possibility of support waning for the donation was the least impressive part of his oral evidence. He agreed that by chance he met Mr. Hamm and Vera Engelhorn at the Clinic on 13 November 2009 when he received "*a cold handshake*"[36]; and that he subsequently sent them both flowers[37]. All of this, combined with my assessment of Mr. Haefliger (a renowned fund-raiser and cultural promoter) as a man with refined intuitive skills, makes it impossible to believe that Haefliger was not aware from these meetings of a risk that, with the Settlor's declining health, the significance of his personal support for the project as a key underpinning of the funding commitment was also likely to diminish.

235. The 30 November 2009 Minutes record the negative public reaction and press reporting following the City's Planning Report which had by that stage been published. Further work on the operating concept was proposed. Board President Mr. Reinshagen also reported on a meeting with Mr. Reichmuth as a result of which it was clear that (a) communications with the Trust could only be through Rutli, and (b) an increase in the donation to cover the projected increase in construction costs was "*not currently on the cards*". The legal status of the promised donation was tabled for further discussion[38]. It was clear by this juncture that the initial Actori Reports could not be used as a basis for seeking final political approval because:

(a) the Actori operating concept as presented by the City was unpalatable politically and was effectively rejected by the Business Audit Commission of the City of Lucerne;

(b) there were funding gaps both in terms of construction costs and operating costs;

(c) the site had yet to be finally determined; and

(d) the project was still accordingly at a fairly preliminary stage.

[36] Day 14, pages 152-156.
[37] Day 15, page 17.
[38] G1/595.

236. These were not insurmountable problems, certainly not on the Michael Haefliger scale. But they were clearly developments of which the Trustee was, potentially, entitled to be aware in order to assess, in particular, how likely successful completion of the project was in light of the preliminary costs incurred to date, the likely outstanding preliminary costs and the prospects for resolving the construction costs and operating expenses gaps. I say the problems were not 'insurmountable' because the plea that they were fatal is both hindsight-laden and based on a failure to appreciate the flexible character of the Swiss system of direct democracy. It also reflects a view of the facts which incorrectly assumes that the parties had contracted for a far more rigid framework for completing the feasibility stage than had in fact been agreed. I say the Trustee was entitled to this information 'potentially' for the following reasons. In the factual matrix of the present case, it is far more obvious that this was information that Rutli would have been required to produce upon request than that this was information that Rutli ought to have volunteered, based on the "expectations" contained in the 30 October letter or otherwise.

237. I reach these findings because the way in which the parties interpreted Rutli's functions in practice (and added flesh to the bare bones of the original contract) was such that the only heads of information which were clearly required by the Trustee were retrospective annual accounts of expenditure and prospective annual estimates of expenditure together with very general status reports. It is important to bear in mind that there was no explicit obligation to disclose supporting information about the evolving preliminary works. It was not an implied ancillary term of the mandate that all feasibility studies, even those which were not intended to be relied upon, had to be remitted; this was not even an "expectation" spelt out in the 30 October 2007 letter. Nor was it in my judgment an ancillary implied term of the donation contract that the donee had to stand or fall by the first iteration of design concept which was developed.

238. By letter dated 23 June 2008, after a failed attempt at a meeting, Mrs Minors requested "*a written report on progress to date*"[39]. By letter dated 20 July 2008, written (unusually) on Reichmuth & Co letterhead, Mr. Reichmuth provided a two page status report and forwarded an extract from Rutli's Salle Modulable sub-account with the Bank. By letter dated 17 November 2008, following a Geneva meeting between Mr. Reichmuth and the Trustee's Managing Director Mrs Michelle Wolfe, Reichmuth wrote that at that meeting he had been looking forward "to achieving three goals" from the meeting:

> "*1. To inform you where we stand in the project….*

[39] D1/130.

2. To give you full insight into the internal competence order of the Salle Modulable Trust. One of your clients has delegated three persons of this trust in this sub-foundation of the Lucerne Festival Foundation.
3. In order to fulfil your bookkeeping needs, I was asking the Salle Modulable Foundation to make a clear budget for the expenses of the next year. The trust has decided to do so. I will be able to send you the respective decisions of the Salle Modulable Foundation at least by mid-December, so that we know what capital you have to make available for next year on our back to back structure."[40]

239. Goal 2 might be read as implying that detailed information on the project was to be accessible via the Settlor's nominees to the SMF Board; a similar point had been made by Rutli earlier, in its 26 February 2008 letter to the Trustee[41]. Be that as it may, Michelle Wolf agreed with these three goals in her letter of 22 December 2008. By letter dated 8 January 2009, Rutli forwarded the 2009 budget with a concise positive report on the project running to just over 5 lines. The SMF budget indicated that various consultants including Actori had been retained in 2008 and would be retained further in 2009. The Trustee's response of 26 January 2009 merely sought confirmation of when SMF would formally approve the budget; no clarification of the project details and progress was sought. Mr. Reichmuth received an email from Dr. Bicker on 22 March 2009 stating as follows:

"*As the representative of the founder I have been seconded by the Art Trust to the Foundation board of Salle Modulable I would like to speak to you about the project on a one to one basis*…"

240. According to paragraph 120 of Mr. Reichmuth's First Witness Statement, this meeting took place and:

"…*He told me that Mr. Engelhorn had arranged for his appointment as Butterfield's agent, though his dealings were chiefly with Mr. Engelhorn, Butterfield were happy to take a back seat. He provided Butterfield with updates on progress from time to time.*"

241. Although it seems clear that Dr. Bicker rarely reported matters of substance directly to the Trustee, Mr. Reichmuth's assumption that the Trustee was being briefed was based on more than his misconceived view that the Settlor controlled the Trust and that the Settlor's SMF-nominated Board members were reporting to him. Two months later, the Consultancy Agreement was being executed and on 15 May 2009 Mrs. Minors

[40] D1/157.
[41] E3/2063.

was writing to a colleague advising: "*I am presently in need of CHF100,000 to pay Dr. Uwe Bicker's consultancy fee for 2008 and 2009.*"

242. A final material consideration for assessing the extent to which Rutli may be said to have breached an ancillary term of its mandate contract with the Trustee in failing to voluntarily report on the Autumn 2009 developments in Lucerne is that around the same time the Trustee was informed by Graham Jack (its former senior employee who became a Protector of the Trust on 27 August 2009) of arguably one of the most serious potential causes for concern: the fact that construction costs were now estimated at more than the CHF 120 million cap. The relevant communication hinted (and no more) that the Trustee's commitment to the project might need to be considered in the near future. A 5 October 2009 "Client Call Report" records:

> "*GJ had an update for the trustees on the Salle Modulable Project. GJ advised that since the initial commitment to fund CHF 120 M for the project by the Settlor, the city of Lucerne and other parties to the project had advised that the cost expectation was now nearer CHF 145 million to complete. GJ confirmed that the project commitment was initiated on the recommendation of the Settlor, but that the other beneficiaries were not willing to fund additional monies beyond the CHF 120 M earmarked for the project. GJ suggested the trustees research the correspondence leading up to the project in readiness for any discussions which might arise in the future over the matter.*"

243. This note, to my mind, hints at "exit" strategies being in contemplation because it is difficult to see what relevance the correspondence leading up to the project would have to anything other than analysing the legal status of the arrangements. If it was desired to use best endeavours to make the project and the donation succeed, the first priority would logically be to communicate the Trustee's position to SMF (via Rutli) and make it clear that unless the projected costs of the project could be significantly reduced, funding would have to be withdrawn on grounds that feasibility seemed unlikely to be achieved.

244. Another Client Call Report recorded discussions on 6-7 October 2009 between the Trustee and the Protectors which Christian Weinhold described in evidence as "*a key turning point*"[42]. This both confirms (a) that important information was at hand already, (b) that further information was desired about the project and (c) undermines the notion that Rutli breached either an ancillary term of the donation contract or mandate contract by failing to report fully on the project status in the Autumn of 2009:

[42] Day 22, page 37, line 22.

"*CW commented that information had been received that the proposed costs may exceed the initial CHF 120M that had been earmarked for the project. CW further advised that he thought the Settlor would be agreeable to having the funding increased to the new proposed CHF 145M amount. GJ advised that he was aware that Vera, Julie and Philipp Engelhorn were not keen on having the trustees provide any additional funding over the agreed CHF 120M. After some discussion it was recommended that PKM request a progress report from Uwe Bicker on the project. It was also recommended that the trustees arrange a call with the beneficiaries to discuss the matter and to determine their wishes and gain their input.*"[43]

245. The consensus amongst the Trustee and Protector team that a key status report on the project should be sought not from Rutli, but from Dr. Bicker, not only confirms that the supply of information by Rutli was not a fundamental or essential term of the donation contract. It confirms the view propounded by Mr. Reichmuth himself and supported by the way the parties implemented the contract(s), that his reporting duties were very limited indeed-certainly after it was agreed that Dr. Bicker would be paid for his services on the SMF Board. Patrice Minors did contact Dr. Bicker by email on 7 October 2009, acknowledging receipt of a finance plan sent in German on 18 August 2009. What the Trustee was looking for was "*a more comprehensive document, in English, that sets out progress that has been made thus far, inclusive of the current status of the project. A costing allocation for each stage completed thus far would be most helpful.*" Dr. Bicker replied the following day in somewhat unhelpful terms:

"*I will adress [sic] your concerns at our next meeting, but I do believe all these detailed data are with Dr. Reichmuth at Ruethli Stiftung. Please approach him in addition.*"[44]

246. This was an unhelpful response because clearly Dr. Bicker was in a better position than Mr. Reichmuth to give a meaningful status report having attended numerous Board meetings for almost two years. Had he given evidence, Dr. Bicker may well have retorted that the information request itself was formulated in unhelpful terms. It merged two different requests-firstly a status report and secondly an accounting. If Christian Weinhold's assessment of him was correct, Professor Dr. Dr. Bicker was likely offended by being asked to supply a summary of project expenditure so far. That information would in any event have been included in the 2009 budget which had most likely been prepared by financial officers. Further, the same budget had clearly been approved by SMF and the Trustee only a few months earlier.

[43] E4/3435.
[44] E4/3438.

247. Nor was Dr. Bicker, according to Christian Weinhold in the course of the present trial, the sort of person who could sensibly be asked to prepare a "*comprehensive document*". What (I infer from this evidence) he was probably more suited for was giving a high level oral view of the status of the project on a conference call when the Trust team could put pertinent questions to him, such as what reports if any have the various consultants mentioned in the 2008 and 2009 budgets produced? What is your prognosis for the construction funding gap being eliminated? How much longer is it realistically likely to take to demonstrate that the project is either viable or not viable? It is surprising that Mrs. Minors was not prompted by her superiors and, in particular, the usually proactive Protectors, to approach Dr. Bicker in a more effective manner. This suggests to me that there was no great interest at this stage in analysing the detailed status of the Project. Rather, the Trustee was girding its loins, as it were, for a potential battle between the Settlor's camp and the beneficiaries on whether additional capital should be allocated for an expanded version of the Salle Modulable concept.

248. It was well understood on all sides that the latest model was not viable within the confines of the existing financial commitment, whatever the precise legal standing of that commitment might be. It ought to have been obvious on all sides that with sensible adjustments to the model, albeit adjustments that might have involved some loss of face for the key promoters, capital and operating gaps could potentially be closed and existing political traps carefully avoided. For reasons that are themselves somewhat unclear, both camps seemed motivated to build their positions obscured by fog rather than seeking out clearer air.

