Neutral Citation Number: [2023] EWHC 3305 (Ch)

Case No: HC-2015-001414

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 December 2023

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

ASTURION FOUNDATION	**Claimant**
- and -	
ALJAWARAH BINT IBRAHIM ABDULAZIZ ALIBRAHIM	**Defendant**

- -
- -

David Mumford KC and James Kinman (instructed by **Bryan Case Leighton Paisner LLP**) for the **Claimant**
Rupert Reed KC and Simon Atkinson (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing dates: 5, 6, 7, 10, 11, 12, 14, 17, 20, 21 July 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 2PM on 21 December 2023 by circulation to the parties or their representatives and by release to the National Archives.

CONTENTS

Mr Justice Adam Johnson:

Introduction

1. The essential question in this action concerns the validity of a transfer of registered land in England, purportedly undertaken by the Claimant, a Liechtenstein foundation.

2. The foundation's official name is "*Asturion Fondation*", but I will refer to it as "*the Foundation*". It was originally established in Liechtenstein in October 1974. It is common ground that the late King Fahd bin Abdulaziz of Saudi Arabia – then known as Prince Fahd – was the founder. I will refer to him as "*King Fahd*".

3. A foundation is a legal person under Liechtenstein law. However, it does not have members or shareholders. Rather, it is a legal personality attached to a pool of assets dedicated to a particular *purpose*. As explained by the experts, foundations are governed by the *Personen-und Gessellschaftsrecht* 1926 (Law on Persons and Companies) (the "*PGR*"). The Foundation, being a foundation established prior to 1 April 2009 (when the PGR was extensively revised) is governed primarily by the PGR as it was in force prior to that date, subject to some specific exceptions.

4. In this case, the assets making up the Foundation were a number of properties used by members of the Saudi Royal family as residences. From 1977 when it was acquired, they included the property at the centre of the present dispute, a large house known as Kenstead Hall, situated on The Bishop's Avenue in North London. Also forming part of the assets of the Foundation (either directly or indirectly) were Chateau de l'Aurore in Golfe-Juan (the "*French Property*"); land in Grünwald, Germany (the "*German Property*"); and an interest in the Al-Nahda Palace in Marbella (the "*Spanish Property*").

5. The present litigation arises as follows. The Defendant – I will refer to her as "*the Princess*" – is the widow of the late King Fahd. Her case is that, in June and September 2001, King Fahd gave instructions for the four properties I have mentioned, including Kenstead Hall, to be transferred into her name (the instruction concerning Kenstead Hall is dated 2 September 2001 – I will refer to it as the "*2001 Instruction*").

6. The various instructions, including most importantly for this action the 2001 Instruction, were directed to M^{e} Faisal Assaly, a long-standing and trusted adviser to King Fahd, who at the time was a member of the Foundation's board. The instructions were not, however, actioned immediately, and in fact none had been actioned by the time King Fahd died in August 2005.

7. King Fahd's heirs under Islamic or Shari'a law were the Princess (his widow), Prince Abdul Aziz bin Fahd (his son with the Princess) and eight other children from prior marriages, including Prince Mohammed bin Fahd, another son of King Fahd by an earlier marriage ("*Prince Mohammed*").

8. As is customary under Islamic practice, a council of King Fahd's heirs was established to oversee management of his estate ("*the Council of Heirs*"). The Council came to be headed by Prince Mohammed, and had as its adviser a Dr Abdul Mohsen Saad Abdulaziz Al Rowaished ("*Dr Al Rowaished*"), a senior Saudi Arabian lawyer.

9. There were then further delays after the King's death in actioning the instructions I have referred to. Although the German Property was transferred to the Princess in June 2006, the Spanish Property was transferred only in April 2011, Kenstead Hall in October 2011, and the French Property in December 2012.

10. I will explain more in the chronology below, but in short the delays at least partly reflect a question which developed about whether consent of the Council of Heirs was needed, and had been given, before the transfers could be effected. In the event, during late 2010, M^{e} Assaly determined that he should proceed in light of the instructions given to him by the late King, and did so.

11. We are concerned in these proceedings with the transfer of Kenstead Hall. This was effected by means of a transfer of the registered estate of Kenstead Hall via a Land Registry Form TR1, signed as a Deed by M^{e} Assaly and dated 14 October 2011 (the "*TR1*").

12. At the time, the Foundation in fact had three board members. These were M^{e} Assaly, Dr Wiederkeher, a Liechtenstein lawyer, and Prince Mohammed. The fact of its execution by M^{e} Assaly, in particular against the background of some uncertainty about the position of the Council of Heirs, gives rise to one of the objections to the transfer now taken by the Foundation, which is that it was beyond the internal competence of M^{e} Assaly, acting alone, to effect a distribution of the Foundation's assets without engaging the other board members, which he failed to do.

13. The second objection concerns the way in which the Foundation says its assets were to be divided up. This relates to the question of the Foundation's *purpose*, which I have mentioned above. The argument of the Foundation is that part of the *purpose* of the Foundation, as identified by King Fahd himself, was the distribution of its assets to his heirs under Islamic or Shari'a law, either in their Shari'a shares (which would involve the Princess, as widow of King Fahd, receiving a 1/8th share, and King Fahd's sons and daughters sharing the residue on the basis that each daughter received half as much as each son); or if that is wrong, then in equal 1/10th shares. Either way, it is said that the effect of the transfer of Kenstead Hall to the Princess, either alone or in combination with the transfers of the other properties I have mentioned, was to confer on her benefits in excess of her rightful share, and that was contrary to the Foundation's purpose. As this, the Foundation relies on agreed valuation evidence showing that, as at October 2011, the value of Kenstead Hall corresponded to 14% of the value of the overall assets of the Foundation – so in excess of her 1/8th Shari'a share and well in excess of a 1/10th share, which would be even smaller.

14. I will briefly explain below the history of at least some of the litigation which has affected the Foundation. For now it is sufficient to note that the present

claim, together with other claims relating to the French, German and Spanish Properties, is being brought by a new Foundation board, Me Assaly having sadly died in May 2015, and Prince Mohammed having been removed by Order of the Liechtenstein Court of Appeal in April 2017 (as later upheld by the Liechtenstein Supreme Court).

The Case in Outline

15. Against the background I have briefly described, the Foundation's claims are in summary as follows:

    i) To start with, it argues that the transfer of Kenstead Hall to the Princess, supposedly effected by means of the TR1, is in fact void, since such transfer was contrary to the Foundation's purpose, and/or was executed by Me Assaly in excess of his powers under the Foundation's constitution. Either way, Me Assaly lacked authority to execute it and consequently it is of no legal effect.

    ii) If that is wrong, and the Princess did acquire title to Kenstead Hall by means of the transfer, that transfer is liable to be set aside (rescinded), either because it was a voluntary disposition of property undertaken in breach of what English law would characterise as fiduciary duties owed by Me Assaly, and/or on the basis that the transfer was effected by Me Assaly acting under a mistake as to his duties and obligations, which was sufficiently serious as to make it unconscionable for the Princess to retain the benefit of it (see Pitt v. Holt [2013] UKSC 26, [2013] 2 AC 108).

    iii) Alternatively, if that is wrong and if the title acquired by the Princess cannot be set aside and rescinded, then she should be liable nonetheless either (a) to make restitution for having been unjustly enriched, the value of her enrichment corresponding to the value of Kenstead Hall, or (b) to pay damages for having knowingly received and retained the Foundation's property, knowing that it had been transferred by Me Assaly in breach of what English law would characterise as his fiduciary duties.

