In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 65

BETWEEN:

(1) STIFTUNG SALLE MODULABLE
(2) RUTLI STIFTUNG

Plaintiffs

-v-

BUTTERFIELD TRUST (BERMUDA) LIMITED

Defendant

RULING ON COSTS AND TERMS OF FINAL ORDER

(in Court)[1]

Date of Hearing: 8-9 May 2014

Date of Ruling: 28 May 2014

Mr. Alexander Layton QC of counsel and Ms. Lilla Zuill, Cox Hallett & Wilkinson, for the Plaintiffs

Mr. Mark Cran QC and Mr. Jan Woloniecki, Attride-Stirling & Woloniecki, ASW Law Limited, for the Defendant

[1] To save costs, the present Ruling was circulated to the parties without a formal hearing to hand down judgment.

Introductory

1. On February 21, 2014, I delivered Judgment following a trial which ran for approximately five weeks from early November to mid-December 2013. I summarised my main findings in the following terms:

> "***Contractual claims***
>
> ***Swiss law***
>
> *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 Bermuda 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.*"

2. For personal reasons, I was unable to afford the parties the scheduled two full days requested to settle the terms of the final order and costs. In addition to these issues, an application by the Defendant for a stay of Judgment pending appeal was listed for hearing. Nevertheless, I considered that the time made available to the parties should have sufficed to deal with all outstanding issues had time not been wasted by unnecessary spats. Accordingly, I gave directions for the filing of skeleton arguments to deal with the narrow issue of what conditions should be attached to the stay pending appeal which it was common ground the Defendant was entitled to seek.

3. Settling the terms of the final Order was complicated by two factors. Firstly, both sides, to lesser and greater extents, appeared to me to wish the Court to police implementation of the Order to a greater extent than I had initially envisaged to be necessary. I had assumed that, provided of course that the Judgment was not overturned on appeal, the parties would cooperate to comply with any Order of this Court. The Plaintiffs are both charities; the Defendant is a licensed trust company owned by a leading bank which, at trial, positively insisted that as Trustee it exercised independent judgment and was not simply an open channel through which the wishes of the settlor and/or the beneficiaries were expressed.

4. However, the draft Orders tendered seemed to me, in part, to be based on the premise that the parties would, like their counsel, continue to fight in the cat and dog fashion which intermittently undermined the dignity of the latest chapter in the present saga. In this respect, it must be noted, the Plaintiffs' counsel was, quite clearly, more sinned against than sinning.

5. Mr. Cran complained that I did not afford counsel the opportunity to address the Court at trial on the potential finding that the Plaintiffs were entitled to enforce a Swiss law donation contract by way of alternative relief to the expressly pleaded damages claim. Further, it was contended that neither side had an opportunity to address the scenario reflected in the Court's key findings. Counsel pointed out that the appropriateness of ordering specific performance would be a ground of appeal. I reminded him that, at the end of the evidence, I had asked counsel to address me on various possible scenarios[2]. Mr. Woloniecki addressed the notion of premature termination of the hypothetical Swiss law contract in closing, and, quite pertinently for present purposes, submitted as follows[3]:

> "5*What happens if you unlawfully or wrongfully purport*
> *6 to resile from that donation contract?*
> *7 Well, there's no controversy about this.* ***The***
> *8* ***primary remedy under Swiss law, the Swiss law for***
> *9* ***failure to complete a donation, is essentially***
> *10* ***a specific performance. Performance of the donation****,*
> *11 paying the extra money.*" [emphasis added]

6. Of course, it was disputed that any such finding was appropriate on the facts of the present case. Mr. Layton, in his closing, was extremely reluctant to encourage the Court to reach a conclusion which did not entail the award of the full liquidated sum. On remedies, he submitted that Bermudian law remedies were broadly consistent with those under Swiss law, so that, for instance, declaratory relief could be granted where damages were not appropriate. He also, reluctantly, accepted that it was open to the Court to find that the contract had not been terminated, was still alive and the Plaintiffs were merely entitled to a further opportunity to establish feasibility:

> "*1It may be that there is an interim stage, now that*
> *2 we have got to the position we are in, which is that*
> *3 more of the US$12 million will be payable in the project*
> *4 planning stage in order to get a viable proposal that is*
> *5 consonant with 2013/2014 reality, because of course*
> *6 things have moved on.*"[4]

7. It was common ground that the Defendant was entitled to a stay of Judgment pending appeal. The conditions of any stay could not be agreed. I gave directions for the filing

[2] Day 21, page 190.
[3] Day 22, pages 14-17 at 17.
[4] Day 24, page s 187-191 at 191.

of written submissions on the conditions of such stay and strongly encouraged both sides to seek to resolve any outstanding disputes on the terms of any stay. If necessary, I will determine the stay conditions in a separate judgment.

Recitals to Order

8. I approve the Plaintiffs' form of the recitals including (with one minor drafting amendment) the following additional paragraph, inserted after the hearing in response to submissions made by Mr. Cran, which I indicated had merit, about the contractual requirement to have persons linked to the Trust involved in the project management process. This was an essential feature of the contract which I found was formed. Accordingly, the additional recital containing an undertaking should be included in the Order in the following terms:

> "***AND UPON DR ACHERMANN AND MR HAEFLIGER UNDERTAKING*** *through Counsel to propose to its board that SMF appoint as additional members of the board Mr Walter Graf, provided he confirms he is willing to accept such appointment and the ordinary duties under Swiss law of board members of a Swiss charitable foundation, and also a further person who is nominated by BTBL who is independent of the parties hereto, is practising as a Swiss lawyer of good standing and repute who is willing to accept such appointment and the ordinary duties under Swiss law of a board member of a Swiss charitable foundation and is reasonably considered by SMF and BTBL to be suitable to serve on its board.*"

The contract

9. An Order is made in terms of the following paragraphs of the Plaintiffs' revised draft Order:

> "*The Contract*
>
> *1. BTBL entered into a binding Swiss law donation contract with Rütli on the terms of the ISA, which incorporated the 23 August Letter, the 10 September Letter and Rütli's Endowment Rules (together, "the Contract").*

2. Pursuant to the Contract, BTBL agreed as donor to provide funding of up to CHF 120 million for the Planning Costs and Construction Costs of the Project.

3. The Contract was made for the benefit of SMF as ultimate donee and SMF is entitled to enforce the rights arising under it.