249. The follow-up request for the same information of Mr. Reichmuth also merged the distinct, yet un-particularised, status report request with an expenditure accounting report request. But Mr. Reichmuth obtained a short status report from Mr. Haefliger and Walter Graf dated 15 October 2009[45] and himself reported to the Trustee by letter dated 19 October 2009:

(a) providing a 2009 running account;

(b) advising that the plans had been expanded to include a Campus and a meeting was planned to ascertain what the additional costs might be (he did not pass on the SMF estimate of CHF 165 million), noting that "*proof of sustainability remains the deciding milestone before the building-start*" ; and

[45] E4/3490.

(c) indicated that the 2010 budget would hopefully be forwarded by the end of the year.

250. The conflict which later broke out was at this point fermenting and seemingly focussed not on sustainability but on the scale of the project and the 'grand vision' for Lucerne as a cultural centre that the Settlor was being encouraged on his sick bed to support. Patrice Minors in an internal email on 7 October 2009 propitiously warned that the "*matter has the potential to get quite contentious*"[46]. On 22 October 2009, Mr. Reichmuth (on Reichmuth & Co letterhead) wrote the beneficiaries "*at the request of your parents and grandparents*" seeking support for the campus concept on the grounds that the Settlor himself regarded it as "*the icing on the cake*"[47]. It is not for this Court to judge where the precise dividing line was between the Salle Modulable supporters' self-less devotion to fulfilling the declining Settlor's wishes and their ego-driven desire to achieve a 'grand scheme'. However, it is easy to imagine that the beneficiaries were not impressed with the spectre of their ailing father and grandfather being, from their perspective, 'hounded' to increase the Trust's already substantial promised gift. The beneficiaries' response, however it was communicated, cannot have been positive because on 29 October 2009 Rutli requested the Trustee to provide its authorised signatories list. This can only have been required to analyse the legal status of the funding commitment.

251. In summary, therefore, battle-lines were emerging between the Settlor's 'SMF at any cost' supporters and the beneficiaries' 'hold the line' camp. The project was still at a preliminary stage and, in my judgment, the subsequent (i.e. post-Rutli's 15 October 2009 status report) negative reaction to the City Planning Report from some quarters in Lucerne and the operating expenses gap were matters which the Trustee could have elicited if the topics were of genuine interest. The Trustee did not consider Rutli responsible for providing a status report on the project at all; it only turned to him when its other contractually appointed agent, Dr. Bicker, suggested Reichmuth was a more appropriate port of call for the Trustee's enquiries.

252. To the extent to which the original donation contract required Rutli to provide information at the Trustee's request about the status of the project independently of the budget approval process, which <u>is</u> supported by the evidence objectively viewed, I find that Rutli did not breach that duty in the autumn of 2009 because it received no or no specific request for the relevant information. Further and/or alternatively if Rutli was required to supply such information of its own initiative (which is <u>not</u> supported by the

[46] E4/3737.
[47] E4/3514.

facts as I find them to be), its obligation to do so was so unclear that any breach was essentially technical and not attributable to any legally cognisable fault on Rutli's part.

253. The Trustee was well aware that SMF was proposing an expanded version of the project which required additional construction funding and that this potentially impacted (absent modifications to the concept) the viability of the entire project. The negative reaction to the City Planning Report and the operational funding gaps were subsidiary challenges which could also be resolved (in the absence of any rigid timelines) through negotiating modifications to the SMF operating concept. I find that they did not constitute evidence in late 2009 that feasibility could not be achieved.

254. Moreover, the informal character of the donation contract and the spirit within which it was entered into and implemented by the parties was such that the Trustee's main concern to that point was whether or not the Settlor and the beneficiaries in general terms wished to support the project or not. The non-disclosure of which the Trustee now complains as a ground for justifying termination of the contract only became of material and genuine concern after the Trustee decided to implement an exit strategy based on the apparent premise that no binding funding commitment had ever been made. The parties' contractual relations were forged in a spirit of amity and shaped by the distinctive back-seat driving style which the Trustee was by 2007 quite accustomed to. In my judgment the disclosure obligations of Rutli against this background may fairly be very narrowly defined.

255. Accordingly, the Trustee was not entitled to revoke the gift on the asserted failure to provide information in late 2009 grounds. Having regard to the fact that Rutli's contractual role after the establishment of SMF and the retention of Dr. Bicker as a consultant to the Trustee is so distinct from that of SMF as the ultimate donee, it seems on this ground alone difficult to support a finding that any breaches by Rutli of its own obligations would entitle the Trustee, acting in good faith, to revoke the donation contract.

256. I would in any event reach the same conclusion if I was required to consider instead whether SMF as donee was at fault in breaching an ancillary term or proviso of the donation contract requiring it to disclose information relevant to the viability of the project within the relevant timescale[48]. In analysing these issues, it is hopefully again

[48] Neither party appeared to explicitly contend that SMF was the donee for the purposes of performing the contract, while Rutli was the donee merely for the purposes of contract formation. This is my preferred way of viewing the position under Swiss law. On this basis after SMF was formed, the Trustee looked primarily to Dr. Bicker for project status information and to SMF as the substantive counterparty to the transaction (as reflected by their post-January 2010 direct dealings with SMF). Rutli's obligations were limited to being a 'front' in Lucerne and receiving and disbursing donation monies while providing related accounting information and budget estimates. The Plaintiffs

made clear why I find it necessary to regard the dominant relationship between the parties as falling within the rubric of a donation contract. Any separate mandate contract which does exist must be regarded as merely facilitative of and subsidiary to the dominant relationship which shaped the parties' interactions in relation to the Salle Modulable project.

Did the Trustee prevent fulfilment of the condition subsequent by terminating in bad faith?

257. Considerable attention was focussed on the circumstances of termination upon which the Plaintiffs relied primarily to make good their contention that the Trustee acted in bad faith to prevent them from complying with the condition subsequent with the result that the condition of viability is deemed to be satisfied. The same evidence may conveniently be considered in relation to the latter issue and the related question of whether a sufficient opportunity was given to Rutli and/or SMF to remedy the breaches of proviso complained of.

258. On 27 November 2009, SMF sent to Rutli a list of 2010 costs. The Lucerne Festival advised Rutli on 1 December 2009 that this budget had been approved by SMF the previous day[49]. On 4 December 2009, the City of Lucerne received an Interpellation from the Swiss People's Party querying what the real costs of the Salle Modulable would be and querying the availability of adequate funds. Reference was made to the "*CHF 100 million that was pledged by the still-anonymous donors*". A Zurich-based newspaper called 'Sonntags Zeitung' on 6 December 2009 published a story linking Christof Engelhorn (and his cousin Curt) to the Salle Modulable donation. Michael Haefliger was quoted in the story as saying: "*The Foundation knows who the donors are, but the Foundation respects their desire not to be named.*" This story was a very significant development from the Trustee's perspective although from an SMF perspective it might have been expected to give support for the project something of a boost: the doubts about the *bona fides* of the donors and their financial solidity were potentially laid to rest. Other articles subsequently appeared which were clearly viewed by Haefliger (and SMF) as a means of rallying support for the project Haefliger had conceived[50].

259. The initial report on these stories by recently appointed Executive Protector Graham Jack in a 14 December 2010 conference call with representatives of the Trustee triggered a very measured response which suggested requesting routine information from

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did contend, seemingly as a fall-back position in case the assignment of claim from Rutli to SMF failed, that the donation contract was made for the benefit of the subsequently formed SMF, a submission I accept and which probably achieves the same practical result.

[49] E5/3621, 3625.

[50] E5/3631-3640, 3652-3657.

the various players in Lucerne. Patrice Minors obtained (from Christian Weinhold) one article and on 18 December 2010 wrote Uwe Bicker and Karl Reichmuth expressing "*great surprise*" and disappointment that anonymity had been breached. Reichmuth was thanked for using a subsequent interview to mitigate any damage. Minors then requested Reichmuth to submit the 2010 budget, seemingly attaching a copy of the 30 October 2007 letter and noting:

> "*We have committed to the funding of a maximum of CHF120 million to this project as evidenced by the attached and with such a commitment wish to reiterate the importance of reporting all expenditure related to this funding…*"

260. The letter also noted (without any comment or any request for explanation) that the article mentioned the issue which was later portrayed in these proceedings as being of fundamental importance: "*political turmoil regarding who was to provide the operating costs.*" SMF was requested to produce official financial statements[51]. The operational costs funding gap may not have been voluntarily disclosed earlier that year, but was known about by the Trustee in fairly vivid terms by 18 December 2009 before the 2010 budget was even received. The Trustee conveyed the distinct impression that their main concern was monitoring preliminary expense figures rather than forming a big-picture view on viability or, alternatively, obtaining deeper insights into what information the money spent thus far had generated.

261. Meanwhile, back in Lucerne, the SMF Board of Trustees met on 16 December 2009 with Karl Reichmuth participating in an "*exchange of ideas*" which was described in the Minutes as "*very enlightening and instructive*"[52]. These Minutes were the first exhibit in Mr. Cran's case that SMF had been guilty of doctoring the minutes to avoid the Trustee getting a complete picture of SMF's affairs after a request was subsequently made for the Minutes to be disclosed. This was the meeting when Benjamin Beck, the regular secretary, was absent and Jost Huwyler served as Protokollfuhrer. Jost Huwyler gave a straightforward explanation for why the discussion with Mr. Reichmuth about the legal status of the donation of the donation was not recorded: the Board expressly decided on the cryptic summary which is recorded[53]. However he admitted that he had taken personal notes which he had never been asked to produce[54]. I do not believe these Minutes were doctored in any way; but the failure to properly inform Mr. Huwyler of his obligation to disclose his notes reflects a serious breach of the Plaintiffs' discovery obligations if a specific request for disclosure of any notes of that meeting was made in September 2013.

[51] E5/3660-3683.
[52] G1/600.
[53] Mr. Achermann testified that Mr. Reichmuth requested that no detailed Minutes be taken of his remarks.
[54] Day 15 pages 152-156.

262. On 22 January 2010, Jost Huwyler forwarded provisional annual accounts for 2009 to Mr Reichmuth and Dr Bicker. Dr. Bicker requested by way of response that they be translated into English "*so the Trust can understand it*". Later that same day Dr. Bicker queried whether Mr. Reichmuth should not wait to forward the final version of those statements later that year and expressed concerns about the Settlor's health while noting the importance he believed the Settlor attached to his (Bicker's) continuing support for the project. On 28 January 2010 Mr. Reichmuth forwarded the Trustee an English version of the 2010 budget and promised the "*audited financial statements*" in "*March/April*" (it is possible the Budget had been previously forwarded on 14 January 2010). Mrs. Minors said she would revert after receiving a report of the meeting with the two Protectors, Jack and Weinhold, earlier that day[55]. It is difficult to identify any good reason for not forwarding the draft financial statements which compared the 2009 budget (which the trustee had approved) with actual expenditure. The budget was CHF 4 million and the actual expenditure was just over CHF 1.8 million. It referred to budgeted work carried out by Actori on the campus concept (of which the Trustee was in general terms aware) as well as two items of non-budgeted work.