16. The Princess denies all these claims. Many points are pursued, but the main lines of defence are:

    i) The Foundation's *purpose* was not as the Foundation now argues, and specifically it was not limited by any requirement that its assets were to be distributed to the King's heirs only in accordance with their Shari'a shares or in equal 1/10th shares. On the contrary, it was consistent with the purpose of the Foundation for its assets to be distributed as indicated by the King while alive, and he had an unrestricted right to require the transfer of individual properties to those who would become his heirs on death as he saw fit.

ii) M[e] Assaly had power under the Foundation's constitution to act alone. That follows from the Foundation's basic constitutional document – *i.e.*, its Articles – taken together if necessary with a Power of Attorney granted to M[e] Assaly by the Foundation board in 1988 (the "*1988 Power of Attorney*"), pursuant to which the board delegated to him all necessary powers of management and administration, including (it is said) a power of disposition.

iii) In any event, determining the extent of M[e] Assaly's authority is exclusively a matter of the law of Liechtenstein, which makes no distinction between the concepts of actual or ostensible authority known to English law, and instead asks only whether circumstances have arisen in which the acts of a "*representative body*" (such as a board member) have engaged the liability of the corporation in question – here, the Foundation. Such circumstances have arisen here as regards the transfer of Kenstead Hall, and so the Foundation is to be taken as bound by M[e] Assaly's actions in transferring it, which were within the scope of his *representative authority*.

iv) If that is wrong, and the correct approach is in fact to distinguish between M[e] Assaly's actual and ostensible authority, then M[e] Assaly did have ostensible authority to effect a transfer of Kenstead Hall, even if he was not actually authorised to do so. That is because the Foundation held him out as able generally to enter into transactions on its behalf, by including in the relevant public register in Liechtenstein a reference to him having sole signing rights on behalf of the Foundation. The Princess and her agents relied on that representation in entering into the transfer.

v) Further and in any event, the Princess says she is entitled to the protection afforded by s.26 of the Land Registration Act 2002 ("*LRA 2002*"), the effect of which is that she is deemed to take free of any limitation on the Foundation's power to dispose of the registered estate in Kenstead Hall. Consequently, her title to Kenstead Hall cannot be questioned. That disposes of any argument that the transfer is void, or any argument that it can be rescinded, or indeed any argument that she is liable to account personally for damages for knowing receipt, because any such claim is defeated by the acquisition of an unimpeachable title to the property in question (see, for example, Byers v. Saudi National Bank [2022] EWCA Civ. 43, [2022] 4 WLR 22, now affirmed by the Supreme Court [2023] UKSC 51), and that is what happened here by operation of s.26.

The Evidence

Factual Evidence

17. The factual evidence was as follows.

For the Foundation

18. Dr Wolfgang Rabanser: Dr Rabanser gave a witness statement and was cross-examined. He is a Liechtenstein lawyer and member of the board of the Foundation since 2018. He gave evidence about the background to the litigation and the Foundation's approach to pursuing claims against the Princess for the return of Kenstead Hall and the other properties transferred to her. I am satisfied that Dr Rabanser was an honest witness and accept his evidence that the decision to pursue the present litigation represented the decision of the Foundation's board acting in good faith, in light of the arguments available to it.

19. Dr Al Rowaished: I have mentioned Dr Al Rowaished above. He is a senior and well-respected Saudi Arabian lawyer, reaching the end of a distinguished career, who represented the Council of Heirs and has acted as an expert adviser to the Saudi Arabian government. Dr Al Rowaished filed written evidence and was cross-examined remotely. He gave evidence about the course of his communications with M^{e} Assaly and others in relation to the Council of Heirs' attitude to the transfer of Kenstead Hall. He was frank about the fact that his memory of events which happened 18 years ago was imperfect. I am satisfied that Dr Al Rowaished was an honest witness, but as I note at [130] below, I am not able to accept certain parts of his evidence, which I think he must be mistaken about given it is contradicted by the contemporaneous documents.

For the Princess

20. The Princess: The Princess herself filed a short witness statement but did not appear at trial and was not cross-examined. That did not matter much, since her evidence was very general and of limited significance to the legal issues which arise.

21. Mr Jaber Al Ibrahim: Mr Al Ibrahim (referred to as "*Jaber*") is the Princess's cousin. He provided financial advice to the Princess and assisted with her affairs. He also provided a witness statement but due to pressing personal circumstances did not attend trial and was not cross-examined. Again, with respect, his evidence about the general background in fact adds little if anything to the issues I have to address.

22. Mr David Martin Davies (referred to as "*Martin Davies*"): Mr Davies joined Peter T James & Co as an articled clerk in 1979. He ran the firm's Riyadh office from 1981, then moved to its Washington D.C. office in 1984 before returning to Riyadh in about 1986 and back to London in about 1988. He later became a partner at Howard Kennedy, then Clyde & Co, then Mishcon de Reya. Mr Davies has spent his career servicing wealthy middle eastern clients from offices in London, Washington D.C. and Riyadh. He had a long association with the Saudi royal family, assisting in the management of English assets. This brought him into contact with M^{e} Assaly. He assisted in facilitating the transfer of Kenstead Hall between 2009 and 2011.

23. I found Mr Davies an entirely honest and straightforward witness and accept the evidence he gave. The Foundation in its Closing Submissions was critical of Mr Davies and argued that at the time of the transfer, there were real doubts

about M[e] Assaly's authority to give effect to it, which Mr Davies as an experienced solicitor should have been alive to. In light of the findings I make below about the purpose of the Foundation and the extent of M[e] Assaly's internal competence to act on the Foundation's behalf, those points fall away. In my view, although Mr Davies had imperfect information at the time, he was correct to assume, even on the basis of the information he had, that M[e] Assaly was properly authorised, and further inquiries would only have revealed the same answer.

Expert Evidence

24. I heard detailed expert evidence on the following topics and disciplines.

Liechtenstein law

25. The relevance of Liechtenstein law is obvious. The Foundation is a legal person under the law of Liechtenstein, and key issues concern its structure and internal management and administration, all of which are matters of Liechtenstein law.

26. For the Foundation: I heard evidence from Dr Manuel Walser ("*Dr Walser*"). Dr Walser is a Liechtenstein lawyer and occasional ad-hoc judge on the Liechtenstein Supreme Court and the Liechtenstein State Court.

27. For the Princess: I heard evidence from Dr Harald Bösch ("*Dr Bösch*"), an Austrian and Liechtenstein lawyer and academic, and author of a leading text on the law of Liechtenstein foundations.

28. Both experts were professional and impressive, but as I explain below, where there were material differences between them, I preferred the evidence of Dr Bösch.

Swiss Law

29. Swiss law is only (potentially) relevant as the possible governing law of the 1988 Power of Attorney (mentioned above at [16(ii)]).

30. For the Foundation: I heard evidence from Prof. Dr. Christiana Fountoulakis ("*Dr Fountoulakis*") of Fribourg University.

31. For the Princess: I heard evidence from Prof. Christoph Müller ("*Prof. Müller*"), a professor in the faculty of law at the University of Neuchâtel.

32. Again, both experts were professional and impressive, but had Swiss law been relevant I would have preferred the evidence of Prof Müller on the question of the validity and interpretation of the 1988 Power of Attorney.