4. The Contract is subject to a condition subsequent that the Project be viable.

5. The Contract is subject to a proviso or ancillary term that SMF is entitled to demonstrate within a reasonable time through a credible feasibility study that the Project is viable.

6. It was a proviso or ancillary term of the Contract that BTBL is entitled to assess on an ongoing basis whether any further payments should be made pursuant to the Contract, having regard to its good faith assessment of the feasibility of the Project.

7. BTBL was not and is not entitled to terminate the Contract as it purported to do in 2010, its purported termination or revocation of the Contract was invalid and unlawful and the Contract remains in force."

10. The underlined text in paragraph 6 reflects the insertion by me of wording proposed by the Defendant's counsel. I also grant an Order in terms of the following provisions of the Plaintiffs' amended draft Order:

` *"Assignment*

8. The benefit of the Contract was validly and effectively assigned by Rütli to SMF pursuant to a Deed of Assignment dated 15 December 2010.

Completed gifts

9. Donations totalling CHF 5.75 million have been paid by BTBL to Rütli and/or SMF towards the Planning Costs of the Project, leaving a balance of up to CHF 114.25 million for Planning Costs and Construction Costs.

10.The payments which BTBL has already made referred to in paragraph 9 above, and the payments which it is or will be liable to pay referred to in paragraphs 14 and 16 below, were paid as, or will when paid be, completed gifts from BTBL to Rütli and/or SMF, and SMF became (or will become) the absolute beneficial owner thereof and does not hold on trust or subject to any equitable obligation and SMF does not and shall not, in particular, hold such payments subject to any resulting trust, Quistclose trust, constructive trust or obligation to make restitution to BTBL.

Rütli's ancillary mandate

11. The Contract included an ancillary mandate agreement under Swiss law between Rütli and BTBL pursuant to which Rütli was to act as a front for BTBL in relation to the Project and to hold and pay to SMF funds remitted to it by BTBL. The ancillary mandate agreement has been terminated.

12.Rütli is not now required to perform any role, and is not subject to any reporting obligations or other duties to SMF or to BTBL by way of review of the viability of the Project or of any feasibility study, or by way of oversight of the planning, development and construction of the building, or otherwise."

11. As regards paragraph 10 of the Order, the Plaintiffs' counsel sensibly conceded that the initial wording, which would have relieved SMF of any duty to account for monies received, was far too broad. The present wording has omitted the words "*or obligation to account to BTBL*" to avoid any suggestion that SMF can use monies donated otherwise than for the purposes contemplated by the contract as read with the terms of the Order.

12. The Plaintiffs, in their amended draft Order, invited the Court to include the following provisions in the Order, only one of which (paragraph 16) was seriously controversial:

> "*Giving effect to the Judgment*
> *13. the Contract and its express and implied terms shall be specifically performed and carried into execution, in particular in accordance with the following provisions of this Order.*
>
> *14. If SMF demonstrates within a reasonable time that the Project is viable, then, subject to paragraphs 6 above and 15 below, the condition mentioned in paragraph 4 above will be satisfied and BTBL will be liable to make payments to SMF of up to CHF 114.25 million; such payments shall be used for the purposes of any further Planning Costs in accordance with paragraph 16 below and the Construction Costs which shall be paid in stages linked to progress of construction work. This sum shall not be used for Operating Costs.*
>
> *15. For the purpose of paragraphs 4, 5, 6, 13 and 14 above and paragraph 16 below, the provisions of Schedule 2 to this Order shall have effect.*
>
> *16. In order to enable it to exercise its entitlement referred to at paragraph 5 above, SMF is, subject to paragraph (10) (a) of Schedule 2, entitled to be paid a further sum by BTBL of not less than CHF 4,205,000 towards the costs of planning and preparing the feasibility study referred to in paragraph (2) of Schedule 2, which sum BTBL is hereby directed to pay in three instalments. The first instalment shall be CHF 2,205,000 and it shall be paid forthwith. The second instalment shall be CHF 1 million and it shall be paid by 31 December 2014 and the final instalment of CHF 1 million shall be paid by 30 June 2015. SMF is, subject to paragraph (10) (b) of Schedule 2, entitled to be paid further sums by BTBL towards the Architect Design*

Competition Costs and the Tendering Costs. The Planning Costs payable by BTBL shall not exceed CHF 6.25 million.

17. BTBL's counterclaim is dismissed.

Harbour Funding Agreement

18. The Harbour Funding Agreement is valid.

19. If and to the extent that the Plaintiffs are unsuccessful in recovering all or any part of the Harbour Liability by way of costs on taxation, they may to that extent discharge such unrecovered part of the Harbour Liability from the sums to be paid to SMF pursuant to paragraph 9 above (other than sums paid for the purpose of Planning Costs), and such payments shall be regarded as payments made for the purposes of the Project."

13. The amended paragraph 16, instead of seeking a lump sum, attempts to meet the Defendant's objections that this would be a major departure from the contract found by the Court to exist, by providing for instalment payments. The Plaintiffs rejected the Defendant's contention for quarterly accounts and the remitting of money based on those accounts on the grounds that it would afford the Defendant too much opportunity to obfuscate and delay. This submission requires the Court to assume, in effect, that the Defendant will act in bad faith and thumb its nose at this Court's Judgment, even if it is upheld on appeal. I see no proper legal basis for this assumption.

14. The Defendant's case for quarterly accounts was presumably based on the practice which appertained in 2010 when Rutli dropped out of the picture and the Trustee supervised the donation with heightened scrutiny in the context of implementing an exit strategy. The Plaintiffs' case for specific sums to be ordered to be paid was, it seemed to me, based on the premise that this Court should be engaged in ongoing supervision of the further implementation of the contract, thus relieving the parties of the originally agreed obligation to cooperate at all phases of the donation contract and

resolve any difficulties themselves. The contract found to have been concluded as a matter of Swiss law contained an ancillary term or proviso to the effect that "*annual budgets be submitted to the Trustee before the next financial year was funded and annual accounts thereafter*" (Judgment, paragraph 309(c) as read with paragraphs 310 and 237).