263. If the main concern of the trustee was controlling costs, in raw number terms costs were being controlled. If the Trustee wanted a deeper understanding of how much had been spent relative to what further preliminary costs were likely to be incurred, the draft accounts would not have provided the answer. The questions needed to be clearly raised by the Trustee. On the one hand, the Trustee was clearly entitled to be told in accordance with past practice how much had been spent in 2009 and on what before approving and forwarding further funds for the 2010 budget.

264. The two Protectors met first with Karl Reichmuth and then with Hubert Achermann and Walter Graf. Graham Jack's original notes record that Mr. Reichmuth agreed that the information flow from SMF was deficient in the preliminary meeting. In the main meeting, the same notes record Dr. Achermann acknowledging SMF's fiduciary role and the importance of ensuring that funds were properly spent and agreeing to supply copies of SMF's monthly meeting minutes. Mr. Jack explained the elements he felt a feasibility study should have and Achermann agreed. The notes also recorded the Protectors making it clear that: "*Gap between revenue & operating costs had to be funded from other sources. Key condition for our participation.*" Mr. Graf is recorded as stating that the construction costs estimate had increased to CHF150 million and the number of seats might have to be reduced. Mr. Jack considered it to be a "*very productive meeting*". I do not find that the SMF representatives deliberately withheld material information at this stage. It was essentially disclosed that the concept developed to date

[55] E3/3843-3852; D1/385.

had to be revised to reduce construction costs and the Protectors (on this occasion acting on behalf of the Trustee) were plainly aware that an operating costs gap existed and had to be eliminated.

265. I am unable to find that the SMF representatives clearly understood that the Trustee was interested in seeing copies of any feasibility studies obtained to date. At this juncture, it seems clear, the Trustee had no qualms (which it revealed) about proceeding with the project subject to the original feasibility conditions and without any hint that time was of the essence-despite appreciating that challenges to developing a viable concept already existed and needed to be addressed. On the other hand, it seems obvious that SMF could at this juncture have made a fuller and franker disclosure to the Protectors (and the Trustee) of where the project stood and indicated a willingness to negotiate on the shape and scale of the project with a view to achieving a mutually acceptable way of achieving a successful outcome. Instead, no doubt using intelligence gleaned by Michael Haefliger from the Settlor about the fracturing of support for the project in the beneficiary ranks, a tactical decision was made by SMF to continue to focus their 'back door' efforts of using the ailing Settlor's wishes as leverage to persuade the Trustee to support an expanded version of the concept.

266. Assuming that SMF may properly be viewed as the donee and counterparty to the donation contract entered into by the Trustee on 30 October 2007, this was an inappropriate way of seeking to enforce its contractual rights. After all, I find that the Protectors had emphasised at the 28 January 2010 meeting that all communications should be with the Trustee, not the Settlor. It might be said that subsequent events would in large part vindicate SMF's judgment in early 2010 that it would be unproductive to seek to engage with the Trustee directly on the merits of the project. On the other hand, it is difficult to gauge the extent to which the initial opposition on the part of the beneficiaries may have been influenced by the perception that Michael Haefliger (dubbed the "puppet master" by Mr. Cran[56]) was determined to exploit his special relationship with the Settlor to extract whatever he wished from the Trust. On any sensible view of the emerging dispute, neither side had moral authority to cast the first stone.

267. A major change of course was foreshadowed within the Trust camp when Graham Jack on 5 February 2010 sent an email to the beneficiaries, his fellow Protectors and Patrice Minors stating:

[56] Day 15, page 9 line 15.

"*Based on the feedback I have received there seems to be a consensus that due to a variety of factors there is no longer the full support of the project that there was at the outset…*

There have also been concerns over the lack of transparency relating to the use of current funds advanced for the project. The absence of documents like a feasibility study for the project and a business plan have also raised questions although Christian and I were recently advised that these documents exist and simply have to be translated into English before forwarding the same to the trustee.

The trustee has had some preliminary dialogue with a local law firm on what our legal obligations are relating to the commitments initially given for the project. This can be discussed in more detail during the conference call but is clear that we have to be very careful on how any communication is worded from now on…"[57]

268. That same day Mr. Reichmuth hosted a meeting at the Bank attended by Michael Haefliger and Walter Graf. According to Mr. Haefliger's note of the meeting dated 7 February 2010, it was agreed that "*a clear shift in the lines of influence is on the horizon and it must be assumed that their influence in the project will reduce considerably in the coming weeks and that the Trust will take an increasingly important role…*"[58] The Trustee's Client call Report dated 10 February 2010 memorializing a conference call between all key members of the Trust team shows that by that date the beneficiaries were clearly opposed to the project while the Settlor's support was contingent upon a site being found within the city of Lucerne. The dilemma which emerged at this point and became more marked later was a natural tension between the wholly appropriate desire of the Trustee to have regard for the conflicting wishes of the beneficiaries and a declining Settlor in circumstances where legal status of the funding commitment initially made just over 2 ½ years earlier had yet to be clearly mapped out.

269. Looking at the issue of termination broadly, in my judgment it is impossible to infer that the Trustee prevented the Plaintiffs from satisfying the feasibility condition in bad faith without also being satisfied that the Trustee knew or ought to have known that they were violating Rutli and/or SMF's contractual rights. The principle (which it seems to me the Plaintiffs relied upon as a fig leaf to cover the nakedness of their case that feasibility had substantively been established) in my judgment is intended to operate in clear and unambiguous cases of interference with contractual rights. I accept Professor

[57] E5/4032.
[58] E5/4045-4046.

Dasser's opinion that a party will not be found to have acted in bad faith in circumstances where he acts reasonably in the pursuit of his interests. This is supported by the case of *DFT 133 527 c.3.3.3* and the following passages in the translation of the Swiss Court's judgment in that insurance case:

> "*In order to determine whether a given conduct violates the rules of good faith, the conduct must be assessed by taking all the circumstances of the case at hand into account, in particular the motives and the intended goal…*
>
> *In the present case, the claimant's refusal to request a disability insurance pension, even though she had been invited to do so by the defendant…seems barely comprehensible, and the claimant does not provide any reasons for the refusal that would deserve protection.*"

270. Graham Jack's 5 February email referred to above had referenced "*preliminary dialogue with a local law firm on what our legal obligations are relating to the commitments initially given for the project*". On 1 February 2010, Patrice Minors wrote to Vanessa Schrum of Appleby advising that the Protectors and the beneficiaries (excluding the Settlor) were not in favour of proceeding further with the commitment and asking: "*would you kindly review the attachments and determine if the trustee is legally bound to honor this commitment and if so what would be the potential ramification if we rescinded this commitment.*"[59] The Protectors were not in fact united in opposition, as in subsequent months Dr. Scheuer would faithfully articulate the Settlor's preference for completing the project. Having regard to the layers of complexity which were unravelled in the course of the present proceedings, it is impossible to believe that the Trustee received unequivocal advice at that juncture to the effect that Swiss law governed the contract and terminating the funding was legally impermissible under Swiss law. For reasons that I will come to below when dealing with the Bermudian law position and which seem obvious from the fact that the Trustee's primary case was that Bermudian law governed the contract while the Plaintiffs' contended for the Swiss law position, the Bermudian law position is materially different to the Swiss law position.

271. In these circumstances, the Trustee's crab-like crawling motion towards a formal termination decision on 3 June, 2010, while representing to the Plaintiffs that they were still willing to consider funding the project, did not reflect transparent dealings at their best. The Plaintiffs, however, were well aware between February and June that the promised bounty was slipping from their grasp; they themselves were analysing their legal position and taking steps to ensure that their own strategic ruminations did not fall into 'enemy' hands. It was in this area that Mr Cran's forensic rapier pierced the

[59] E5/3997.

Plaintiffs' protective clothing most effectively. The SMF Minutes of 5 March 2010, for example, show an agenda item 7a ("*Donor contacts...Update*") which is not dealt with substantively in the body of the Minutes. Instead, at the beginning of the Minutes is a note: "*To start, there is an internal meeting of the members of the Board of Trustees without Minutes*". Both sides were preparing for the legal conflict which ensued. There could be no real deception perpetrated by the Trustee on the Plaintiffs, however, because the borders between the Trust camp and the Plaintiffs' camp were porous, with the Settlor the common point of contact[60].

272. Further and in any event, Article 156 CO provides as follows: "*A condition is deemed fulfilled where one of the parties has prevented its fulfillment by acting in bad faith.*" There must be some causative link between the bad faith conduct of the party in breach and the non-fulfilment of the condition. That assumes that the innocent party can demonstrate that, either (a) but for the guilty party preventing him from fulfilling the condition, the condition would have been satisfied, or (b) (to use a lower threshold test) if the guilty party had behaved differently, the condition would have been fulfilled. I agree with Professor Dasser's analysis in his Reply report of how Swiss law applies in practice in this respect:

> "149. *A Swiss court would also take into account whether the condition could have been met if the party in question would have behaved differently or whether other developments outside of the responsibility of the party that prevented the condition from being fulfilled impeded the success of the project (decision of the Swiss Federal Supreme Court 4C.2512004 dated 13 September 2004, c.3.2.2 [Exhibit 91]). In that context, a Swiss court would take into account whether the feasibility study due in December showed indeed feasibility and would thus have probably been approved by BTBL and also whether the further milestones, namely the referendum, could have been expected to be met.*"

273. Mr. Cran, with his mastery of the detailed evidence about the project, also poked, prodded and pierced the defences of the Plaintiffs' fragile case on feasibility having been established, leaving it in tatters. The most that can be said about the impact of the premature termination of the donation contract on the ability of the Plaintiffs to establish feasibility is that the Plaintiffs lost the opportunity of demonstrating feasibility both in terms of construction costs and operational viability thereafter. The Brunner-Herrnleben Report shows an operating expenses gap which Mr. Schwerzmann's evidence suggests may well have been capable of being closed from public funding, although his evidence is far more credible as regards the current political situation than it is as regards the position in 2010. There is no positive evidence that the necessary public funding support existed as at the date of the Report. The construction estimate lacks solidity, while even foundation for the operating expenses figures appeared to be based on somewhat unstable

[60] For instance, on 1 April 2010, Dr. Scheuer met the Settlor and his wife together with Karl Reichmuth and Michael Haefliger: E5/4350-4352.

ground. The Report itself does not resemble the sort of final feasibility study which was contemplated by the parties' agreement, although it could well have constituted a significant part of such a study. Little weight can be attached to the speculation of witnesses (e.g. First Achermann, paragraph 26) that if the Trustee had not withdrawn the Lido site would have been approved by voters in a referendum. So there is no basis more solid than "*such stuff that dreams are made on*" for finding that, but for the premature termination of the contract, feasibility would have been established.

274. In summary, the wrongful termination (or revocation) of the contract prevented the Plaintiffs from completing their endeavours to demonstrate feasibility within a reasonable time. It did not prevent them from actually demonstrating feasibility because there is little more than speculation to support the conclusion that (a) preliminary costs and construction to be funded by the Trust could have been brought within the CHF 120 million commitment and (b) the necessary political approvals for obtaining the site and closing the operating expenses gap would both probably have been obtained, based on the project plans which were on the table in 2010. For all of the above reasons, I reject the Plaintiffs' plea for the condition subsequent of the donation contract to be deemed to have been fulfilled by reason of the Trustee's acting in bad faith by preventing its fulfilment.