Saudi/Shari'a law

33. Saudi/Shari'a law is relevant to certain background matters, including the concept of Shari'a shares and the rights of a deceased's heirs on death. There was little if any disagreement between the experts on this discipline.

34. For the Foundation: I heard evidence from Dr Ali H. Almihdar, a barrister practising in England and in Saudi Arabia.

35. For the Princess: I heard evidence from Dr Faisal Baassiri, a lawyer practising in Saudi Arabia.

36. Both experts were professional, diligent and courteous and did their best to assist the Court.

The Foundation

37. It will be useful to say a little more, briefly, about the history and structure of the Foundation.

Me Assaly/the 1977 Regulation

38. I have mentioned above that the Foundation was originally established in Liechtenstein in October 1974. King Fahd was the founder.

39. Me Assaly was initially appointed to the Foundation's board in December 1976, but in the event this was only a short tenure because he resigned in 1977.

40. Me Assaly's resignation is recorded in an important document headed "*DECLARATION*", made by King Fahd in Riyadh in December 1977. As well as deciding to accept Me Assaly's resignation, this document also records the King's decision to grant "*a general power of attorney to Mr Faisal ASSALY"* (see further below).

41. Additionally, and importantly for present purposes, the Declaration contains what has been called the "*1977 Regulation*".

42. The particular significance of the 1977 Regulation is related to the question of the Foundation's *purpose*. At the time, in December 1977, Article 6 of the Foundation's Articles provided as follows:

> "*Article 6 – Purpose*
>
> *The purpose of the foundation consists of the management of the foundation assets and in the payment to the beneficiaries of regular or extraordinary benefits from the foundation assets or from its earnings within the meaning of the instructions contained in a special regulation.*"

43. This language obviously contemplated a further document, namely a *regulation*. This was provided for under Article 7, which stated:

> "*Article 7 - Regulation*
>
> *It is the responsibility of the founder or his legal successor to issue a regulation regarding the beneficiaries*."

44. The 1977 Regulation was made by King Fahd having regard to his responsibility as founder under Article 7. The 1977 Regulation is as follows:

> "*The undersigned … declares that he is setting the present Rules according to Article 7 of the Articles of Association of the above-mentioned Foundation:*
>
> *1) during his lifetime, the undersigned will be the sole beneficiary of the Foundation,*
>
> *2) in the event of his decease, the beneficiaries of the Foundation will be his legal heirs according to Islamic law (Koran/Shariat).*
>
> *Only the majority of all the heirs may decide:*
>
> *(a) liquidation of the Foundation,*
>
> *(b) the resignation and the appointment of members of the Board of the Foundation,*
>
> *(c) any other decision whatsoever concerning the Foundation.*"

45. It is the 1977 Regulation which, in the view of the Foundation and its expert Dr Walser, had the effect of crystallising the Foundation's purpose in a way which required attention to the interests of the King's *"legal heirs according to Islamic law (Koran/Shariat)"*, and which therefore imposed a limitation on the Foundation's ability to effect distributions of its assets to those heirs in a manner at variance with their Shari'a interests (or at any rate, at variance with their equal treatment).

The 1978 Power of Attorney

46. A document intended to be a general Power of Attorney in favour of M^{e} Assaly was executed by all four of the Foundation's then directors, including Prince Mohammed as Chairman, in February 1978 ("*the 1978 Power of Attorney*").

47. The Liechtenstein law experts were agreed this was not effective because it purported to confer general authority on someone who at the time was not a member of the Foundation's board. Notwithstanding that, however, there is evidence that M^{e} Assaly conducted activities on behalf of the Foundation in reliance on the 1978 Power of Attorney. For example, King Fahd gave an instruction in 1981 for the transfer of certain London properties owned by the Foundation to his sons. The first of these, 2 Bolney Gate, appears to have been transferred to Bolney Gate Holdings N.V. on behalf of Prince Saud in July 1985. The transfer document was executed by M^{e} Assaly. This was before his reappointment to the Foundation Board in late 1985 (see below). Other transfers (of Gainsborough House to Winch Holdings S.A on behalf of Prince Mohammed) and of Risinghurst (to Hawk Holdings Limited on behalf of Prince Sultan) appear to have been made 1987, after M^{e} Assaly's reappointment but before the 1988 Power of Attorney.

1985 – Changes to the Articles/M^e^ Assaly reappointed to the Board

48. A number of changes to the Articles were made in December 1985, following a declaration made by King Fahd.

49. For one thing, as a matter of terminology, King Fahd became known as the "*primary beneficiary*".

50. Further, according to the translation relied on by the Princess at least, the word *"begünstigten"* (i.e. beneficiaries) in Article 7 was changed to *"destinatäre"* (i.e. *"recipients"*). More generally Article 7 was modified to read as follows (the new wording is underlined):

> "*Article 7 - Regulation*
>
> *It is the responsibility of the primary beneficiary to issue a regulation about the beneficiaries [recipients] and if need be further entitled parties. This regulation is irrevocable and binding for the legal heirs of the primary beneficiary, no matter what circumstances, motives or facts have to be taken into consideration."*

51. At the same time, M^e^ Assaly was reappointed to the Foundation's board. Another new board member, Dr Batliner, was also appointed, but he executed a contract of mandate with M^e^ Assaly which required him to do as M^e^ Assaly instructed.

52. In any event, the board members by this stage were Prince Mohammed (referred to as Chair or President), M^e^ Assaly (Vice-Chair or Vice-President), Dr Batliner, and a M^e^ Christ (a Swiss notary).

53. Article 10 of the Articles is headed "*Function of the Foundation Council*". From December 1985, following the re-appointment of M^e^ Assaly, what was then the second paragraph of Article 10 was amended to read as follows – the reference to the Vice-Chair being a reference to M^e^ Assaly:

> *"The Foundation council shall only be bound by the joint signature of its president and vice-president or one of the other members. The foundation council adopts its resolutions in accordance with this principle during meetings or through written correspondence (circulars, telegrams, telex). The foundation council may transfer the exercise of part or all of the powers vested in it to one of its members, to the primary beneficiary, or to another person nominated by the latter."*

1988 – The 1988 Power of Attorney

54. In 1988 a further general Power of Attorney was executed in favour of M^e^ Assaly, who by this time was a member of the Foundation's Board, apparently under the power vested in the Board under Article 10(2) (the "*1988 Power of Attorney*"). The 1988 Power of Attorney is signed by Prince Mohammed and

by M[e] Christ, but not by M[e] Assaly (the donee of the power), or by Dr Batliner. There are issues to address about the validity of the 1988 Power of Attorney and I will need to come back to it below (see at [218] *et seq*.). It is also this document about which there is a dispute concerning its governing law: the Foundation argues it is governed by Swiss law, and the Princess argues it is governed by the law of Liechtenstein. This is why the parties produced evidence on Swiss law.