15. Accordingly, I make an order in terms of the Plaintiffs' amended draft paragraphs 13 to 15 and 17 to 19, with a modified paragraph 16 providing as follows:

> "*16. Annual budgets shall be submitted to the Trustee for the next financial year and annual accounts thereafter. The parties shall in good faith agree the amount of each annual budget within a reasonable time of the Trustee receiving a draft annual budget. The Trustee shall fund each annual budget in such amount as may be agreed. The Planning Costs payable by BTBL shall not exceed CHF 6.25 million.* "

16. I have also declined to include in paragraph 16 the incorporation by reference of the following provisions of paragraph 10 of the proposed Schedule to the Order:

> "*(a) In relation to the costs associated with the preparation of the feasibility study referred to at paragraph (2) of this Schedule:*
>
> *(i) 9 weeks before the second and third instalment referred to in paragraph 16 of the Order, SMF shall send to BTBL a budget of costs associated with the preparation of the feasibility study which SMF expects to incur in the succeeding 6 month period.*
>
> *(ii) BTBL must submit to SMF in writing within 4 weeks of receipt of the budget its objections to any proposed expenditure disclosed in the budget stating its grounds of objection and the amount in dispute.*
>
> *(iii) Save for any amount to which such objection has been taken, the amount in the budget shall be remitted to SMF by BTBL on the dates provided in paragraph 16 of the Order.*
>
> *(iv) The parties must endeavour in good faith to resolve the dispute over the amount to which objection has been made within 8 weeks of the objection being raised. If they fail to do so, application may be made to the court for resolution of the*

same. In order to safeguard its position in costs, either party may make an offer to the other without prejudice save as to costs, such offer to be made within 2 weeks of the end of the 8 week period as aforesaid. Any such offer must be accepted, if at all, within 21 days of its receipt;

(b) 9 weeks before it expects to incur Tendering Costs or Architect Design Competition Costs respectively, SMF will send to BTBL a budget in relation to such costs. The procedure for agreeing such budgets or resolving disputes in the absence of agreement described in paragraph (10) (a) above shall apply mutatis mutandis…"

17. The above procedural regime appears eminently sensible and to be broadly consistent with the sort of regime which reasonable persons, in the position of the parties, would agree to adopt. However, in my judgment it is not appropriate for this Court to impose such a regime on the parties by way of an Order giving effect to the Judgment which was actually delivered in the present action. In substance the Plaintiffs are granted declaratory relief clarifying what the terms of the contract are, in the expectation that the parties will be able to implement the contract without further recourse to the Court.

18. Although I find that the Plaintiffs are in principle entitled to relief by way specific performance, and the parties should be given liberty to apply should the need arise, I see no proper basis at this juncture to compel the Defendant (or indeed the parties generally) to perform a myriad of specific contractual duties which the Defendant has not yet refused to discharge. The remedy of specific performance, at this juncture, is essentially limited to requiring the Defendant to further fund the Project, in accordance with the contractual bargain which the Court has declared to have been consummated.

19. Paragraph 19 contemplates any shortfall between costs recovered on taxation and the Harbour Liability may be paid out of monies paid by the Defendant towards Construction Costs. This Order was sought and is granted on the implicit basis that SMF will have to fill any consequential Preliminary Expenses shortfall from other sources. It follows logically from the Court's approval of the validity of the Harbour Funding Agreement.

20. It seems convenient at this juncture to consider those portions of the proposed Schedule to the Order which are intended to complement the primarily declaratory provisions of the Order which give effect to the Court's findings as to the terms of the

contract. The following definitions in the Plaintiffs' draft Schedule 1 were, with one notable exception, uncontroversial:

> "***Schedule 1***
>
> *In this Order, the following terms have the meanings set out below:*
>
> *(a)"23 August Letter" means the letter dated 23 August 2007 from BTBL to Rütli in which BTBL offered to donate CHF 120 million towards the Planning Costs and Construction Costs of the Project;*
> *(b)"10 September Letter" means the letter dated 10 September 2007 from Rütli to BTBL in response to the 23 August Letter;*
> *(c)"Architect Design Competition Costs" means the costs which SMF will or may incur in connection with commissioning one or more architects to prepare plans and drawings to attain the best design solution for the theatre referred to in the definition of the Project at paragraph* 0 *below;*
> *(d)"Art I Trust" means the trust created by a Deed executed by Mr Christof Engelhorn and Bermuda Trust Company Limited on 26 April 1991 establishing a settlement known as Art I Trust for the benefit of beneficiaries referred to in clause 2(1)(F) of the said Deed;*
> *(e) "BTBL" means the Defendant;*
> *(f) "Construction Costs" means the costs of the Project associated with constructing the building referred to at paragraph m below;*
> *(g)"Harbour" means Harbour Fund II, L.P., a fund advised by Harbour Litigation Funding Ltd of 1st Floor, Kendal House, 1 Conduit Street, London, W1S 2XA;*
> *(h)"Harbour Funding Agreement" means an agreement entered into by SMF with Harbour dated 12 July 2012 for the funding of the costs of the litigation, the effect of which was extended to Rütli by a letter dated 8 November 2012;*
> *(i)"Harbour Liability" means such sums as will become payable by the Plaintiffs to Harbour pursuant to the Harbour Funding Agreement save for such sums as the Plaintiffs may recover from BTBL pursuant*

to the costs orders herein which relate to costs that the Plaintiffs paid with funds provided to them by Harbour pursuant to the Harbour Funding Agreement;

(j)"ISA" means the Individual Supplementary Agreement signed by two representatives of the Second Plaintiff on 19 September 2007 and by two representatives the Defendant on 30 October 2007;

(k) "Operating Costs" means the costs of running the building referred to at paragraph (m) below;

(l) "Planning Costs" means the costs of and associated with the planning, designing and developing of the Project (other than Construction Costs), and includes the Architect Design Competition Costs and the Tendering Costs;

(m)"The Project" means the project to be undertaken by SMF in conjunction with other organisations in Lucerne for the purpose, broadly in accordance with the vision and wishes of Mr Christof Engelhorn, of planning developing and constructing a new theatre building which can be put to a variety of uses which include opera, musical theatre contemporary music, performing arts, chamber concerts and other musical productions and which is situated in the City of Lucerne together with all matters incidental thereto;

(n) "Rütli" means the Second Plaintiff;

(o) "Rütli's Endowment Rules" means the Rules adopted by the board of Rütli on 15 June 2001 and known (in translation) as the "Rules Governing the Use of Funds Entrusted to the Rütli Endowment, Lucerne";

(p) "SMF" means the First Plaintiff;

(q)"TPC Proposal" means the a document titled "Proposal for theatre consultancy services" dated 10 April 2014 prepared by Theatre Projects Consultants addressed to SMF's solicitors which is exhibited to the Seventh affidavit of Toby Benjamin Michael Graham dated 11 April 2014[5];

[5] By agreement (q) was omitted from the final Order after a draft of this ruling was circulated.