Did the Trustee afford Rutli and/or SMF a reasonable grace period within which to remedy any breaches of provisos to the donation contract thereby becoming entitled to revoke the donation?

275. My above findings in relation to the Plaintiffs' failure to prove that the Trustee's bad faith conduct prevented the Plaintiffs from establishing viability primarily take into account the events which happened up to the date when the Trustee first formally decided that the project should be brought to an end. It seems more helpful to analyse the events of the last lap mainly in relation to the issue of whether the Trustee afforded the Plaintiffs an adequate grace period within which to remedy any breaches of proviso thus acquiring the right to revoke the gift. The experts agreed that a donation promise made under a binding contract could be revoked for non-compliance with a proviso provided an opportunity to cure the relevant breach had been given. I consider this issue in case I am wrong in finding that a reasonable time for demonstrating feasibility had not expired by in or about June and/or October 2010, my primary finding being that no breach of proviso occurred.

276. In summary, the Trustee's position from early 2010 was in my judgment dominated by the shift of beneficiary and Protector support away from supporting the project with a termination decision being impeded only by the honourable goal of not overtly overriding the wishes of the Settlor. This goal was not motivated by any sense of legal obligation; it was unequivocally the Trustee's sense of moral deference to the

Settlor aligned with a corresponding familial deference on the part of his daughter and grandchildren. Enquiries about the status of the project, its problems and its potentialities during this phase were more symbolic than substantive with no credible suggestion that the Trustee's team regarded itself as subject any binding legal obligations as far as a grace period is concerned. It was in this area of his cross-examination, that Mr. Layton scored the most points, abandoning his disarmingly polite probing in favour of a more pugilistic style.

277. At the 1 April 2010 meeting between Dr. Scheuer and the Settlor (with Michael Haefliger, Mr. Graf and Karl Reichmuth in attendance), the Protector communicated the general loss of confidence in the project in the Trustee camp based primarily on uncertainties about project costs and the Settlor pleaded for more time. The delay was fairly blamed by the SMF camp on the complexities of the concept and the public or political dimensions of the project. It was asserted that preliminary costs would still not exceed the 10% estimate so that the most that would be thrown away would be CHF 12 million.[61] The Trustee's note of a 9 April 2010 meeting in Zurich recorded a meeting between the beneficiaries and the Settlor in Lucerne on 6 April: "*the beneficiaries are still opposed to the project but are challenged by the emotion of CE*"[62]. After discussing various matters relating to financial viability, it was decided to request a 1st quarter 2010 report. The issue of the need for more time for the complexities of the project to be unravelled was seemingly ignored. The 2010 budget had not been paid and Mr. Reichmuth, proudly ignoring the inconvenient truth that the financial viability of the project as a whole was under review, expressed surprise that for the first time the budget was <u>not</u> being accepted "*without detailed explanations.*"[63]

278. It was to some extent somewhat odd, however, that the Trustee appeared to be implying that concerns existed about the detail of expenditure when Rutli had been delegated this task and the Trustee had agreed that monies once donated would not be recoverable. There was no direct request for explanations as to what were the major items of expenditure to date and what return had been obtained from the work of the various consultants listed in previous annual accounts. In April 2010, in any event, there was considerable uncertainty about what shape the project would ultimately take making it impossible to provide clear answers to the Trustee's legitimate financial viability concerns. As long as the 2010 budget was in limbo, of course, the pace of the search for further clarity in terms of the project's design was inevitably slowed. The evidence points strongly to the conclusion that the parties were stuck in something of a quagmire. Rutli and SMF were determined to adhere to the grandest version of the project using the

[61] E5/4350-4352.
[62] E5/4360.
[63] E5/4399.

Settlor's support as potent leverage; the Trustee felt compelled to muddle through, simultaneously looking for grounds for withdrawal, giving the appearance of assessing feasibility while most importantly refusing to distress the Settlor by insisting that the project had to be scaled down or brought to an end. Neither side confronted the merits of the project head on. Patrice Minors would later with good reason suggest that, contrary to earlier suggestions that Rutli and SMF had misconceived notions about the influence of the Settlor over the Trust, emotional blackmail was the effect of (if not the intent behind) their extensive contact with him[64].

279. A decision was taken not to continue with the funding on 3 June 2010 in the course of a conference call amongst the Trust team. In addition, the decision was, unusually, formally confirmed in Minutes of a Meeting of the Trustees of Art I and II Trusts[65]. On 10 June 2010 Mrs. Minors met with the Settlor and then SMF in Lucerne. She reported that the Settlor felt the Trustee had no power to stop the project, although Christian Weinhold did not recall this aspect of the meeting. In the subsequent meeting with SMF, Mrs. Minors made it clear that SMF had until October and at the latest the end of 2010 to produce (a) a comprehensive feasibility study, and (b) written confirmation that operating costs would be borne by an entity other than the Trust. SMF was also asked to provide wind-up figures for costs to the end of the year. The reason given at the meeting for the Trustee withdrawing was a breakdown in communication between Rutli, SMF and the Trustee as a result of which "*the specifics of milestones that were required had not been communicated by KR to SMF*". Mrs Minors concluded her report to the beneficiaries by stating[66]:

> "*While this is not the outcome that I was favouring, it is one which the trustee, in its fiduciary role, feels to be the best for this particular time. We are still unwavering in the position of not funding the project in its entirety i.e to completion and remain hopeful that the feasibility study supports this. We also continue to be unconvinced that the necessary funding commitment for operational costs will be realised.*"

280. This strongly suggests that the Trustee planned to terminate the funding in any event irrespective of the results of the feasibility study and had sought an operational costs commitment which it did not consider could be given. The Trustee's position orally articulated on 10 June was confirmed in its letter dated 17 June 2010. This for the first time referred to the 23 August 2007 letter as "*the non-binding letter of intent*". It also elevated to the status of one of two "*significant milestones*" a requirement not referred to

[64] E6/4828.
[65] D2/664.
[66] E6/4860.

in the 30 October 2007 letter at all: "*The provision of a commitment from the City of Lucerne and/or Canton of Lucerne (and/or from another reliable public or private entity) confirming that it would finance the annual operational costs of the Project beyond construction.*"[67] Looked at in isolation, this position might be viewed as evidence of bad faith. Looked at in context however, the Trustee had more likely than not been advised that there was (at least arguably) no binding obligation to fund the project. In addition, the Trustee's position was to a large extent merely a response to the SMF camp's apparent tactics of manipulating the Settlor's emotions in his last days.

281. In continuing to inspire hope in the Settlor that his dreams might still be achieved in the face of the opposition of the Trustee and the other beneficiaries, did Mr. Reichmuth and (in particular) Mr. Haefliger lose sight of the boundaries between their own ambitions to bring a huge project to Lucerne and true devotion to the Settlor's heartfelt dreams? I have no doubt that these two staunch advocates of the project, which was bringing money to Lucerne even during the preliminary phase, each had well-developed egos and could not bear to contemplate the project flopping. On the other hand, I also consider it quite plausible that the Settlor enjoyed the attentions these non-family members gave him as they afforded him the dignity of not being viewed as a vulnerable sick old man; Haefliger and Reichmuth seemingly treated him as the patrician he had for so long been, capable of wielding influence and power, until the end.

282. This somewhat intense emotional background no doubt explains the lack of clarity in the Trustee's approach. The 17 June 2010 letter confirmed the parties' agreement that the Trustee would communicate directly with Dr. Achermann of SMF going forward, as Mr. Reichmuth was blamed for failing to communicate the Trustee's views effectively. It seems he agreed to be a sacrificial lamb. It also recorded that the decision to cease funding was being "*set aside until October 2010*". This was completely at odds with the position Mrs. Minors conveyed to the beneficiaries as representing the true position on 10 June. On 25 June 2010, having reviewed the 1st Quarter Report, the Trustee queried for the first time the references to Actori preparing various models in 2009. Only a copy of the more recent Brunner evaluation was requested by Mrs Minors. The retention of Actori had been disclosed in the 2009 budget 18 months earlier but was first queried after a formal decision to terminate funding had been taken. On or about 19 July 2010, the trustee received a response from SMF which noted that "*in the framework of the Swiss political and legal environment a formal commitment will only be available in the later phase of the project.*"[68]

[67] E6/4907.
[68] E6/5219-5223; E6/5361.

283. Meanwhile, Dr. Scheuer's plea for a final decision to be deferred until October was rebuffed by the Trustee in an email dated 23 July 2010:

> "*The Trustee's position to cease funding of the Project has not changed…..The extra time given to SMF to meet the 2 Milestones was a courtesy of the wishes extended by the Settlor. We all agreed that we did not expect that SMF would meet the Milestones according to the time constraints and hence the collective expectation was at that time that the trustee's decision would be formalized at year end at the latest…I appreciate that this matter has brought out many a change of opinion and emotion, but I believe that the stance taken by the Trustee is the correct one and the decision that remains now is to determine the best way to carry it out.*"[69]

284. Clearly, the Trustee's decision to postpone the termination decision made on 3 June 2010 until October was not based on the notion that the Plaintiffs had failed to meet the requirements of a proviso that feasibility be established by a particular point in time and that they deserved to be given in good faith a grace period to comply. The Trustee did not advance this argument, and only relied upon its 28 October 2010 letter as notice of revocation. However, this background must in my judgment be taken into account when analyzing the effect of the 28 October letter.

285. After the Settlor's death in early August, the Trustee wrote SMF on 17 August 2010 raising various detailed queries about the 2009 Financial Statements and the 1st Quarterly Report and concluded with the warning: "*Absent some unique and significant development that might transpire between now and October 2010, please expect the winding up of the Project.*"[70] When SMF sought confirmation of a December 2010 deadline in the context of seeking to cover costs until year end and reported "substantial and very promising" progress, this prompted Mrs. Minors to insist on proceeding with a 27 September meeting and "*ASAP convey our collective decision in this regard in person.*"[71] When SMF sought to delay the meeting, Mrs. Minors told the Protectors:

> "*While the decision of the trustee would be the same whether it be rendered today or end of October, I believe that B&M* [presumably Baker & McKenzie] *once having sight of this email will insist that we honor our deadline. Painful as it may be, I question whether we have a choice. I highly doubt that we will be challenged in the courts, but I guess we want to be in a favourable position just in case.*

[69] E6/5245-5247.
[70] E6/5361-5363.
[71] E7/5479.

I will forward you B&M strategy of approach when it is received."[72]

286. The sub-text beneath the express words used by the Trustee did not escape the notice of Dr. Achermann at the time. In his 29 September 2010 letter responding to Mrs. Minors' 17 August letter, he astutely noted: "*I sense in your letter a complete lack of genuine interest in a constructive dialogue driven by a full commitment to the late Settlor's vision.*" On 13 October 2010 Mrs. Minors met Dr. Achermann, advised him of the Trustee's decision to withdraw funding and proposed a joint public relations approach. This proposal was roundly refused[73]. The following day SMF issued a rallying cry in the form of a Press Release expressing shock at the withdrawal of funding and quoting Marcel Schwerzmann to demonstrate political support for the project. The day after that the Trustee's media advisor, Contract Media, advised Patrice Minors of their briefing to reporters on the Trustee's behalf. Under cross-examination, Mrs. Minors (who disclaimed responsibility for briefing Contract Media directly) was forced to admit that various clearly inaccurate statements were apparently made to the media on the Trustee's behalf.