1993 – Sole Signature Right for M[e] Assaly

55. Article 10 of the Foundation's Articles was amended again in 1993. Importantly, the second paragraph was amended as follows:

> " *... The Foundation council shall only be bound by the joint signature and one of its president and one of the other members. Notwithstanding the foregoing, the Vice-President shall be entitled to sole signature. The Foundation council adopts its resolutions in accordance with this principle during meetings or through written correspondence (circulars, telegrams, telex).*"

The Relevant Articles in full

56. By 1993, and at all material times thereafter including in October 2011 when the transfer of Kenstead Hall took place, the key provisions of the Foundation's Articles read as follows (although sub-paragraphs are not numbered in the original text, I have added numbering below for ease of reference later in this Judgment, and I should also add that in relation to the 1993 Articles the Princess again makes the same point recorded at [50] above, namely that the word "*destinatäre"* in the German version should be rendered as *"recipients"*, rather than *"beneficiaries"*):

> "*Article 6 – Purpose*
>
> *The purpose of the foundation consists of the management of the foundation assets and in the payment to the beneficiaries of regular or extraordinary benefits from the foundation assets or from its earnings within the meaning of the instructions contained in a special regulation, but excluding the operation of a business managed in a commercial manner.*
>
> *Article 7 - Regulation*
>
> *It is the responsibility of the primary beneficiary to issue a regulation about the beneficiaries and if need be further entitled parties. This regulation is irrevocable and binding for the legal heirs of the primary beneficiary, no matter what circumstances, motives or facts have to be taken into consideration.*

Article 8 – Disbursements

(1) Within the regulations issued by the primary beneficiary the foundation council decides the amount and the type of payments to the foundation beneficiaries.

(2) If the primary beneficiary has not issued a regulation the foundation council will decide at its own discretion regarding the appointment of beneficiaries and the extent of their benefits.

(3) The foundation beneficiaries shall not be deprived of the amounts allocated to them by possible creditors, either through enforcement or through bankruptcy.

Article 9 – Foundation council

(1) The foundation will be administered by a foundation council consisting of at least three members.

(2) The members of the foundation council will be appointed or revoked by the primary beneficiary.

(3) Each member of the foundation council must inform the secretariat of the foundation council by means of registered letter in a case of his resignation.

(4) Should the primary beneficiary be prevented under all titles from appointing a member of the foundation council, the remaining members of the foundation council are empowered to proceed to the appointment as long as this appears necessary in the interests of the primary beneficiary as well as those of the foundation.

(5) If no members of the foundation council remain or if the same is no longer in a position of fulfilling the duties allocated to it, the right to appoint new members of the foundation council will be granted to the legal representative; in such case, the same has to take into account the intention of the primary beneficiary expressed in the regulation of the foundation.

Article 10 – Function of the Foundation Council

(1) The foundation council represents the foundation in a legally binding manner toward the foundation beneficiaries as well as third parties, and determines the will of the foundation through its resolutions in accordance with the provisions of these statutes.

(2) It constitutes itself according to the instruction of the primary beneficiary and designates those persons who are authorized to represent the foundation. The foundation council shall only be bound by the joint signature of its president and one of the other

> *members. Notwithstanding the foregoing, the Vice President shall be entitled to sole signature. The foundation council adopts its resolutions in accordance with this principle during meetings or through written correspondence (circulars, telegrams, telex).*
>
> *(3) The foundation council may transfer the exercise of part or all of the powers vested in it to one of its members, to the primary beneficiary, or to another person nominated by the latter.*
>
> *(4) It administers the foundation in agreement with the purpose of the same and in line with the instructions and directives of the primary beneficiary, the same being of a binding character in this context.*
>
> *…*
>
> *Article 13 – Amendments to the statutes and dissolution of the foundation*
>
> *The primary beneficiary is authorised to amend the statutes or the organisation of the foundation and may dissolve the foundation, either wholly or in part, in observance of the provisions of the law. Such amendments to the statutes, in their entirety or in part, must be within the framework of the purpose of the foundation. They must always comply with the intention of the primary beneficiary expressed in the regulation of the foundation.*"

Public Register

57. Some (limited) information about foundations is made available publicly by means of entries at the Public Registry Office.

58. By the time of the transfer of Kenstead Hall if not before, the register entry describing the Foundation's purpose read as follows:

> *"Purpose – the purpose of the Foundation is to manage the assets of the foundation and to provide the beneficiaries with regular or extraordinary benefits from the assets of the foundation or from its income in accordance with the instructions contained in special regulations, but excluding the operation of a business operated for commercial purposes."*

59. This language was essentially the same as that in the original Article 6 (see above at [42]), but with some additional (and irrelevant) language at the end, added by later amendment.

60. M[e] Assaly's sole signing right, as created in 1993 (see above at [55]) was also reflected in the public register. The relevant entries provided:

> "*Notes –*
>
> *…*
>
> *General rules on representation: The President shall sign jointly with one of the other members. The Vice President shall sign individually.*
>
> *…*
>
> *Administrative details -*
>
> *…*
>
> *Assaly, Faisal – Vice President of the Board of Trustees – Individual signature.*"

Other Relevant Background

61. Other matters of factual background are relevant. I set out what seem to me the key points below.

The 2001 Instruction

62. Mr Davies dealt in his evidence with the background to the 2001 Instruction concerning Kenstead Hall. Mr Davies had retained a handwritten note of a meeting he attended in London on 28 August 2001. The meeting was with M[e] Assaly and Mr Faez Martini. Mr Martini was a senior figure at the Saudi Arabian Embassy in London, who acted as a regular point of contact for Mr Davies in relation to instructions concerning King Fahd and other members of the Royal family. Mr Davies referred to Mr Martini as the "*Head of Royal Protocol*", or sometime just "*the Royal Protocol*".

63. Mr Davies' instructions came from M[e] Assaly. They were to the effect that King Fahd wished to effect a transfer of Kenstead Hall to the Princess. This is borne out by the handwritten note, which includes the following:

> "*own name: ALJOHARA ALABDULAZIZ ALBRAHIM*
>
> *King in his name to his wife in her own name*"

64. Mr Davies found nothing unusual in this instruction, since it was similar to past dealings with properties owned by the Foundation. In his evidence in the Liechtenstein proceedings before his death, M[e] Assaly consistently maintained the position that he had been given oral instructions by King Fahd to transfer the four properties I have mentioned above, including Kenstead Hall, to the Princess. His evidence was that the properties were all acquired during the

marriage of King Fahd to the Princess, and had been used exclusively by the King, the Princess, and by their son HRH Prince Abdul Aziz. M[e] Assaly said it was therefore understandable that the King wished the properties to remain at the exclusive disposal of the Princess and of his son Prince Abdul Aziz, after his death as before.

65. Mr Davies explained that he was instructed to produce a document intended to give effect to the King's instruction. Mr Davies was thus the one who produced the text of the 2001 Instruction. As signed by the King – it is dated 2 September 2001 - this provides as follows:

> *'This letter is my formal and binding authority to His Excellency, Mr. Faisal Hikmat Assaly, holder of Saudi Arabian Diplomatic passport No. 994-2, to do all that is necessary to effect the transfer by way of gift of all of my legal and beneficial ownership and interest of any nature in the property known as Kenstead Hall, the Bishops Avenue London N.2., registered at H.M. Land Registry in the name of Asturion Foundation and registered with Title Number MX 384245, to my wife, Princess Aljohara Brahim Al Abdul Aziz Al Brahim.*
>
> *This formal binding authority empowers His Excellency Mr. Faisal Hikmat Assaly to instruct all persons, companies, trustees and other agents and representatives responsible for the legal and administrative affairs of Asturion Foundation of Vaduz, Liechtenstein, to prepare and execute all documents and resolutions as may be required to effect the said transfer of Kenstead Hall to Princess Aljohara Brahim Al Abdul Aziz Al Brahim and to co-operate with representatives of Princess Aljohara Brahim Al Abdul Aziz Al Brahim in all matters relating to the registration of her name as the legal and beneficial owner of the property at H.M. Land Registry without restriction or encumbrance and as may otherwise be necessary.*
>
> *His Excellency Mr. Faisal Hikmat Asaly [sic] is also hereby empowered to employ such legal and other representatives as he may think fit to prepare and advise upon the transfer referred to above."*

66. At the same time as preparing the 2001 Instruction, Mr Davies was also instructed by M[e] Assaly to prepare a power of attorney, by the Princess in favour of her son, Prince Abdul Aziz. This was executed in September 2001, and relevantly, by its terms Prince Abdul Aziz was authorised:

> *"(a) To execute sign and deliver on my behalf all such deeds and documents … necessary … for carrying out into complete effect … the transfer of the Property from my husband … and the Asturion Foundation to me and to ensure registration of me as owner of the Property.*

> *(b) To manage the Property and to take all necessary measures to do so including giving instructions and appointing any person which my Attorney shall think fit*."