> *(r)"Tendering Costs" means the costs associated with tendering for and the negotiation and conclusion of contracts for the construction of the building referred to at paragraph (m) above.*" [emphasis added]

21. Mr. Cran complained that the Plaintiffs' first draft Order defined the Project in a way which paid insufficient regard to the musical element, which was actually agreed in the pleadings (the first sentence of paragraph 14 of the Re-Amended Statement of Claim was admitted in paragraph 11 of the Re-Amended Defence and Counterclaim). The second draft definition sought to accommodate this concern by introducing explicit references to musical disciplines. The Judgment did not record any formal definition of the project as such. In outlining the introductory part of the pleadings which were described as "uncontroversial"), the first sentence of paragraph 14 the RASC was quoted as follows (Judgment, paragraph 6):

> "*...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.*"

22. I find that paragraph (m) of Schedule 1 should read as follows:

> "*(m)"The Project" means the project to be undertaken by SMF in conjunction with other organisations in Lucerne for the purpose, broadly in accordance with the vision and wishes of Mr Christof Engelhorn of constructing 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.*"

23. I should note that Schedule 1 was also amended as regards the definition of Planning Costs in response to the Defendant's insistence that it should include construction contract negotiation and tendering costs.

24. The first section of proposed Schedule 2 to the Plaintiffs' amended draft Order provides as follows:

"***Schedule 2***

Demonstrating viability

(1) The Project shall be viable for the purposes of paragraphs 4 and 5 of the Order if:

(a) it is reasonably credible that the Construction Costs can be met out of the sums which would be payable (after payment of Planning Costs) by BTBL under paragraph 9 of the Order, together with such other money to be raised from private and/or public donors (but after deduction of such if any sums as are required to discharge the unrecovered part of the Harbour Liability); and

(b) it is reasonably credible that the Operating Costs can be met from revenues, subsidies and other sums or resources to be raised from private and/or public donors to be applied towards the Operating Costs.

(2) A feasibility study will satisfy paragraph 14 of the Order if it consists of one or more documents or other evidence which together, to a standard of reasonable credibility and in sufficient detail to enable BTBL to make the assessment referred to in paragraph (4) below, in relation to the theatre the subject of the Project which includes (but is not be limited to) the following:

(a) details of the plans developed and to be developed by SMF in conjunction with others and prepared with assistance of consultants;

(b) identify the proposed site of the theatre;

(c) include the detailed design of the theatre and a summary of the cultural opportunities it is expected to provide;

(d) include an illustrative production schedule;

(e) include market research;

(f) explain how it is proposed that the Construction and Operating Costs be met and any funding gaps will be bridged; and

(h) explain the assumptions on which the plans are based and the information and empirical data on which such assumptions have been founded.

(3) SMF shall provide the feasibility study (or if it is not in English, a translation thereof into English) to BTBL by 15 December 2015.

(4) Once SMF has presented the feasibility study to BTBL, BTBL shall assess the viability of the Project. If BTBL has any questions or comments concerning the feasibility study, it shall communicate such questions and comments to SMF in writing as soon as reasonably possible and in any event no later than [42 days] after receipt by it of the feasibility study.

(5) If BTBL does not within [42 days], communicate its questions or comments in writing to SMF or communicate in writing that it has no such questions of comments, it shall be treated as having assessed the Project to be viable.

(6) SMF may respond to BTBL's questions or comments as soon as reasonably possible and in any event within [42 days] of receiving them (or the last of them), whether by making any amendments or additions to the feasibility study or otherwise.

(7) BTBL shall then have a further 2 weeks within which to assess the viability of the Project and communicate its assessment to SMF. If it does not do so within that time, it shall be treated as having assessed the Project to be viable.

(8) If SMF demonstrates that the Project is viable in accordance with the time limits laid down by this Schedule, it is to be treated as having done so within a reasonable time."

25. At the hearing, the Plaintiffs' counsel contended for the objective test for viability set out in paragraph (1) above whilst the Defendant's counsel insisted that the Judgment (paragraphs 169 and 170) effectively gave the Trustee the sole discretion (to be exercised in good faith) to determine viability. Mr. Layton argued that unless there was an objective element to this key test, the Order could not effectively be policed. Both these arguments had some merit. On the one hand, the position contended for by Mr. Cran is more consistent with the actual findings of the Court, as well as the non-commercial nature of the donation contract. On the other hand, it is difficult to conceive of a means of testing (a) whether or not SMF has established feasibility, and/or (b) whether a determination by BTBL that the project is not feasible has been arrived at in good faith (under Swiss law), without carrying out an objective analysis of feasibility. On balance, I accept Mr. Cran's submission that the language of the Order should reflect the obligation of SMF to satisfy BTBL on the issue of feasibility rather than simply expressing an objective test. The rejection by the Defendant of an objectively clear and cogent feasibility case, however, would likely be difficult to justify in good faith.

26. The detailed prescription of what will constitute a feasibility study may well be helpful (paragraph (3)); the procedural framework for assessment of the feasibility study (paragraphs (4) to (8) seem quite sensible. However, in my judgment there is no need for this Court at this juncture to predetermine what documents SMF should be required to submit in the future. What documents are submitted should be shaped by the particularities of the Project at the end of the preliminary phase and should be the subject of future negotiation between the parties. The Judgment did not envisage an Order dealing with these matters.