287. On 28 October 2010, the Trustee wrote SMF to "*formalize the decision that*…[the] *Trustee…would withdraw its support for*" the project and to "*nonetheless confirm that the decision rendered….was indeed final*". The penultimate paragraph of this letter effectively agreed that SMF could spend any funds it had in hand in pursuing work it had stated it intended to carry out for the balance of the year. In paragraphs 37 to 38 of Swiss Law Appendix A to the Trustee's Closing Skeleton Argument, it is:

(a) accepted that the experts agree that a valid revocation notice must grant the donee a grace period for compliance with the proviso; and

(b) noted that Professor Dasser opined that the Trustee's 28 October 2010 letter qualified as a valid notice of revocation.

288. I find that the 28 October 2010 letter cannot be construed as a valid revocation of the donation contract because it did not afford any genuine or good faith grace period within which the proviso could be complied with. Affording the donee from 28 October 2010 until the end of the year to demonstrate feasibility was not in all the circumstances a fair or reasonable grace period in light of the fact that deadlines were first mentioned in June of that year and proof of political support was being unilaterally sought at a time when it could not be obtained. Further and in any event, any implied grace period cannot

[72] E7/5517.
[73] E7/6091.

be relied upon as an opportunity to remedy a contractual breach which was advanced in good faith because the Trustee had decided to withdraw funding irrespective of the result of the study.

289. In reaching this conclusion, I have found that in all the circumstances of the present case the Trustee has not been able to identify any valid grounds for revocation of which it was unaware at that time. Without deciding whether as a 'pure' matter of law or legal theory it is possible to rely on grounds subsequently discovered outside of the employment and/or tenancy field, my factual findings do not support the Trustee's case that any valid additional termination grounds first came to its notice after the termination decision was finally made in October 2010. No need to consider the issue of limitation defences arises. However, I regard the breaches of proviso complained of to be continuing in nature in any event.

Remedies for breach of contract under Swiss law

290. The experts agreed that the primary remedy for breach of a promise of a gift is a claim for performance i.e. collection of a contractual debt: paragraph 68(1) Joint Report. It was also agreed that performance is due immediately "[i]*n the absence of a party agreement or a time for performance arising from the nature of the legal relationship*": Joint Report, paragraph 68(2). The parties expressly agreed that monies were only payable:

(a) in the first instance towards preliminary costs estimated at a maximum of CHF 12 million;

(b) on the express condition that:

(i) constructing the Salle Modulable was feasible, in terms of expenses to be funded by the Trust, for no more than CHF 120 million including preliminary costs,

(ii) any such construction costs would be payable in stages and not as a lump sum, and

(iii) operational feasibility was also demonstrated with operating costs not being borne by the donor; and

(c) subject to the implied term or proviso that feasibility should be established within a reasonable time.

291. On analysing the experts' individual reports, however, they also appear to me to be agreed that the primary remedy for breach of contract generally is "*a claim for performance*": First Jolles, paragraph 286; Second Dasser, paragraph 204. The experts also agreed that where a claimant has a positive interest, damages are designed to put the claimant in the position he would have been in if there had been no breach of contract. Although attention is focussed by the experts on damages, I am satisfied that the agreed proposition of a right to demand performance is fluid enough under Swiss law to encompass specific performance or a declaration that an unlawfully terminated contract is still in force.

292. Having regard to the nature of the donation contract entered into, in my judgment it is obvious that the Plaintiffs are not entitled to recover any liquidated sum as such relief would give them a windfall, rather than putting them in the same position they would have been in if the breach of contract by the Trustee had not occurred. I accept entirely that the position may well be quite different where the donation contract consisted of a simple promise to donate a liquidated amount of money.

293. Because the Trustee prudently paid SMF all project costs incurred to 31 December 2010, no question of loss capable of being compensated for in damages properly arises. Appreciating, as always, that the application of the law to the facts is a matter for my independent judgment, I found the analysis of Professor Dasser on this issue (i.e. that the peculiar nature of the donation contract did not give rise to an entitlement to a liquidated sum) to confirm my own sense of what the correct result should be.

294. For the avoidance of doubt and to repeat my observations above, in my judgment the better Swiss law view is that SMF was at all material times the donee for whose benefit Rutli entered into the original contract in August and September 2007 as confirmed on 30 October 2007 by the ISA. SMF has standing to seek all remedies available to it either on this basis or as assignee of Rutli's rights under the assignment agreement the validity of which was never credibly challenged.

295. In summary, I find that SMF and/or Rutli is/are entitled to enforce their right to demonstrate through a credible feasibility study that the Salle Modulable project is viable in terms of both construction costs and operating expenses within a reasonable time which, subject to hearing counsel, I would direct to be a period of 12 months. The nature of the project envisaged by the donation contract was sufficiently broadly defined and lacking in parameters of time to justify the conclusion that it is still potentially viable despite the passage of time. The somewhat vague evidence adduced by the Plaintiffs in relation to the possibly scaled down version represented by the NTI (New Theatre

Infrastructure) project in my judgment just suffices to support this finding[74]. After all the Settlor's 8 August 2007 letter to the Beneficiaries and the Protectors merely sought their support for a request that the Trustee consider funding "*the construction of a house with flexible arrangements for experimental music theatre…including classical opera!*"[75] The core concept underlying the Salle Modulable is simply a building the interior of which can be physically adapted for different types of musical or theatrical performance thereby creating unique artistic experiences.

Findings: the Bermuda law contractual position

Formation and terms of contract

296. In my judgment, the Bermudian law position is significantly different to the Swiss law position because the concept of a binding contract flowing from a gratuitous promise not made under seal is not recognised by local law. If the contract was instead governed by Bermudian law, I would make the following key findings:

(1) the 23 August 2007 letter (as read with the 10 September 2007 letter and the ISA) does not evidence a binding commitment by the Trustee to donate CHF 120 million if the feasibility conditions are met;

(2) the said documents (construed together with the parties subsequent conduct) evidence an agreement in principle (or non-binding statement of intent) to make such a donation if the feasibility conditions are met;

(3) the said documents evidence an agreement in principle by the Trustee to pay the preliminary costs up to an estimated CHF 12 million;

(4) the ISA read with the letters referred to therein evidences an express binding agreement between the Trustee as to:

(a) the charitable object to which monies the Trustee decided in its discretion to donate would be applied (i.e. the Salle Modulable project as described in the ISA and the 23 August and 10 September correspondence),

(b) the account into which donated monies would be paid,

[74] E.g.: Witness Statement of Hubert Achermann, paragraphs 90-97; Witness Statement of Marcel Schwerzmann, paragraphs 13-20.
[75] D1/28.

(c) the services Rutli would provide (principally, ensuring the monies were properly applied and providing periodic reports),

(d) the consequences of the Trustee making a donation (i.e. irrevocably transferring title to all monies donated) ;

(5) by necessary implication, I would find that the parties must be deemed under Bermudian law to have agreed that the Trustee had a broad discretion to terminate funding at any time before it formalised its commitment to fund the construction costs. This finding flows from the fact that if the correspondence described as evidencing an agreement in the ISA does not evidence a binding agreement to donate the construction costs at all but only an agreement in principle, in my judgment the parties must be deemed to have agreed a broader donor withdrawal discretion than would be implied in the context of a binding (albeit conditional) promise to make the full donation.

297. I fully appreciate that this interpretation of the scope of the contract under Bermudian law is (as regards the scope of the discretion to withdraw funding) more favourable to the Trustee than its case contended for. However, in my judgment the Trustee's legal advisers quite understandably focussed on the Swiss law position with the result that the Bermudian law 'dog' appeared to me as if it were being 'wagged' by a Swiss law 'tail'. The Trustee's Bermudian law case appeared to me to be designed to mirror and/or fortify its Swiss law case by conceding the existence of a narrowly defined contract (mirroring the contract contended for under Swiss law if a donation contract was found to exist) rather than articulating a wholly distinctive Bermudian law position. There is a natural inclination towards marrying the Bermudian and Swiss law contractual positions and seeking to avoid at all costs being criticised for inconsistent findings. I attempt below, however, to resist that inclination and to consider as fairly as possible the distinctive Bermudian law position acknowledging common ground only where it appears appropriate to do so.

298. Firstly, one must shelve the notion that the 23 August and 10 September 2007 letters were capable of being construed as a binding donation contract because from a common law perspective, on their face, they evidenced only an "agreement in principle" to fund the construction costs (pending confirmation by the Trustee that it was willing to

pay for preliminary costs on terms to be agreed and/or to make a commitment to fund the actual construction). The ISA (and other relevant evidence) must then be construed with a view to seeing what specific contractually binding terms were actually agreed.

299. The ISA, construed under Bermudian law, is in my judgment not entirely easy to interpret as regards deciding what agreement it records beyond its express terms. It clearly provides for the Trustee to make donations towards the project defined in the ISA itself from time to time, with no suggestion of any binding commitment to meet preliminary expenses and/or construction costs. It clearly provides that donations once made are not refundable (a clause possibly drafted with tax considerations in mind). It clearly provides that Rutli is charged with ensuring that the monies are properly applied to the intended purpose. The significance of the reference to "*so agreed by*" the 23 August 2007 and 10 September 2007 letters is not crystal clear for present purposes; because under Bermudian law the concept of a 'donation contract' made for the benefit of a third party in contemplation at the date of the contract and only identified at the date of performance does not exist as such. The cross-reference "*so agreed by*" may accordingly be read as either suggesting:

(a) that the letters are considered as evidencing a binding conditional agreement to donate up to CHF 120 million;

(b) that the letters are considered as evidencing (together with the ISA itself) a binding agreement to pay the preliminary costs only; or

(c) a variant of (a) and/or (b).

300. In my judgment, it is impossible to sensibly construe the Trustee/Rutli correspondence, read in light of the ISA, as evidencing a binding conditional contract for the donation of up to CHF 120 million for the construction of the Salle Modulable. The 23 August letter itself was not in any sense more than a letter of comfort or, to use the language adopted by the Trustee nearly three years later, a "non-binding letter of intent." The 10 September Rutli response effectively thanked the Trustee for its moral commitment and clarified the important point that funds would have to be advanced towards preliminary costs to enable the Trustee to get to the point of deciding whether to formally support the project-amounting, as the Trustee contended, to a counter-offer. The use of the term "in principle", and the rushed circumstances in which the offer was formulated in the context of a putative contract governed by Bermudian law, cannot sensibly be construed as evidencing an intention to create legal relations. The crucial

question then becomes how the ISA and/or the 30 October 2007 letter changed this position.

301. The 30 October 2007 letter confirms the foregoing objective construction of the relevant documentation, even though I would again find that it did not evidence contractually binding terms of the contract which was formally memorialised by the ISA. Assuming Mr. Reichmuth did believe a binding donation contract subject to a condition subsequent had been concluded viewing the transaction through the lens of Swiss donation contract law, the following is still clear. The Trustee's representatives did not subjectively believe that they had already entered into a binding commitment to fund the project. I so find because that letter still reflected a somewhat hazy sense of how the preliminary stages of the project would progress. It envisaged that only after political approval of the project post-final feasibility study would the Trustee be required to "*formalize its commitment to the project.*"

302. Bearing in mind that a straightforward reading of the cross-referenced correspondence through Bermudian legal lens does not support the view that the Trustee was offering to make a binding commitment, some solid evidential basis is required to support the finding that in signing the ISA, the Trustee was confirming the existence of a binding agreement to donate up to CHF 120 million on the terms set out in the relevant correspondence as read with the ISA. The 23 August 2007 letter expressly negatived an intention to create legal relations as regards the donation promise, contrary to the position under Swiss law. The ISA signified a binding commitment as regards how any monies donated by the Trustee in the future would be held and applied by Rutli. Did it also signify a binding commitment to make the donation on the terms set out in the relevant letters? In my judgment clearer words were required to justify construing the ISA as effectively overriding the very explicit reservation of rights made by the Trustee in its 23 August 2007 letter viewing the documents with common law eyes.