2005 – The Death of King Fahd

67. King Fahd died on 1 August 2005. As I have mentioned, on his death his heirs were identified as the Princess, his five sons and his four daughters – i.e. 10 heirs, five male and five female.

68. No further steps had been taken by the time of King Fahd's death formally to vest title to Kenstead Hall (or any of the other three relevant properties) in the Princess. This was despite the King having signed the 2001 Instruction in September 2001. The signed 2001 Instruction only emerged after the King's death. Mr Davies however said this was not unusual: in such families, in his experience, matters would often be left unactioned for extended periods of time. I accept that as evidence of Mr Davies' experience.

69. It seems that M^{e} Assaly was concerned though about the continuing effect of instructions given by King Fahd before his death, but not yet implemented. He was approaching the matter from the point of view of someone well familiar with principles of Islamic or Shari'a inheritance law. This is strict about the division of a deceased's estate in accordance with the required Shari'a shares, and any deviation from that principle requires unanimous agreement of the heirs.

70. At the time the board members of the Foundation included a M^{e} Christ. A note of a meeting M^{e} Assaly attended with M^{e} Christ in Geneva on 14 September 2005 contains the following statement:

> "*Furthermore, Maitre Assaly can no longer fulfil instructions which would have been given to him by King Fahad before his death without the agreement of his heirs*."

71. On 31 October 2005, however, M^{e} Assaly had a meeting with Prince Mohammed in Jeddah. This seems to have assuaged M^{e} Assaly's concerns, at least based on his interpretation and understanding of what was discussed. He prepared a note, which reads as follows:

> "*I met His Royal Highness* ***Prince Mohamad Bin Fahd Bin Abdul Aziz*** *at his house in Jeddah that day upon his request and he told me:*
>
> *'We agree to respect the will of His Majesty the King Fahd and to carry out his orders with regards to the transfer of the four relevant palaces on behalf of his wife, Princess Alijohara Alibrahim*
>
> *And I answered: it is a noble decision.*"

72. There is though an issue about what was actually said. In his later evidence in the proceedings in Liechtenstein, Prince Mohammed indicated that he had conceded only that he (and the heirs) would honour instructions given while the King was in good health. This did not necessarily include the instruction in relation to Kenstead Hall.

73. In any event, on 9 December 2005 M^{e} Assaly sent to Prince Mohammed copies of what he described as the "*Four Royal Commandments*" which included the 2001 Instruction dealing with Kenstead Hall.

2006 – Initial plans for the transfer of Kenstead Hall

74. Efforts progressed with a view to the transfer of Kenstead Hall. One issue was the tax treatment of the proposed transfer. This presented some sensitivity for M^{e} Assaly, because he interpreted the instruction given to him by King Fahd literally, and as requiring any transfer to be to the Princess in her name. Notes of a meeting in Geneva on 10 February 2006 indicate there were discussions about the transfer being to a newly formed company which was wholly owned by the Princess. A later note from Mr Martini to the Princess's brother, Sheikh Majed Ibrahim, dated 26 February 2006 shows that this proposal was later modified, so that Kenstead Hall would first be transferred to the Princess (which would "*allow M^{e} Assaly to implement the written instructions in his possession*"), and then as a second step transferred to a newly formed company owned by her.

75. On 6 June 2006, the German Property was transferred to the Princess by M^{e} Assaly.

2007-2009 – A period of inactivity

76. The transfer of Kenstead Hall did not however progress.

77. The reasons are obscure, and the documentary references are sparse, but a clue may be provided by a note sent to M^{e} Assaly by the Princess's son, Prince Abdul Aziz, on 5 May 2009 in which he said:

> "*You asked me about my statement with regard to the four palaces of which my late father ordered the transfer of ownership in the name of my mother, Princess Al-Jawharah-Alibrahim.*
>
> *I declare and swear before God that he gave her these houses. I also swear before God that this matter was settled after the death of the King during a meeting […] Please finalise all of this by transferring the ownership into the name of my mother … as soon as possible*."

78. This suggests possible disagreement among the heirs about the properties including Kenstead Hall, and it seems a possible difference of view about what had or had not been agreed during a meeting following the King's death.

79. In any event, by 14 August 2009 Mr Davies, then a partner at Howard Kennedy, was able to send a letter to the *Royal Protocol* Mr Martini, summarising certain matters which needed to be addressed concerning the intended transfer of Kenstead Hall. Among other points, Mr Davies said the following:

> ***"1. Formalities on behalf of Asturion***
>
> *It will be necessary for Asturion to execute one or more documents to give effect to the transfer to HRH Princess Alijoharah's company. I understand that Maitre Faisal Assaly remains on the Asturion Board and is a signatory on behalf of Asturion. It therefore seems likely that Faisal Assaly will need to sign any transfer documents, as has been the case with previous transfers, together with any other stipulated signatories …*
>
> ***2. HM King Fahd's Heirs***
>
> *As a matter of professional conduct, I would need to receive confirmation that HM King Fahd's other heirs are aware of and approve the transfer of the Property from Asturion to HRH Princess Aljoharah."*

80. Mr Davies was cross-examined closely about the effect of paragraph 2, but I accept his evidence that he included it as a matter of prudence, given his experience of other family situations, and not as a legal requirement. That seems to me entirely logical and consistent with the probabilities, given Mr Davies' naturally cautious approach and long experience. Paragraph 2 is not expressed as indicating a legal requirement, and it is notable that it is addressed in a separate paragraph from the formalities governing the transfer on the part of Asturion, which is where one would naturally find any relevant legal requirements, given that Kenstead Hall was owned by the Foundation.

81. By December 2009 Mr Davies was in contact with a Dr Grabner, a lawyer at the Liechtenstein firm of Marxer & Partner. On 4 December 2009 Mr Davies sent Dr Grabner an initial checklist of matters relevant to a transfer of Kenstead Hall, including:

> " *… obtaining up to date information from the Register or other authentic source as to the good standing, Board members, signatories etc of Asturion*."

82. On the same day Mr Davies also sent a letter to Mr Martini with a "*Summary of Documents*" which Mr Davies thought would be "*required in effecting the proposed transfer of Kenstead Hall*". As Mr Davies explained in his covering letter, his *Summary of Documents* included:

> " *… a confirmation from Asturion Foundation that Asturion Foundation has the authority of the beneficiaries following HM King Fahd's death*. *I appreciate that this may be sensitive but I believe it is appropriate in the circumstances*."

83. It seems to me this reference is a little more ambiguous as to whether Mr Davies at the time considered the "*authority of the beneficiaries*" (which seems to me a reference to King Fahd's heirs) as a legal requirement of the Foundation itself. But if he did, it was no more than a guess, because he did not have an up-to-date picture of the Foundation's constitution, hence his enquiries of Dr Grabner the same day. He was shooting in the dark, and if he did think consent of the beneficiaries was a requirement under the constitution of the Foundation, he was wrong, as I will explain below.