27. In the second and third sections of Schedule 2, the Plaintiffs proposed directions relating to interim assessments. Many of these provisions involved a level of detail which I consider beyond the proper role of this Court to prescribe. To the extent that they are uncontroversial, they deal with matters which may properly form the subject of an agreement between the parties on how the contract may best be implemented by them in the future. Proposed paragraph 14 does articulate more concisely what the Judgment (paragraphs 178-179) meant by referring to the formation of a "high level view", although reproducing the phrase itself is superfluous. Many of these provisions involved a level of detail which I consider beyond the proper role of this Court to prescribe. To the extent that they are uncontroversial, they deal with matters which may properly form the subject of an agreement between the parties on how the contract may best be implemented by them in the future. Proposed paragraph 14 does articulate more concisely what the Judgment (paragraphs 178-179) meant by referring to the formation of a "high level view", although reproducing the phrase itself is somewhat superfluous:

"*<u>Scope of assessments and time limits</u>*

(14) In conducting any of its assessments under paragraphs (4), (7), (9) and (10) of this Schedule, BTBL shall act in good faith (within the Swiss law meaning and effect of this term) and reasonably, shall confine its assessment to the formation of a high level view and shall have regard to (a) the fact that primary responsibility for implementing the Project rests with SMF (in conjunction with other organisations in Lucerne); (b) BTBL's "back seat" role in relation to the Project and (c) the fact that the Project will not proceed without the approval of the relevant authorities in the City and Canton of Lucerne; (d) in relation to Construction Costs, the fact that such viability has been established. "

28. I would accordingly Order that Schedule 2 should provide as follows:

"*Demonstrating viability*

(1) The Project shall be viable for the purposes of paragraphs 4 and 5 of the Order if SMF satisfies BTBL:

(a) that the Construction Costs can be met out of the sums which would be payable (after payment of Planning Costs) by BTBL under paragraph 9 of the Order, together with such other money to be raised from private and/or public donors (but after deduction of such if any sums as are required to discharge the unrecovered part of the Harbour Liability); and

(b) that the Operating Costs can be met from revenues, subsidies and other sums or resources to be raised from private and/or public donors to be applied towards the Operating Costs,

Provided that in assessing whether or not it has been satisfied that the Project is feasible, BTBL is required to act in good faith in accordance with Swiss law.

(2) *A feasibility study will satisfy paragraph 14 of the Order if it consists of one or more documents or other evidence in sufficient detail to enable BTBL to make the assessment referred to in paragraph (1) above in relation to the theatre the subject of the Project.*

(3) *SMF shall provide the feasibility study (or if it is not in English, a translation thereof into English) to BTBL by 15 December 2015.*

Interim assessments

(4) The following are assessments envisaged by paragraph 6 of the Order, namely assessments by BTBL:

(a) during the preliminary phase (that is, before a contract is entered into for the construction of the theatre) whether further payments should be made towards Planning Costs having regard to how monies have been spent (and whether the further Planning Costs payable by BTBL hereunder might exceed CHF 6.25 million) and the apparent viability of the Project the latter view being made by reference to the matters referred to in paragraph 1 of this Schedule;

(b) during the construction phase (that is, once a contract is entered into for the construction of the theatre) whether further payments should be made having regard to the viability of the Project (which for the purposes of this sub-paragraph means the matters referred to in paragraph 1(a) of this Schedule) ; and

(c) at either stage, whether further payments should be made having regard to the matters referred to in paragraph (1)(b) of this Schedule.

(5) For the purpose of enabling BTBL to make the assessments mentioned in paragraph 4 of this Schedule, and to determine the Construction Costs payable to SMF pursuant to paragraph 14 of the Order SMF shall provide BTBL with such information as may reasonably be required to enable BTBL to make such assessment.

Scope of assessments

(6) *In conducting any of its assessments under paragraph (4 of this Schedule, BTBL shall act in good faith (within the Swiss law meaning and effect of this term) and reasonably, and shall have regard to (a) the fact that primary responsibility for implementing the Project rests with SMF (in conjunction with other organisations in Lucerne); (b) BTBL's "back seat" role in relation to the Project and (c) the fact that the Project will not proceed without the approval of the relevant authorities in the City and Canton of Lucerne; (d) in relation to Construction Costs, the fact that such viability has been established.*"

Costs and security

Did the Plaintiffs succeed?

29. It now remains to deal with the issue of costs, and then security. I find that the Plaintiffs have achieved substantial success in establishing that an enforceable donation contract continues to exist. I reject the contention that either the Defendant should be awarded 60% of its costs or that, alternatively, no order should be made as to costs, having regard to the result.

30. The Defendant's main case was that no contract was ever formed and that any contract which had been formed was validly terminated. Although the Plaintiffs failed to establish that they were entitled to liquidated damages and/or that the Defendant

acted in bad faith in Swiss law terms, they succeeded in establishing that the Defendant had no legal right to terminate the contract.

31. This success is quite obviously significant in practical terms. It is the Defendant, not the Plaintiffs, which is apparently seeking to overturn the main findings of this Court on appeal. This appeal is presumably being pursued with a view to achieving the result that the contract is held to have been validly terminated. In the course of the hearing to settle the terms of the final Order, the Defendant's counsel repeated the incantation that the Defendant was convinced the Project was simply not feasible. This Court has found that feasibility may still possibly be established.

32. Various authorities were cited, most of which articulated the same broad principles against the backdrop of different facts. The Defendant relied upon the following dictum of Devlin J in *Anglo-Cyprian Trade Agencies Ltd-v-Paphos Wine Industries Ltd.* [1951] 1 All ER 873 at 874, cited with approval by Hellman J in *Williams-v-Bermuda Hospitals Board* [2013] Bda LR 14 at paragraph 6:

> "*No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a 'successful' plaintiff. In certain cases he may be, eg where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained."*[emphasis added]

33. Mr. Woloniecki correctly submitted that the Plaintiffs' prayer for relief only explicitly sought substantial damages. That might be significant in many cases; in the present instance, however, it may in part be attributable to the litigation funding tail wagging the litigation dog. More significantly still, an important legal right which underpinned the damages claim, the formation of an enforceable Swiss law donation contract which had not been validly terminated by the Defendant, was established by the Plaintiffs. This right may yet result in the Defendant paying the entire sum claimed towards the relevant charitable object. This can hardly be characterised as a purely pyrrhic victory. Mr. Layton aptly cited my own decision in *Binns-v-Burrows*[2012] Bda LR 3 at paragraph 6[6], and also '*Cook on Costs*', which explained the rationale underpinning the 'costs follow the event' rule as being that:

[6] Where I held that: "*unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:*

> *(a) determine which party has in common sense or "real life" terms succeeded;*
> *(b) award the successful party its/his costs; and*
> *(c) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.*

"*if a claimant succeeded in recovering any part of a disputed claim he was entitled to his costs because it has been necessary for him to come to court to recover anything.*"[7]

34. On the other hand, it still remains to consider whether the Court should reduce the Plaintiffs' award having regard to the following principle articulated by the Court of Appeal for Bermuda (Evans JA) in *First Atlantic Commerce Ltd.-v Bank of Bermuda Ltd.* [2009] Bda LR 18 (at paragraphs 66 to 67):

> "*66…In our judgment, however, if the claimant is entitled to costs on the basis that he has achieved substantial success, as FAC is, he should recover the costs of establishing liability, as well as causation and damages.*
>
> *67. But it does not follow that he shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd. (No.2) [1992] 1 WLR 1207 : in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason.*"

Should the Plaintiffs' costs be reduced by reason of their failure on various issues?