303. The Skeleton Argument of the Plaintiffs for Trial sought to rebut any arguments which might be made about the lack of any sufficient consideration being received for the Trustee's donation promise. The consideration Rutli provided under the ISA and the August/September correspondence, however, was limited to its role as agent of the Trustee, primarily with regard to receipt and payment of funds donated and reporting on the progress of the project. It is common ground that it was implicitly agreed at some point that Rutli would also act as the Trustee's front in Lucerne It was not seriously disputed that Rutli could (as it in fact did) charge interest on monies held in the sub-account. This helps to demonstrate that Rutli agreed in signing the ISA to be the Trustee's agent in connection with the proposed funding of the Salle Modulable project. It does not in my judgment support a finding that the Trustee agreed to pay Rutli up to

CHF 120 million if the feasibility conditions were satisfied and that any consideration was provided by Rutli which was directly connected to this promise.

304. The Plaintiffs' submissions do not adequately explain on what proper basis these facts can be construed as evidencing (a) the formation of a binding Bermudian law contract between the Trustee as principal and Rutli as the Trustee's agent, while (b) at the same time evidencing a contract between the Trustee and Rutli either as a principal or as an agent of either the Lucerne Festival or, perhaps, the yet to be formed SMF. The Plaintiffs satisfactorily dealt with the Swiss law position according to which a donation contract may be accepted on behalf of a yet to be identified (ultimate) donee. The Trustee contended no such contract was concluded but relied primarily on an analysis of the correspondence and did not really grapple with the impact of the ISA.

305. I reach the same result contended for by the Trustee; however, I do so via a somewhat different analytical route. In my judgment it is ultimately clear that no conditional contract to fund the construction of the Salle Modulable was concluded as of 30 October 2007 when the ISA is construed under Bermudian law. But, if I am wrong and the position is ambiguous, I would resolve the ambiguities in the ISA on this issue against its drafter, Rutli. In summary, under Bermudian law no binding commitment to fund the project subject to the feasibility conditions was assumed by the Trustee.

306. The Trustee conceded that a Bermudian law contract was formed between the Trustee incorporating the terms of its own 30 October 2007 letter (a) obliging the Trustee to fund preliminary expenses, and (b) conferring upon it a broad discretion to either approve or reject the feasibility study upon its completion before final approval by the people of Lucerne. I reject the proposition that the 30 October letter evidenced contractual terms[76] which amplified the agreement recorded in the ISA (which it returned to Rutli under cover of the same letter). But I find that any agreement to fund the preliminary costs, detached from an umbrella conditional agreement to fund the construction as well, must by necessary implication have given the Trustee more 'wiggle room' to withdraw than if a binding commitment to fund construction had been made.

307. Bearing in mind that no express agreement was concluded on various important issues (e.g. the time within which feasibility had to be established; the precise scope of Rutli's reporting duties; the grounds on which the agreement to fund the preliminary phase could be terminated by the Trustee), the implication of contractual terms is always shaped by the character and function of the parties' expressly agreed bargain. Terms are implied to give efficacy to the relevant contract; not plucked out of thin air. What is

[76] As I did when applying Swiss law-in part based on the concession by its author that it was not viewed by her as having contractual effect.

necessary to make a binding agreement to fund the construction of a flexible opera house if certain conditions are met efficaciously is one thing. Considering what is necessary to make a binding agreement to fund attempts to demonstrate the feasibility of the same project in circumstances where there is no obligation to fund the construction if it is proven feasible, is an entirely different matter.

308. The concession was perhaps understandably made because, irrespective of the technical contractual position between the Trustee and Rutli alone as at 30 October 2007, SMF was subsequently formed and a decision was made to advance funds to SMF via Rutli towards preliminary costs in circumstances where SMF as the intended recipient of the monies was committed to carry out extensive project work with a high public dimension to it. On any sensible view of the facts it would appear artificial and highly technical to find that the Trustee had not entered into a binding commitment to fund even the preliminary costs and that all parties concerned proceeded on the implicit basis that the Trustee could 'turn off the tap' whenever it wished. In early 2008, once SMF was established and the likely course of the project became clearer, the Trustee dealt with the project in a way which was inconsistent with the notion that it could withdraw the funding for the preliminary phase at any point at its sole discretion.

309. Nevertheless, my preferred way of analysing the Bermudian legal position would perhaps have been to treat any contract in relation to preliminary expenses as having been primarily concluded between Rutli as principal and SMF as this is what was contemplated by the express terms of the ISA. That analysis, however, sits more happily alongside a Swiss law donation contract. To the extent that the Trustee contracted with anybody in relation to the preliminary works it seems artificial to view the relevant counterparty as being Rutli rather than SMF. On balance however, these technical distinctions probably have no or no material bearing on the ultimate result and an assessment of the Trustee's termination rights. SMF as project managers, contracting with a Bermudian-based Trust donor acting through its agent Rutli under Bermudian law, must be deemed to have agreed to undertake the preliminary work well knowing that they had no legally enforceable right to claim the construction costs, even if feasibility was established. They could have insisted on obtaining a firm commitment for the construction costs which was binding under Bermudian law. Instead, they chose to rely on their 'soft' connections with the Settlor, a strategy which was probably in part, at the outset at least, based on their exaggerated perceptions of his influence over the Trustee, combined with traditional notions of honour and trust. This strategy was probably also in part based on common sense tactical concerns about the dangers of 'looking a gift horse in the mouth'. In the event, what SMF got was a commitment in effect to fund the project managers' attempts to demonstrate feasibility and no more. What the Trustee was giving was possibly CHF 12 million (the estimated 10% project costs) 'thrown away'. These

monies would be thrown away not only if feasibility was not established but also if, despite the project being shown to be viable, the Trustee for other reasons decided not to commit to it. Into this contract, I find the following terms must be implied:

(a) a requirement that feasibility be established within a reasonable time;

(b) a requirement that any material developments with the project relevant to feasibility be reported to the Trustee;

(c) a requirement that annual budgets be submitted to the Trustee before the next financial year was funded and annual accounts thereafter (assuming this was not expressly agreed);

(d) a discretionary power for the Trustee to terminate the preliminary costs funding agreement if it determined in good faith at any time that either:

(i) the project was clearly not viable;

(ii) viability could not realistically be established within a reasonable time or for a reasonable price having regard to the initial Rutli estimate for preliminary expenses;

(iii) the project managers were guilty of material non-disclosure; or

(iv) for any other reason it was clear to the Trustee that it would not in any event formally commit to funding the construction phase .

310. Implied terms (a) to (c) would in my judgment broadly correspond with the implied terms or provisos of a Swiss law donation contract. Only the discretion to terminate would be materially different, having regard to the absence of even a conditional agreement to incur the substantial costs of funding construction.

Was the contract validly terminated by the Trustee under Bermuda law?

311. For the same reasons as I reached the corresponding conclusions under Swiss law in relation to the donation contract, I would find that the trustee was not entitled to terminate the contract for failure to complete within a reasonable time or for non-disclosure of the obstacles to feasibility which emerged in the last quarter of 2009.

312. Although in theory one might contend that the time and reporting implied terms should be construed as more onerous for Rutli and/or SMF in relation to a preliminary expenses only contract, this conclusion is not justified by the way in which the initial somewhat threadbare contract was fleshed out in practice. The first mention of deadlines came in June 2010 after the decision to terminate funding was formally made. The Trustee displayed no serious interest in understanding the detail beneath the annual accounts and draft budgets until after the termination decision had been made as well. This was not neglect on the Trustee's part. After all, it had expressly agreed that Rutli would ensure that monies it actually donated were properly applied. In addition, and more importantly perhaps, it reflected the general *modus operandi* in relation to the project overall consistent with what may be assumed to be acceptable Bermudian trust practice in relation to a 'charitable' trust[77]. As long as the Settlor and beneficiaries were united behind the project and taking into account the fact that SMF had on its Board at least one representative of the Trust (Dr Bicker, who was originally nominated by the Settlor as well), the need for rigid timelines and detailed oversight simply did not arise. The Trustee's case in these respects must be rejected because it seeks to superimpose onto an amicable contractual arrangement a formulation of implied obligations which would only be necessary to give efficacy to an arms-length commercial relationship.

313. This overview of the relevant factual matrix is supported by the fact that the Trustee first sought formal legal advice about the status of its commitment to the project after the wall of support for the project from key Trust stakeholders began to crumble in early 2010. By this time, however, the bare bones of the agreement memorialised in the ISA the Trustee signed on 30 October 2007 had been fleshed out by over two years of implementation practice. It was by this time impossible for the Trustee to deny that it had agreed at least to fund the preliminary expenses of the project, even though there was considerable room for doubt on all sides about what the precise parameters of that agreement were. This doubt arose not just because the funding agreement itself was not recorded in a composite legal document. Important matters such as the Trustee's termination rights were left to implication as well. As noted above, I find that by necessary implication, the Trustee had a contractual discretion to terminate the preliminary expenses funding agreement (on the hypothesis that it was governed by Bermudian law) if one or more of the following grounds were to be made out:

(1) the project was clearly not viable;

[77] I.e. a trust the assets of which are primarily deployed towards funding charitable ventures rather than holding shares in commercial companies run for a profit.

(2) viability could not realistically be established within a reasonable time or for a reasonable price having regard to the initial Rutli estimate;

(3) the project managers were guilty of material non-disclosure; or

(4) for any other reason it was clear to the Trustee that the Trustee would not in any event formally commit to funding the construction phase .

314. Neither of grounds (1) to (3) was in my judgment made out at trial, even assuming that matters subsequently coming to the attention of the Trustee and not relied upon at the time fall to be taken into account. This corresponds to my findings in relation to the Swiss law donation contract position. However in my judgment it must be deemed to have been agreed that if the Trustee for any *bona fide* reason decided that it was not willing to proceed with the commitment to fund the construction of the Salle Modulable which it had not yet made, it was entitled to terminate the more limited contract it had in fact entered into subject to:

(a) reasonable notice; and

(b) funding all reasonably incurred preliminary costs which were outstanding.

315. Accordingly, if the only contractual relationship between the parties related to the funding of preliminary expenses with the Trustee not bound to fund construction even if it was shown to be feasible, I would find that the contract was lawfully terminated on the following grounds:

(1) the Trustee had proper regard to the fact that the majority of beneficiaries and Protectors by June 2010 did not wish to pursue the option of funding the construction of the Salle Modulable which had not yet been committed to under Bermudian law;

(2) the Trustee had no legal obligation to have regard to the Settlor's wishes either generally or to the exclusion of the other beneficiaries. Moreover, the Settlor's Letter of Wishes expressly requested the Trustee to "*consider the wishes of my children and remoter issue as you would my own*"[78];

[78] Paragraph 11, E2/1193.