84. By 14 December 2009 Marxer & Partner had obtained a copy (in German) of the public register for the Foundation. Dr Florian Marxer emailed Mr Davies to explain that it showed Prince Mohammed as President and M^{e} Assaly as Vice-Chair. On 21 December Mr Davies, who had just returned from abroad and anticipated matters moving forward in the next few weeks, wrote again to Dr Grabner to ask whether he could confirm that M^{e} Assaly was entitled to sign on his own. Dr Grabner responded excitedly:

> *"Pursuant to the extract of the Register dated 14 December 2009 I may confirm that Maitre Assaly has a sole signature right, so he is entitled to sign on his own for and on behalf of the Foundation!"*

January and February 2010 – Permission of the Council of Heirs

85. On 7 January 2010 Mr Davies sent a further letter to Mr Martini about the logistics for transferring Kenstead Hall. He had by this stage met the Princess herself in Riyadh, and had obtained her written authority to proceed. In his letter to Mr Martini, Mr Davies said the following:

> *"As some time has passed since the proposed transfer was first discussed, I believe it to be appropriate to notify the King's other heirs of the proposed transfer as soon as possible. In this way, the heirs or a senior member of the Family will have an opportunity to acknowledge the position and confirm that there is no objection to the transfer."*

86. What happened next is controversial.

87. The available documents include a note prepared by Mr Martini dated 14 January 2010 and sent to M^{e} Assaly. It refers to the fact that M^{e} Assaly " … *has the right to sign in the name of the Company, also relying in this regard on direct instructions from His Majesty*". This seems to be a reference to the information recently obtained by Marxer & Partner, the Liechtenstein law firm instructed by Mr Davies.

88. The letter goes on though to refer to Mr Davies' requests for confirmation from the heirs, and then states that the matter was discussed by Mr Martini with Prince Mohammed during a meeting in Paris on 13 January 2010. The note then continues:

> *"… His Highness replied that the approval of the Commission is a legal requirement in such transactions, and promised to contact Dr Abdulmohsin Al Rowaished, the authorized member of the said Commission, in this regard to ask him to respond officially*."

89. Mr Martini also sent a copy of his note to Jaber and copied to Mr Davies on 14 January. The note was in Arabic and so not immediately intelligible to Mr Davies, but Mr Martini's covering email to Jaber said: "*We will also require a 'no objection' letter from the rest of the heirs or an explicit statement from Mr Assaly that the point is covered for due diligence*."

90. It is therefore clear that by this stage, it appears as a result of the cautious approach taken by Mr Davies, the question of consent of King Fahd's heirs had crystallised into an issue affecting, in particular, the plan to transfer Kenstead Hall.

91. Moreover M[e] Assaly – who at an earlier stage had thought that any necessary consents had been provided by Prince Mohammed at their meeting in Jeddah in October 2005 (see above at [71]) - was on notice of it. That is confirmed by one of his documents, headed "*CASE MONITORING NOTES*", which contains a number of entries on the topic of the heirs' consent from 2010 and 2011. The first entry is dated 14 January 2010, and provides:

> *"According to the letter from Faez Martini … [Prince Mohammed] told him on 13 January 2010 that he would contact Dr Abdul Mohssen Alrwaished … to reply officially concerning the agreement of the council of heirs on the transfer of the four properties … according to the orders of his late majesty King Fahd."*

92. On 8 February, Mr Davies sent an update to Jaber. He said he had been in contact with Mr Martini, who in turn had spoken to Dr Al Rowaished:

> "*When I spoke to Faez [Martini] he reported to me that he had had a conversation with the (sic.) Dr Al-Rowaisheed, the lawyer, in respect of the confirmation awaited from the other heirs regarding the transfer. Faez reported that Dr Al Rowaisheed said that there would be a definitive answer during the course of this week.*"

93. That is consistent with another note prepared by Mr Martini dated 13 February 2010, in which he referred to having contacted Dr Al Rowaished several times, the last of which was on 8 February, during which Dr Al Rowaished had indicated he would respond by the end of the week. Mr Martini said he was still waiting for that response. He also recorded having spoken to M[e] Assaly, who had called him on Saturday 13 February, to ask whether any response had been received, and who had said that "*in the event we do not receive the said letter, the situation will be 'negative', and will give rise to negative attitudes that will concern other instructions and orders*!" Mr Martini went on, "*The matter is*

further complicated by the absence of a firm decision from the persons who have a right to decide in such sensitive matters."

94. Mr Martini sent his note by email to Jaber on the same day, Saturday 13 February. His covering email suggests a high degree of concern and anxiety. He was plainly concerned that matters were slipping out of control or at least that issues were emerging which he was not capable of resolving.

95. The matter continued to be unresolved, and plainly was a cause of anxiety for both Mr Martini and M[e] Assaly. Further notes from Mr Martini dated 20 and 22 February indicate that he had had an inquiry from M[e] Assaly, who was interested to know who paid for the accounts of what Mr Martini called "*the London palaces*." When Mr Martini indicated that the expenses, including those of Kenstead Hall, were paid by "*His Royal Highness Prince Abdulaziz ben Fahad ben Abdulaziz and his mother*", based on statements submitted by Mr Martini, M[e] Assaly is reported to have said, " *... this will provide legal evidence in favour of the Prince's mother*."

February 2010 – Mr Davies' Letter of 26 February

96. A series of exchanges between 24 and 26 February show Mr Davies and Mr Martini between them seeking to balance competing interests but with the benefit of imperfect information. The competing interests were, on the one hand, the desire to deal with M[e] Assaly in a way that was as simple and straightforward as possible, versus on the other the sense that any transfer would need to be carried out in a manner consistent with the Foundaton's constitutional documents.

97. Mr Davies had imperfect information because, although he had the confirmation as to M[e] Assaly's signing power taken from the Liechtenstein public register (reconfirmed in an email dated 24 February 2010 from Dr Marxer, in which Dr Marxer said that M[e] Assaly could therefore "*represent the Foundation within the boundaries of the Law, the Articles ('Statutes') and By-Laws*"), Mr Davies did not have up-to-date copies of the Foundation's constitutional documents. Dr Marxer thought that might be important:

> "*Whether Maitre Assaly (respectively the Foundation Council in its entirety) is empowered to dispose of the London property in general and to transfer said property to a company linked to one of the beneficiaries in special can only be answered after examination of the foundation documents (i.e. the Statutes and By-Laws).*"

98. It is clear that Mr Davies did not have up-to-date copies of the Foundation's constitutional documents because on 5 February he had written to M[e] Assaly, c/o Mr Martini, asking for them (he said it would be most helpful if M[e] Assaly could kindly provide a copy of "*Asturion's By-Laws and Statutes for my records ...*"). These had not been received by the end of February, however, and it seems were never received.

99. Nonetheless, on 26 February 2010, Mr Davies sent a letter to M[e] Assaly confirming M[e] Assaly's signatory power and entitlement to effect a transfer of Kenstead Hall.

100. The final version of the letter was however preceded by two earlier drafts, which were somewhat more cautious in tone and content than the final version.