35. Mr. Woloniecki submitted that any costs award in the Plaintiffs' favour should be reduced having regard to the following "*significant failures at trial*":

    (a) the Plaintiffs' failure to establish feasibility through five witnesses who consumed almost 20% of the trial (10% discount);

    (b) the failure to establish bad faith (10% discount);

    (c) the failure to establish the litigation funding provided by Harbour Litigation Funding as a head of damages (Defendant should recover 90% of its costs on this issue. In addition there should be a further (presumably global) discount of 5 to 10%);

    (d) the failure of the Plaintiffs' Bermuda law claims;

    (e) the dismissal of the Plaintiffs' trust claims and the Defendant's Counterclaim negate each other.

36. My findings on each of these issues are as follows:

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[7] '*Cook on Costs 2012*', paragraph 11.12.

(a) the Plaintiffs' case on feasibility was shown to be quite unmeritorious and involved a considerable amount of Court time and preparatory costs. I agree that a 10% discount is appropriate in this regard;

(b) the Plaintiffs' best shot at establishing feasibility was through establishing that funding was withdrawn in bad faith. Although this claim failed, the Court nevertheless found that the purported termination was not legally valid or justified, on the basis of largely overlapping facts. I see no justification for any discount in this regard;

(c) the Plaintiffs succeeded in establishing that the contract was governed by Swiss law. The need to determine the Bermuda law position flowed from the Defendant's rejected assertion that Bermuda law governed the parties' relationship. I see no justification for any discount in this regard;

(d) I see no justification for any costs reduction because the alternative and clearly subsidiary trust claims failed. These legal claims were advanced in a proportionate manner. The Plaintiffs should be entitled to recover as part of their overall costs the costs of successfully defending the Counterclaim.

Should the Plaintiffs' costs be reduced based on the Plaintiffs' conduct of the action?

37. In addition, it was contended the Court should have regard to the Plaintiffs' unreasonable conduct in the course of the proceedings as regards the following matters:

(a) the specific discovery application heard on 22 May 2013 was "hugely unsuccessful" (either the Defendant should be awarded 95% of its costs or 95% of the Plaintiffs' costs of this application should be disallowed);

(b) the Plaintiffs' failure to comply with their discovery obligations;

(c) the Plaintiffs' excesses in terms of bundle preparation with only an estimated 30 % of documents referred to at trial, which the Court warned at the hearing on 10 September 2013 would be visited with costs penalties (a wasted costs order should be made or bundle preparation costs should be disallowed);

(d) the Plaintiffs' excessively long (and expensive) skeleton arguments which were said to have required "*a dedicated team of cave dwelling troglodytes*" (50% of the related costs should be disallowed);

(e) the Plaintiffs' excessively long witness statements (related costs should be disallowed or reduced by 50%);

(f) improper conduct, namely:

(i) the inappropriate redaction of Dr Dr Uwe Bicker's resignation letter;

(ii) the incorrect evidence given by Mr Michael Haefliger;

(iii) Mr. Reichmuth's admitted failure to read his witness statement.

38. My findings on the above issues are as follows:

(a) the submission that the costs of the specific discovery application heard on 22 May 2013 and determined on 27 May 2013 should be disallowed because it was "hugely unsuccessfully" is rejected. This Court's Ruling on that application found that (i) the Plaintiffs' were able to abandon some of their initial requests because "*they had successfully cajoled the Defendant into filling and/or explaining actual or apparent gaps in their initial discovery*" (paragraph 5), and (ii) that each party had achieved a more or less equal measure of success. It concluded as follows:

> "*40. In summary, the Plaintiffs have succeeded in part in respect of Categories 1 and 2 and the Defendant has substantially succeeded in respect of Categories 3 and 4. Unless either party applies within 14 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be in the cause*";

(b) I am not satisfied that the Plaintiffs' failed to comply with their discovery obligations to such an extent (in terms of either deliberation or number of instances) as to warrant any penalty by way of costs;

(c) The Plaintiffs clearly adopted a "when in doubt, don't leave out" approach to preparing bundles of documents and authorities. For instance, there were 5 volumes of authorities prepared for trial; I flagged only two actual authorities which were referred to in oral argument at trial. The trial bundles had to be reorganised shortly before the trial. Many key documents were duplicated. Some volumes contained documentation of minimal actual relevance to the issues canvassed at trial. In similar vein, a paginated bundle of *inter partes* correspondence, which was prepared for the hearing to settle the terms of the final order, ran to more than 900

pages. I only flagged two letters which counsel referred to in the course of that hearing. On the other hand, the Chronological Bundles were extensively referred to and generally provided a convenient means of reviewing the course of events which were explored at trial. It is wrong as a matter of principle for any time unproductively spent in trial preparation to be fully recoverable by way of costs. The Plaintiffs should only be entitled to recover two-thirds of their costs relating the preparation of binders of authorities and/or documents for the trial itself;

(d) Mr. Layton defended the length of the Plaintiffs' written submissions by describing the trial as a three month trial which took six weeks. Having regard to the unusual cocktail of legal issues involving both Swiss and Bermudian law, the use which I made of the submissions and the discounts made under other heads, on balance I see no need to reduce the costs recoverable as regards written submissions;

(e) I found no real substance to the complaint that the Plaintiffs' witness statements were excessively long. While it is obvious that they could not be criticised for excessive brevity, it does not seem to me that the witness statements contained significant amounts of irrelevant material. I am bound to take into account the fact that the Plaintiffs bore the burden of proof and so it is not only consistent with "churning" for their statements to be longer than those prepared by the Defendant. To the extent that there were unnecessary exhibits (duplicating key documents which appeared in other binders), the costs of binder preparations have already been discounted by one third under sub-paragraph (c) above;

(f) the incidents of 'misconduct' complained of by the Defendant are essentially part of the rough and tumble of a civil trial. No finding of deliberate misconduct was made in relation to any witness at trial. There is no proper basis for me to find that the incorrect redaction uncovered by the Defendant represented a deliberate attempt to conceal information, known not to be privileged, from the Court. No further discount on this ground is appropriate or required.