(3) while the totality of the reasons for the shift in support for the project are unclear and/or unknown, they included legitimate concerns about whether the construction costs were feasible and how operating expenses would be paid;

(4) in the absence of a binding commitment to fund the construction phase, it was self-evident that no useful purpose would be served by funding the preliminary phase to completion irrespective of the prospects of feasibility being established; and

(5) the legality of the Trustee's decision to terminate the contract based upon the above considerations is not vitiated by the inelegant manner in which the decision was implemented.

PART IV: TRUST CLAIMS

Findings: are the Plaintiffs the donees of a discretionary power which ought to be exercised in their favour?

The Deed of Addition

316. The Plaintiffs' submitted that the Deed of Addition executed on 6 November 2007 had the effect of "*bringing them within the class of objects eligible to benefit from the Art I Trust*": Skeleton Argument for Trial, paragraph 102. Their pleaded case is that as a result of this document "*the Plaintiffs were beneficiaries; alternatively were objects of a power*…[with] *a legitimate expectation of benefitting from the trust*" (ARDC, paragraph 89d). The Deed added the following persons to the class of beneficiaries:

> "*Any registered charity and non-profit making entity proposed by the Trustee and consented by the Protectors other than one which is an Excepted Person (as defined in the Trust).*"

317. The apparent amnesia which afflicted the Trustee's witnesses about this document was somewhat eyebrow-raising; it seems obvious that this document must have been executed, to some extent at least, with the Salle Modulable project in mind. On the other hand, the legal function of the Deed is far from clear. Its genesis appeared to be linked to a past practice of adding to the list of beneficiaries any charities intended to be recipients of donations from the Trust and thereafter excluding them as beneficiaries[79]. No

[79] Letter of Wishes, paragraph 10.

straightforward legal explanation was proffered as to why the former practice of making donations only to named beneficiaries was later considered to be unnecessary. The Trust Deed contains no general power to make appointments to charities and the Trustee appeared to base the donations on a somewhat awkward construction of the general power under Clause 30(2) to do all things necessary "*for the protection of the interests of all or some of the beneficiaries*".

318. Be that as it may, the valid retort made by the Trustee's counsel is that it is clear that, according to its terms, the mere execution of the Deed could not possibly confer the status of beneficiaries on either Plaintiff. The Deed made it possible for the Trustee with the Protectors' consent to propose that either Plaintiff become a beneficiary. There is not one jot of direct evidence that this ever occurred. Having regard to the 'relaxed' approach taken by the Trustee to formally recording decision-making and the need to obtain legal advice in the early days of the Salle Modulable project, it is difficult not to suspect that the Deed of Addition was intended to formally propose SMF as a beneficiary once it was established and that this formality was simply overlooked. But I am unable to find that either of the Plaintiffs was added to the list of beneficiaries by the 6 November 2007 Deed of Addition.

319. I am also bound to reject the plea that, solely by virtue of the execution of this Deed, the Plaintiffs became legitimately entitled to expect to benefit from the Trust. Such an expectation would logically arise in the case of any other charity which might be proposed as a beneficiary by the Trustee with the consent of the Protectors.

Discretionary objects of a fiduciary power

320. Once the Trustee decided to actually make donations to the Plaintiffs on an ongoing basis, it is difficult to see how it can be denied that they became, assuming the absence of any contractual relationship, to some extent the discretionary objects of a fiduciary power. It being common ground that a contractual relationship existed as regards the preliminary stage of the project, this alternative trust claim only arises for consideration if my primary finding that a donation contract existed in relation to the entire project is held to be wrong. In the absence of any contractual obligation to make the donation, I find it impossible to conceive how this Court could properly find that the Trustee breached its duties by failing to continue funding the project.

321. The short point is that if the Trustee on a discretionary basis decided to cease funding the project with the consent of the Protectors and the majority of the beneficiaries, on what basis can it be contended that the rights of non-beneficiary donees

of a discretionary power ought to have been given precedence? It is true that the Settlor's wishes were overridden; but he was not beneficiary of the Art 1 Trust. And any distributions to the Plaintiffs as mere non-beneficiary donees of a discretionary power can only logically have been made on behalf of (or for the benefit of) the beneficiaries. As Mr Woloniecki rightly submitted, clause 32 ("*Exercise of Powers*") of the Trust Deed confers the broadest possible discretion:

> "*(1) The Trustees shall exercise the powers and discretions vested in them as they shall think most expedient for the benefit of all or any of the persons actually or prospectively interested under this Settlement and may exercise (or refrain from exercising) any power or discretion for the benefit of any one or more of them without being obliged to consider the interest of the others or other of such persons.*"

322. No authority was cited which to my mind even arguably supported the propositions contended for: that the Trustee in deciding to withdraw funding support for the project with the approval of the majority of the beneficiaries and the Protectors (in circumstances where (a) such support was merely discretionary and (b) the Plaintiffs were merely potential beneficiaries) acted in breach of trust. Even where the donee of the power is a beneficiary, exceptional circumstances would be required to warrant the intervention of the Court. According to '*Underhill & Hayton: Law of Trusts and Trustees*', paragraph 57.6:

> "*Exceptionally, if the object of some power like a power of advancement or a power to augment benefits under a pension scheme is also a beneficiary, then the court will intervene to direct exercise of the power in a special case.*"

Common intention constructive trust

323. If the Plaintiffs' contractual claims in respect of an entitlement to the balance of the monies 'promised' fail, no proper basis for finding a common intention constructive trust would arise in all the circumstances of the present case. I rely in this regard upon the findings made in the context of rejecting the Plaintiffs' case that CHF 120 million is presently due and owing to them under Swiss or Bermudian law contracts. I nevertheless accept the governing legal principles relied upon by the Plaintiffs and set out at paragraphs 521-523 of their Skeleton Argument for Trial.

324. The one factual area which might have supported the implication that funds were held on constructive trust by virtue of the parties' conduct is the preliminary work expenses-had it not been common ground that a contract existed in this regard. Once the

Trustee approved a budget and project work was undertaken, it would probably have been unconscionable for the Trustee to repudiate the common intention that it would pay for this work.

Purpose trusts and cy-pres

325. These submissions appear to be parasitic on one or both of the above-referenced trust claims. I accept that if the Plaintiffs did possess trust claims, their enforcement would not be constrained by the fact that the original designs for the Salle Modulable had now been changed in favour of a different but broadly similar charitable object.

326. My primary finding is that under the terms of the Swiss law donation contract which the Plaintiffs are entitled to enforce, they are entitled to seek to demonstrate that the New Theatre Infrastructure project (the NTI project) is a vehicle through which the condition subsequent of the donation contract can be satisfied.

V HARBOUR LITIGATION FUNDING

327. I deal with the Harbour Funding Agreement issue in case I am held to be wrong to have decided that the Plaintiffs are not entitled to recover damages and also to deal with the possibility that any sums which may subsequently be advanced by the Trustee in the future and which might be said to be payable to Harbour under the Funding agreement.

Validity of agreement

328. The Trustee submitted that the Harbour Funding Agreement under which, *inter alia*, the Plaintiffs will have to pay over approximately 40% of any damages recovered in return for litigation funding received in relation to the present proceedings, is contrary to Bermudian policy and void. Mr. Woloniecki accepted that the strength of the traditional prohibitions on champertous agreements had been diluted almost to vanishing point in much of the common law world but invited this Court to adopt a traditional approach. No cogent reasons for swimming against the modern tide were advanced: Defendant's Skeleton Argument, paragraphs 176 to 178.

329. The Harbour Funding Agreement is governed by English law and is clearly valid under its governing law. The constitutionally protected right of access to the Court which is implicit in the fair trial rights guaranteed by section 6(8) of the Bermuda Constitution as read with European Convention on Human Rights jurisprudence on article 6 of that Convention suggest that such funding arrangements should be encouraged rather than condemned. I see no reason why Bermuda's common law should adopt the antiquarian approach contended for by the Trustee. I find the Plaintiffs' submission in support of the validity of the Agreement (Skeleton Argument of the Plaintiffs for Trial, paragraphs 552-582) to be compelling and accept them, resolving the validity issue in their favour.

Can the litigation funding costs be recovered as damages under Swiss and/or Bermudian law?

330. As already noted above, I find that under Swiss law litigation funding expenses would be regarded as falling within the scope of legal costs, the recovery of which would be governed by the procedural law of the forum i.e. Bermudian law.

331. The Plaintiffs submitted in the alternative that such costs should be recoverable under Bermudian law, not as legal costs but under the general principles of contractual damages. The funding agreement was caused by and a reasonably foreseeable consequence of the Trustee's breach of contract. Accepting that these two requirements for the award of compensation for a breach of contract are potentially met by the Harbour Funding Agreement in all the circumstances of the present case (and rejecting the Trustee's highly technical objections that SMF has suffered no loss in any traditional sense), the Plaintiffs appear to me to acknowledge that what type of loss is recoverable also may raise broader legal policy concerns. Their Skeleton Argument for Trial (at paragraph 600) quotes the following *dictum* of Lord Hoffman in *Transfield Shipping Inc.-v-Mercator Shipping Inc. (The Achilleas)* [2008] UKHL 48:

> "*15. In other words, one must first decide whether the loss for which compensation is sought is of a "kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility.*"

332. The present case is not one where the issue of the recoverability of litigation funding is truly engaged head on and so the weight to be attached to my findings on this issue in future cases is clearly limited. It is also a novel point which is ill-suited to being finally determined at the first instance level. However, I find that litigation funding costs in the present context ought not to be regarded as a separate head of damage. The position would be potentially different if the Plaintiffs were seeking to enforce a contractual indemnity clause entitling them to recover full indemnity costs. In the ordinary case such as the present, it is not reasonable to infer that the contract-breaker assumed responsibility for not just paying whatever legal costs might be awarded in litigation it defended unsuccessfully, but also the costs of whatever litigation funding agreement the innocent party might choose to negotiate (or, practically, the difference between its recovered legal costs and the costs of its litigation funding agreement).

333. I express no view on whether or not litigation funding costs are potentially recoverable as part of legal costs under the existing taxation of costs regime.

VI THE DEFENDANT'S COUNTERCLAIM

Rutli's breaches

Bermudian law

334. It is pleaded in the Counterclaim that Rutli breached various contractual and/or fiduciary duties owed to the Trustee under Bermudian law, including its duties to:

(a) provide detailed and intelligible annual budgets;

(b) ensure monies advanced were properly and reasonably spent on the project;

(c) act with loyalty to the Trustee;

(d) be a trustee of monies received subject to equivalent duties to those set out in (a) to (c).

335. In relation to 2008, it is alleged that Rutli failed to submit a sufficiently detailed budget, failed to ensure the CHF 1.5 million advanced was properly spent and improperly paid Michael Haefliger CHF 250,000 for the 'Concept Works' without explaining the true nature of the payment.