101. For example, the first draft said:

> *"I also confirm that subject to any express contrary provisions in the Statutes and By-Laws of the Foundation and within the usual boundaries of the law you are entitled to transfer Kenstead Hall to a company linked to one of the beneficiaries."*

102. The second draft, dealing with the same topic, said:

> "*I confirm you are legally entitled, subject to any express contrary provisions in the Statutes and By-laws of the Foundation, to transfer Kenstead Hall, situated in London, in compliance with the instruction given to you by the late King Fahd to his wife Princess Alijawhara bint Ibrahim A Al Ibrahim*".

103. The final version said simply:

> "*I also confirm that you are legally entitled to transfer Kenstead Hall, situated in London, in compliance with the instruction given to you by the late King Fahd to his wife Princess Alijawhara bint Ibrahim A Al Ibrahim*."

Consent of the Heirs – Prince Mohammed's visit to London

104. Matters still did not progress, however.

105. The fragmentary evidence suggests that, whatever was said by Mr Davies in his letter, M[e] Assaly remained cautious.

106. In an email to Mr Davies and Jaber dated 14 March 2010, Mr Martini recorded M[e] Assaly as specifically requiring *"... a positive answer from Dr Al-Ruwaished, supported by all the other heirs speaking on their behalves collectively, before he will proceed*", which Mr Martini thought was (or probably was) a change from M[e] Assaly's previously stated position.

107. Prince Mohammed visited London between 28 April and 2 May 2010. One of the topics discussed during his visit was the question of the London properties, including Kenstead Hall. On 8 May Mr Martini, who had attended the relevant meeting, sent a Report to Dr Al Rowaished, which he copied also to Mr Davies (to whom he also spoke, given that the Report was in Arabic), and to Jaber. The Report explained the background in some detail, and made the point that an indication of non-objection from the Committee of Heirs had been requested both by Mr Davies and by M[e] Assaly. Mr Martini referred to the somewhat ominous statement from M[e] Assaly that if a negative answer were to be

received, that would "*compromise, relate and concern other instructions and orders!*" (see [93] above).

108. Mr Martini's report then recorded the reaction of Prince Mohammed at their meeting. The report says that the matter would be referred to the "*Heirs Commission*", and then states that Prince Mohammed:

> " *... instructed me, Faez Martini, together with Abdulmohsin Al Rowaished, to offer these properties, or any part thereof, to determine their market value. As such, I requested from His Highness to provide me with a written order, to be signed by him or by his authorized delegate, that clearly confirms his desire and instruction to take this measure and provide Their Highnesses or whomever he specified with the information I collect in this regard*."

Consent of the Heirs – Dr Al Rowaished's visit to M[e] Assaly in Geneva

109. Also in May 2010, Dr Al Rowaished met M[e] Assaly (probably on more than one occasion) in Geneva. M[e] Assaly produced a note dated 19 May. The note is not that easy to follow in translation, but the clear gist of it seems to be as follows, namely that although M[e] Assaly was clear in his recollection about what Prince Mohammed had originally said to him at their meeting in Jeddah (i.e., that "*we agree to respect the royal will in the orders issued by King Fahd*" – see above at [71]), there was now a complication because of the "*reservation*" recently expressed by Prince Mohammed which required the *"referral of the matter to Doctor ... Alruwaished ... to obtain an official response*." This "*precautionary reservation*" meant that the "*steps taken*" in the meantime, which included the Princess having "*taken possession of the Hampstead Palace*", had "*become tainted with a legal irregularity*." In consequence, said M[e] Assaly:

> "*This resulted in me hastening to suspend the proceedings relating to the three palaces: Hampstead in London, Al-Shourouq in the South of France and Al-Nahda in Marbella, and to inform her Royal Highness Princess Aljawharah while awaiting the position of the person in charge officially for the 'Committee of heirs', Dr Abdel Mohssen Alrwaished*."

110. The German Property was not referred to, because of course by then it had already been transferred to the Princess, in 2006.

111. M[e] Assaly was plainly left with the impression that there would be a quick response. His Case Monitoring Notes (see above at [91]) contain the following entry for 21 May 2010:

> *"Dr Abdel Mohssen Alrwaished told me that HRH Prince Mohamed bin Fahd will reply to me on this subject and that he (Prince Mohamed) will be visiting Geneva in two weeks."*

112. In the event, Prince Mohammed did not visit Geneva, and it seems that as far as M[e] Assaly was concerned, he never received the reply he was expecting.

113. I think that is again clearly confirmed by M[e] Assaly's Case Monitoring Notes. The entry for 30 December 2010, referring to the entry above for 21 May 2010 and the promise of a response, states:

> "*This never happened. To date, I have not received any reply from them*."

114. To similar effect, the Case Monitoring Notes for 2 January 2011 say as follows. The tone is rather more intemperate (emphasis in original):

> "*After the lapse of more than seven months since the promise by Dr Abdel Mohssen Alrwaished and without obtaining from him, as the party responsible for the council of heirs, the transfer measures shall resume on the basis of the declaration by HRH Prince Mohammed bin Fahd on 31/10/2005, at his home in Jeddah, regarding the four orders of his late Majesty King Fahd: 'the orders given by His Majesty King Fahd while alive must be respected and executed*."

115. While it is true that Prince Mohammed did not visit Geneva in June 2010, he did write to M[e] Assaly from Saudi Arabia, acknowledging the discussion M[e] Assaly had had with Dr Al Rowaished in Geneva. Prince Mohammed said:

> "*I would be grateful if you could send to Dr Alrwaished a report on all the real property that you supervise, whether the properties are located in Europe or elsewhere, accompanied by a separate financial valuation for each property so that we and the other heirs can give a ruling on them*."

116. There may have been some confusion about what this letter was referring to, as I will explain further below. In the meantime, however, it is quite plain that M[e] Assaly had become exasperated, and had run out of patience, and so began to undertake transfers of the three remaining properties to the Princess.

2011- Transfers of the Spanish Property and of Kenstead Hall

117. Consistently with that, the Spanish Property was transferred in April 2011.

118. By August 2011 Mr Davies, who by that time had moved to Clyde & Co and had become a partner there, was dis-instructed by the Princess, it seems because she was frustrated about the delays in transferring the remaining properties, which she thought Mr Davies had contributed to by being unduly cautious and raising the question of the heirs' consent unnecessarily. That said, she was happy for Clyde & Co, Mr Davies' new firm, to represent her in connection with the proposed transfer of Kenstead Hall, and Mr Davies remained involved behind the scenes, providing information and support to a conveyancing partner, Mr Robert Pilcher.

119. Mr Pilcher sent a letter to Mr Martini on 15 September 2011. Amongst other matters, he said he would need to obtain evidence of M[e] Assaly's authority to sign on behalf of the Foundation together with confirmation that the Foundation was still in existence and capable of entering into the transfer of the property. He said he would undertake the work required via a reputable local firm to deal with these points.

120. The documents then show Mr Davies making inquiries of Dr Grabner and Dr Marxer by email dated 15 September 2011. He asked for confirmation of the following on an urgent basis:

> "1. *that Asturion Foundation is in good standing;*
>
> *2. obtaining extracts of the Public Registry and confirming the current members of the Foundation Council and the Foundation's domicile;*
>
> *3. that Maitre Faisal Assaly still has sole signatory powers (You mentioned last time that this means that Maitre Assaly can represent the Foundation within the boundaries of the law, the Articles ('Statutes') and the By-laws; and*
>
> *4. can you obtain copies of the statutes and the by-laws or do we need to obtain these from Maitre Assaly direct? (Please do not make any contact with Maitre Assaly*)."