Are the Plaintiffs entitled to costs pursuant to various interlocutory orders?

39. I accept the submissions set out at paragraphs 130 to 133 of the Plaintiffs' Skeleton Argument. The Plaintiffs are entitled to the costs relating to all interlocutory orders where costs were either in the cause or reserved.

Are the Plaintiffs entitled to be indemnified for their costs out of the Trust Fund?

40. Mr. Layton submitted that, having regard to the Plaintiffs status as discretionary objects of a fiduciary power, their claims ought to be regarded as having been brought for the benefit of the trust. Accordingly, under the principles established in *Re Buckton* [1907] 2 Ch. 406 at 413-417, the Plaintiffs were entitled to have their costs paid out of the Trust fund. Moreover, the status of the Plaintiffs was broadly analogous to beneficiaries of the Trust. Reliance was placed on the following statements by Lord Walker (on behalf of the Judicial Committee of the Privy Council) in *Schmidt-v-Rosewood Trust* [2006] 2 AC 709 at 734:

> "66…. *There is therefore in their Lordships' view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in McPhail v Doulton) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.*"

41. The principles relevant to determining whether or not a claimant's costs should be paid out of a trust fund are summarised in '*Lewin on Trusts*', 18th edition, at paragraph 21-79 as follows:

> "*(1)Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held. In such cases, the costs of all the parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a construction claim unnecessarily, though will be given credit if he does so on advice. In a case where any doubt is a slight one, consideration should be given to an application to the court under section 48 of the Administration of Justice Act 1985 as a convenient and inexpensive method of securing appropriate protection for the trustees.*
>
> *(2)Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs.*
>
> *(3)Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile*

claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason. A case which falls clearly within the third category is where the whole of the trust fund has been distributed to a supposed beneficiary in reliance on some construction of the trust instrument, or view of the law, and another person claiming to be the true beneficiary brings proceedings against the recipient or the trustee in reliance on a rival construction, or rival view of the law. Here the general principles as to costs of hostile litigation apply between the claimant and the party against whom the claim is directed, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation."

42. All of the cases cited in support of the proposition that the present case was a *Buckton* category 2 case, and not a category 3 case, were cases involving the construction of a clause in a trust deed or will. At the beginning of the trial, Mr. Woloniecki submitted in relation to the alternative trust claims that "*this is not a trust case. It's a contract case."*[8] This submission was upheld in the Judgment delivered following the trial. The present case in my judgment is predominantly a Category 3 case where, ordinarily, the standard rules on costs in adversarial litigation should apply, notwithstanding the fact that a trustee defendant is itself entitled to be indemnified out of the trust fund in any event in respect of its own litigation costs.

43. However, the Plaintiffs' counsel further submitted that (a) the categories for costs payable out of a fund are not closed, and (b) even in a Category 3 case, the Court may exceptionally order costs to be payable out of the trust fund. In *IBM United Kingdom Pensions Trust Ltd.-v- Metcalfe* [2012] EWHC 125 (Ch), Warren J held (in the context of exercising the discretion to make a prospective costs order:

> "*20…There is always room, therefore, for an exceptional case to be dealt with on its facts; and, indeed, when a case does not fall neatly within any of the Buckton categories, the court must exercise its statutory jurisdiction in the way it considers best to achieve justice and fairness.*"

44. I find that the present case falls into *Buckton* category 3, but not "*neatly*" because of the unique factual matrix of the present case. Mr. Layton aptly referred to the following paragraph in the Judgment in the present case:

[8] Day 2, page 109, lines 7-8.

"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.*"

45. The Plaintiffs' claim, which succeeded, was asserted against the following background. The Defendant through an agent publically announced in Lucerne in August 2007 that a substantial donation would be made to construct an opera house. As a result of this promise, SMF was established and the feasibility stage was funded by donations from the Trust. This involved not simply private contractors being paid to carry out technical studies. It involved politicians and public officials considering the feasibility plans from a local government perspective as the gift was premised on the site being publically provided and operational costs being publically funded. The Judgment also made the following findings:

"*182…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.*"

46. The present litigation also arose against the following background:

(a) the Trustee freely elected to structure the donation in a singularly informal and imprecise way, based on the assumption that the project would be implemented (and, presumably any differences resolved) in a gentlemanly way, because it was being managed by persons who were not wholly strangers to the Trust (broadly construed to include the Settlor). Moreover, this occurred in circumstances where:

(i) despite the availability of ample resources, the Trustee elected not to avail itself of legal advice,

(ii) the Trustee had sufficient bargaining power to virtually dictate the donation terms. It could have explicitly excluded the possibility of the Plaintiffs' present claim, and

(iii) the Trustee wrongfully terminated the donation contract in circumstances where it knew that SMF

(the substantive donee) had been established solely for the purposes of the Salle Modulable project, and so would have no funds of its own with which to finance any litigation (litigation funding apart);

(b) the Trustee funded the project for three years, consequentially engaging the SMF Board, various public officials and ordinary citizens in Lucerne in considerable (often voluntary) effort towards reaching the construction phase; and

(c) the Trustee chose to prematurely terminate the funding arrangements on legally invalid grounds before reasonable attempts to demonstrate feasibility could be exhausted, in a manner wholly inconsistent with the spirit of the imprecise contract entered into.

47. In these unique circumstances, I find that it is only just that the successful Plaintiffs' costs (subject to the adjustments indicated above) should be payable on an indemnity basis out of the Trust Fund. Their claim, as vindicated, may fairly be viewed, by broad analogy, as having been brought for the benefit of the Trust.

Are the Plaintiffs entitled to indemnity costs because of the way the Defendant has conducted the litigation?

48. Mr. Layton submitted that the Plaintiffs ought, alternatively, to be awarded indemnity costs because of the "antagonistic" manner in which the Defendant had contested the present litigation. He referred the Court to examples of correspondence which included some intemperate and occasionally rude criticisms of both the Plaintiffs' witnesses and some of their legal team as well. Mr. Woloniecki responded that these matters were more germane to professional conduct than to the issue of costs. In my judgment, the manner in which the litigation has been conducted is not sufficiently egregious as to impact on the award of costs. Allegations of dishonesty were perhaps bandied about somewhat liberally in the prelude to the trial but this was, on the whole, little more than articulating litigation points (which were ultimately not accepted by the Court) in a melodramatic manner.