336. I have already found that there was a donation contract governed by Swiss law and that Rutli's agency-type functions were also governed by Swiss law under the ISA and rejected the corresponding breaches of contract relied upon to justify termination of the said donation contract. For similar reasons I find that these portions of the Counterclaim have not been proved as regards any Bermudian law contract which may be held to have been consummated (albeit one which, as I have found above, the Trustee would have been entitled to terminate on other discretionary grounds). In relation to the matters complained of, I find that:

(a) there was an express or implied term requiring Rutli to furnish the Trustee with sufficiently detailed budgets to enable it to decide what monies to advance for each year;

(b) it is not credible to contend that the 2008 budget was deficient when the Trustee agreed to advance the relevant funds;

(c) the Trustee has failed to prove that Rutli monitoring of the way the funds advanced for 2008 was to any material extent deficient;

337. On balance, I am unable to find that any breach of contract or duty occurred when Michael Haefliger received CHF 250,000 in substance to reward him for developing the Salle Modulable concept and to fortify his commitment to the project and Lucerne. Rutli did give minimal information about the payment both in the 2008 budget and in subsequent accounts. There is no suggestion whatsoever either that the Trustee was deliberately misled by Rutli and no basis for believing that the payment would have been blocked by the Trustee had further information been given at the time. If insufficient information was given at the time the Trustee ought to have queried it before approving the 'inadequately' described budget item. As illustrated by the Bicker Consultancy Agreement, the Trustee was clearly willing to approve contracts designed to achieve a broad purpose without much critical appraisal of the precise legal forms used.

338. As far as 2009 is concerned, the following breaches of contract/duty are complained of. It is complained that inadequate budget information was supplied for that year, inadequate accounting information about the previous year and that the expenditure of the CHF 4 million advanced was not properly monitored. Again, I am unable to find that any breach of duty occurred. The budget was approved and monies advanced on the strength of it. I attach little weight to any queries raised in 2010 about the adequacy of the 2009 accounts as it was in that year, after the decision to withdraw funding had been taken, that specific queries were raised about the accounts for the first time.

339. Even the 28 January 2010 meeting between the Protectors and Rutli and SMF took place after the winds of change had started to blow through the beneficiaries' camp. The Protectors, admittedly on this occasion acting as agents for the Trustee, raised only general concerns about communications, concerns that were to some extent grounded in a genuine lack of consensus between the Trustee and Rutli as to what Rutli's reporting obligations were. Although the Trustee had been in possession of the 2009 budget for several months, no complaints were made at that stage of any deficiencies. The real concerns, after all, were not about financial minutiae. It was about big-picture viability concerns in the wake of known political headwinds in Lucerne and newspaper coverage seemingly designed to rally support for the project in which the Engelhorn family's link with the project had been revealed. Moreover, the confusion about what Rutli's reporting obligations exactly were was not solely attributable to Mr. Reichmuth's self-important reluctance to deal with Mrs. Minors, a woman probably young enough to be his daughter. Because the Trust effectively appointed Dr. Bicker as its agent on the SMF Board, it had constructive knowledge of most of the information it complained Rutli failed to report.

340. As regards 2010, it is alleged that Rutli failed to supply adequate information, failed to ensure that a feasibility study was completed within a reasonable time or by October 2010 and breached its duty of loyalty to the Trustee by (a) giving false and misleading information to the Settlor, and (b) openly taking sides with SMF against the Trustee.

341. I find that after the 28 January 2010 meeting it was obvious that the Trustee was considering terminating the donation contract and Rutli and SMF sought to conceal their potential litigation strategy from the Trustee having agreed to supply copies of the SMF Minutes. My primary finding is that the Trustee's termination was unlawful under Swiss law and not justified by any breaches of provisos on Rutli and/or SMF's part. I reached the same conclusion on the alternative hypothesis that the only contract between the parties was governed by Bermudian law and concerned the preliminary works alone (although I found that the Trustee would have been entitled to withdraw from the project in its discretion on other grounds under local law). This limb of the Counterclaim fails partly due to the fact that Rutli's reporting obligations were limited by the express terms of the ISA; partly because the significance of those obligations was reduced to marginal significance by the disinterest on the part of the Trustee in the detail until the termination decision had been reached on 3 June 2010; and partly because (putting aside legal technicalities), Trust funds were being paid to Dr. Bicker to gain inside information on the project through his membership of the SMF Board. The fact that the Trustee never devised effective means of extracting such information has no relevance to present concerns.

342. Because of the express terms of the ISA, I find that none of the monies paid to the Plaintiffs were recoverable in any event unless the Trustee was able to make out a case of misrepresentation or fraud. The parties expressly or impliedly agreed (in the course of implementing the contract) that the Trustee's primary expenditure monitoring role was engaged before it paid monies to Rutli, not after in the context of a structure used in previous donations whereby the project management entity in Lucerne was to some extent at least managed by persons who were known to and trusted by the Settlor.

343. In addition, the Trustee made the various payments it made in 2010 as part of its exit strategy without reserving its rights in any way well knowing, it seems obvious to me from all the evidence, that upon further enquiry grounds for withholding or reducing the amounts might have been found. If the Trustee is not strictly estopped from seeking to recover these sums, the circumstances in which they were paid further undermines the weight to be attached to the present complaints.

344. The breach of loyalty claim is somewhat different. As 2010 progressed, the Trustee relied even less on Rutli for its fronting role and more on direct communications with SMF. It does seem clear that Mr. Reichmuth intensified his communications with the Settlor and, as battle-lines between the pro-Salle Modulable and anti-Salle Modulable camps became more clearly defined, he nailed his colours to the pro-project camp. As the Trustee failed to plead and/or prove any specific loss which flowed from any acts of disloyalty which did occur, I make no findings on this aspect of the Counterclaim.

Swiss law

345. To the extent that the Swiss law Counterclaim is based on the same factual complaints as the Bermudian law Counterclaim is, I would dismiss the Counterclaim for similar reasons, married with the grounds on which I rejected the plea that the Trustee was entitled to terminate any Swiss law contract on grounds of breaching express and/or implied terms the parties' contract. The Swiss law position is more straightforward that the Bermudian law position in that (a) I have found a donation contract was concluded subject to a condition subsequent covering both preliminary expenses and construction costs and (b) the Trustee was not entitled on any ground to terminate the contract. In light of the express terms of the ISA to the effect that monies once donated are irrecoverable, I see no need to decide if the Plaintiffs are right in contending that as a matter of general Swiss law, a donor does not suffer recoverable loss where the gift is misapplied: Skeleton Argument of the Plaintiffs for Trial, paragraph 623.

346. Analysing the position under Swiss law, the absence of any proven loss apart, the breach of loyalty complaints are even more insubstantial because Rutli was in very broad terms motivated by a desire to honour a legal pact which the Trustee wrongly considered it was not bound by.

347. The Trustee alleged that if it delegated its power to approve the feasibility study to Rutli, Rutli assumed a fiduciary duty which it breached. I have found that no such delegation occurred so this final limb of the Swiss law Counterclaim falls away.

VII CONCLUSION: MAIN FINDINGS

Contractual claims

<u>Swiss law</u>

348. The putative contract was governed by Swiss law. The parties entered into a donation contract under Swiss law pursuant to which the Trustee agreed to fund the preliminary costs and construction of the Salle Modulable opera house in Lucerne, subject to a condition subsequent with two core elements. The donee had to establish feasibility in terms of both construction and operating costs in light of the maximum commitment of the donor: CHF 120 million. Although Rutli accepted the offer, it did so for the benefit of the subsequently formed SMF which was the ultimate donee. As between the Trustee and Rutli, there was a subsidiary or supplemental mandate agreement, primarily evidenced by the ISA, under which Rutli agreed to receive donated cash, pay the project expenses and ensure the monies paid were properly applied, with minimal reporting obligations to the Trustee.

349. The Trustee was not entitled to terminate the donation contract for breach of implied accounting/reporting duties and/or for failure by Rutli and/or SMF to comply with an implied requirement to establish feasibility within a reasonable time. These were not fundamental terms of the contract or conditions but merely provisos which could only constitute valid grounds of termination (a) if breaches were proved and (b) the offending parties were afforded a grace period to cure the relevant breaches. The provisos were not breached and, in any event, no or no sufficient grace period was afforded to the Plaintiffs to cure the breaches. The Trustee's Counterclaim (which broadly mirrored its rejected breaches of contract justified termination pleas) is dismissed.

350. The Plaintiffs failed to prove that the Trustee acted in bad faith to prevent them from satisfying the feasibility condition so as to trigger the presumption that the feasibility condition was in fact met. On the facts found by this Court, the Trustee's unlawful termination of the donation contract did not prevent the Plaintiffs from establishing feasibility and, in any event, the Trustee did not act in bad faith although the manner in which a difficult decision was implemented was inelegant in the extreme. The Plaintiffs had simply not been afforded a reasonable amount of time within which to adjust the designs in order to fit the financial and political requirements of construction and operating feasibility. These findings are not undermined by the fact that the project managers appear in hindsight to have spent too long pursuing unrealistically grand plans and seeking to persuade the Settlor to persuade the Trustee to increase the level of the already generous donation; pursuits which may well have unwittingly helped to unravel vital beneficiary support for the project.

351. The result is that the Plaintiffs are entitled to perform their rights under the contract and to compel the Trustee to perform its obligations under the contract,

performance being the primary remedy under Swiss law for a breach of affirmative contractual rights. The Plaintiffs are entitled to a reasonable period of time (possibly 12 months) within which to demonstrate through a credible feasibility study that the core Salle Modulable concept can be achieved meeting both the construction and operating expenses feasibility tests and taking into account the monies advanced by the Trustee thus far. The Plaintiffs' claim for judgment in the amount of CHF 114.25 million (approximately US$ 127.9) is refused. I will hear counsel to the terms of the final order required to give effect to this Judgment.

Bermuda law (alternative findings in case primary findings are held to be wrong)

352. I was asked to record my alternative findings in case I am held to be wrong in my choice of law findings as to the governing law of the contract. Under Bermudian law I would find that the parties did not enter into any contract at all in relation to the funding of the construction costs. From a Bermudian law perspective, I would be bound to take into account the strong reservation of rights contained in the Trustee's crucial 23 August 2007 letter and the lack of any sufficient consideration being offered by Rutli relevant to the putative donation promise.

353. It was conceded that there was a binding legal agreement as regards the preliminary phase of the project alone. In respect of such a limited binding commitment, I would find that the parties must be deemed (by necessary implication to give business efficacy to such an arrangement) to have agreed that the Trustee reserved the right to terminate the funding arrangement in its discretion in circumstances where (as I find occurred) the majority of the beneficiaries opposed continuing with the project. However, I would for similar reasons as in the case of the Swiss law claim find that the Trustee was not entitled to terminate on the breach of essential terms grounds it relied upon, and would accordingly still have dismissed its Counterclaim.

Trust claims

354. In light of the findings reached in relation to the Plaintiffs' contractual claims and in any event, the alternative trust claims are dismissed.

Harbour Funding Agreement

355. I reject the Trustee's arguments as to the invalidity of the Plaintiffs' English law governed funding agreement on traditional common law principles prohibiting maintenance and champerty. However, I also reject the Plaintiffs' claim that any amounts payable by way of litigation funding are recoverable as damages under Swiss or Bermudian law. Litigation expenses, absent new statutory rules, properly fall to be dealt with under the taxation of costs regime under Bermudian law as the procedural law governing the present proceedings.

Costs, etc.

356. I will hear counsel as to costs and as to the terms of the final order to be drawn up to give effect to the present Judgment.

Dated this 21st day of February 2014 _____

IAN R.C. KAWALEY
CHIEF JUSTICE