49. On the other hand, some brief observations on the topic of lawyerly collegiality are merited. It is possible to conduct litigation aggressively and, through the skilful use of euphemism and understatement, avoid descending to abuse. This 'gentlemanly' art of lawyer to lawyer communications doubtless evolved in England, in now ancient times, but is still practised there today. While many 'Old World' rules of law and practice have been reshaped when transplanted in New World soil, the underlying core values often endure. There is no "*bright dividing-line*" between litigators' duties of collegiality to each other and their duty to assist the Court to achieve the overriding objective. A certain level of cordial relations between opposing lawyers is an important aid to achieving the objective of conducting litigation in an efficient manner; undue acrimony can in extreme cases result in a wasting of costs. As a Canadian legal scholar has observed:

"*[44] Especially the C.B.A. Code strongly addresses the duty of professional collegiality. It states that the lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. This is on the basis that 'Fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially' to the end of serving the public interest effectively and expeditiously...*"[9]

50. As regards the further arguments advanced in paragraphs 105 to 115 of the Plaintiffs' Skeleton Argument, I would not, if required to consider these alternative submissions, award indemnity costs on these grounds.

Summary on costs

51. I Order as follows:

"*Costs*

20. The costs of BTBL of or incidental to or arising out of this action shall be raised and paid on an indemnity basis from the Art I Trust.

21. Subject to paragraph 22 and 23, the Plaintiffs are awarded the costs of the action. For the avoidance of doubt, such costs include the costs of all interlocutory applications where costs were either reserved or awarded in the cause and all costs relating to the final hearing.

22. The said costs shall be paid on an indemnity basis out of the assets of the Art 1 Trust.

23. The Plaintiffs costs shall be subject to the following deductions:

(a) the Plaintiffs shall be entitled to recover 90% of their total costs after applying the deduction referred to in sub-paragraph (b); and

(b) *the Plaintiffs shall be entitled to recover two-thirds of their costs in relation to the preparation of trial bundles of authorities and documents.*"

Payment out of security for costs

52. The Plaintiffs seek payment out of the monies paid into Court as security for costs. The Defendant objects on the grounds that it proposes to appeal and will have no convenient way to enforce any costs orders which may be obtained in its favour as a result of its proposed appeal. The Plaintiffs cited authority in support of their right to payment out; the Defendant cited no authorities supportive of their opposition.

[9] Beverley G. Smith, '*Professional Conduct for Judges and Lawyers*': www.mlb.nb.ca/site/Bookch1.htm.

53. The right to payment out of security for costs lodged by a successful party even where an appeal is pending contended for by the Plaintiffs was supported by reference to two cases of over 90 years' vintage, *The Bernisse and the Elve* [1920] P.1 (at page 7) and the English Court of Appeal decision in *Comitato PortuarioD'Importazione Dei Carboni Fossili de Genova-v-Instone & Co.*[1922] WN 260 (at 261). This principle now seems to be a well settled rule of practice. This view is confirmed by a more recent case (albeit of nearly 50 years' vintage), the unanimous decision of the English Court of Appeal in *Tristan Investments Ltd-v- Methdrell Industries et al* [1965] EWCA Civ JO111-3. Lord Denning (MR, at page 2 of the transcript) held as follows:

> "*This case raises a very short point. The plaintiffs, who are a finance company, brought an action against a hirer and a guarantor under a hire purchase agreement. On the 24th August, 1961, the Master gave conditional leave to defend on the terms that the two defendants paid £1,000 into Court. They paid £1,000 into Court and the action came on for trial in December 1964 before the Official Referee. He decided in favor of the defendants. Whereupon the defendants asked for payment out of the money in Court. After all, they had won the case. The plaintiffs themselves through their counsel said: "I cannot object to that". But the Official Referee then invited an application that the money should stay in Court pending an appeal. He had felt bound to decide in favor of the defendants on what appeared to him to be a technical point. He thought the plaintiffs should appeal; and he invited the plaintiffs to make an application that the money should stay in Court pending the plaintiffs' appeal. The plaintiffs' accepted that invitation. <u>The Official Referee made an order that if an appeal was lodged within fourteen days, then the money was to stay in Court.</u>*
>
> *<u>It is quite plain that the Official Referee had no jurisdiction to make that order. The money was paid in as a condition of leave to defend; and when the defence was successful, it ought to have been paid out. The only object of keeping the money in Court would be so that, if the plaintiffs won the appeal, they would be sure of their money. In short, as security for the satisfaction of the judgment which the plaintiffs hoped to get on an appeal. They have no right to security for that purpose.</u> If authority were needed, it can be found, in the cases to which we were referred, namely, Yorkshire Banking Co. Ltd. v.*

Beatson and Mycock (1879) 4 Common Pleas Division, p. 213 , and also the two cases on securities lodged by a plaintiff who is out of the jurisdiction, The Bernisse and The Elve, 1920 Probate , p 1, and Commutate Portuario D'Importazione dei Carbon: Fossil de Geneva v. Instone & Co. , 1922 Weekly Notes, p. 260." [emphasis added]

54. The Plaintiffs are entitled to an Order in terms of paragraph 22 of their amended draft Order:

"*24. The funds paid into court by the Plaintiffs pursuant to the Order dated 18 October 2012 as security for costs in the sum of BDA$393,775 (together with interest accrued) shall forthwith be returned to the Plaintiffs' attorneys and the said Order shall be discharged.*"

Liberty to apply

55. It was uncontroversial that the following should also be ordered:

"*Liberty to apply*

25.There be liberty to apply, for the purpose of obtaining the Court's directions as to the carrying of the Contract into effect under paragraphs 13 to 17 hereof, and generally in relation to any matter hereunder.

26.Applications for directions pursuant to the liberty to apply be reserved to the Honourable Chief Justice."

Conclusion

56. It is to be hoped that any drafting point or issues of clarification which may arise from the present Ruling can be resolved through correspondence between counsel and the Court.

Dated this 28th day of May, 2014_____

IAN R.C. KAWALEY