121. When Dr Marxer responded on 23 September he said he had requested a copy of the current registry extract from the Public Registry. He made the point that beyond that, the current Articles could only be obtained by someone showing evidence of a legal need, but went on to say that in any event these would probably be no more than "*boiler plate*" and that the By-laws (in effect, the non-public documents like the 1977 Regulation) were likely more important, but these would have to be obtained from M[e] Assaly.

122. By October 2011, Dr Marxer was able to supply a copy of the latest Registry extract, as promised. Amongst other matters, Dr Marxer indicated that this showed the following (reflected in the summary above at [57]):

> "*Asturion Foundation is a registered foundation and no liquidation proceedings have been started.*
>
> *The current members of the Foundation Council are Maitre Faisal Assaly (Vice-Chairman), Prinz Mohamed Ben Fahad (Member) and Dr Alex Wiederkehr (Member and Secretary). There is no Chairman.*
>
> *…*
>
> *Maitre Assaly has sole signatory powers*."

123. As regards the Foundation's Articles and By-laws, Dr Marxer referred to his previous email, and indicated that as per Mr Davies' instruction they had not sought to contact M[e] Assaly.

124. Mr Davies forwarded this email and the accompanying Registry extract to Mr Pilcher on the same day, 11 October.

125. It seems that matters proceeded on that basis, and that Mr Davies never received copies of the up-to-date Articles or By-laws of the Foundation.

126. Thereafter the TR1, effecting a transfer of Kenstead Hall from Asturion Foundation to the Princess, was executed by M[e] Assaly as a deed (his signature being duly witnessed) on 14 October 2011.

2012 –Exchanges between M[e] Assaly and Prince Mohammed

127. On 23 January 2012, M[e] Assaly provided a note to Prince Mohammed, it seems in response to Prince Mohammed's request at [115] above, setting out details of a number of European properties and giving valuations for them. Prince Mohamed replied on 13 February 2012, thanking M[e] Assaly but pointing out that his report did not include details of Kenstead Hall or other properties in Cannes, Marbella, Munich and Geneva. M[e] Assaly replied on 25 February, and pointed out that Kenstead Hall, together with the properties in Munich and Spain had all now been transferred to the Princess, although the French Property was still owned by the Foundation.

128. This prompted a very concerned and unhappy response from Prince Mohammed, who signed himself as chairman of the Council of the Liquidation of King Fahd's Estate. Prince Mohammed pointed to the note from M[e] Assaly dated 19 May 2010, in which he had indicated he was suspending activities in connection with (*inter alia*) Kenstead Hall (see above at [109]). Prince Mohammed's response also expressed concerns about the possible validity of the orders given by King Fahd in 2001, including that in relation to Kenstead Hall, given both the state of the King's health at the time and the fact – as M[e] Assaly himself had acknowledged – that the signed orders had not in fact been presented to him until some 4 years later, after the King's death. Referring to the meeting in Jeddah with M[e] Assaly in October 2005, shortly after the Kings death, the note suggested that any comment which may have been made by Prince Mohammed about honouring the King's wishes had not been concerned with orders given during the King's period of illness. Further, the general point was made that such orders as may have been given were vitiated on the King's death.

129. M[e] Assaly held firm in his response dated 28 March 2012. His points, essentially, were that he had waited for a response from Dr Al Rowaished, but none had ever been forthcoming; and that he placed particular reliance on what Prince Mohammed himself had said in their meeting in Jeddah on 31 October 2005. His response concluded by implying that he was now essentially powerless to act, having implemented the late King's instructions, and that any unwinding of the steps taken would have to involve a Court judgment in the jurisdictions were the transfers had taken place.

130. Incidentally, a copy of M[e] Assaly's response bears a fax header indicating it was sent to Dr Al Rowaished at his room at the Dorchester Hotel in London. Dr Al Rowaished disavowed any knowledge of this, but I think he must be mistaken, and must have forgotten receiving it. Dr Al Rowaished also maintained in evidence that it had been made clear by him orally to M[e] Assaly at their meetings in Geneva that the Committee of Heirs had not consented and would not consent to the transfer of Kenstead Hall. Again, however, it seems to me that Dr Al Rowaished must be mistaken about this, given the distance of time from the relevant events, because his recollection is contradicted by the contemporaneous documents, most particularly M[e] Assaly's note of 19 May 2010 and the entries in his Case Monitoring Notes.

131. In any event, the battle lines were thus clearly drawn. Prince Mohammed, again on behalf of the Heirs' Committee, wrote on 14 April 2012, giving M[e] Assaly one week to re-transfer to the Foundation the properties in question, including Kenstead Hall. The letter again hinted at the idea that the relevant orders from 2001 may not be authentic, relying on the fact that M[e] Assaly himself had expressed suspicions given the amount of time it had taken for him to be provided with the orders in executed form. As to the question of the Jeddah meeting, the point was made that this had at best involved an informal and general exchange, which was not intended to be binding in the particular circumstances which had actually arisen.

132. On both points though, M[e] Assaly remained steadfast. As to the first, he maintained the position that there was no doubt about the authenticity of the orders, because "*these are orders made verbally by the late King in my presence, which he then confirmed in writing in order for me to execute them*" (see his note dated 13 September 2013). As to the second, he maintained the position that the discussion in Jeddah had been serious and formal (see his note dated 3 June 2012), and given that there was no real doubt about the authenticity of the King's orders, he had felt duty bound to execute them (see again his note of 13 September 2013, in which he stated: " ... *the Royal Orders are void of any reference or evidence obliging to obtain the heir's approval to the execution thereof in any way whatsoever*").

The French Property

133. Finally, and for completeness, I note that the French Property was transferred to the Princess in December 2012.

Litigation in Liechtenstein

134. In September 2013, Dr Wiederkehr died, leaving Prince Mohammed and M[e] Assaly as the two remaining board members of the Foundation. This prompted Prince Mohammed and the other heirs (bar the Princess and her son) to issue proceedings seeking an order placing the Foundation under court supervision, dismissing M[e] Assaly and appointing two new board members, namely Dr Robert Beck and Dr Markus Kolzoff. In the context of those proceedings, the applicants applied for and obtained an interim injunction appointing Dr Robert Beck to the board and limiting M[e] Assaly's signing rights, so that he could bind the Foundation only in conjunction with another signatory.

135. By way of appeal, M[e] Assaly sought to revoke Dr Beck's appointment and/or to reverse the limitation imposed on his signing right. Sadly, the appeal was not resolved before M[e] Assaly's death, but was continued thereafter by his heirs, effectively as a dispute over costs. In the event the appeal was dismissed and M[e] Assaly's estate ordered to bear the associated costs. In the course of its Judgment the Liechtenstein Court made the observation that had he not died in the meantime, there would have been grounds for removing M[e] Assaly from office, i.e.:

> *"The failure to document the business activities and to obtain formal resolutions from the board of trustees when selling assets of the resolution would have been grounds for his removal from office."*

136. The Foundation now places particular reliance on this in support of its case that M[e] Assaly acted in breach of his duties as a member of the Foundation's board, and thus exceeded his internal competencies.

137. Later, in May 2015, Prince Mohammed and Dr Beck appointed Dr Markus Kolzoff to the board and a resolution was passed appointing Dr Beck to the board (so he was no longer merely a court appointee). They commenced proceedings in England, France and Spain to recover the properties transferred to the Defendant.

138. The Princess and her son Prince Abdul Aziz reacted by issuing proceedings in Liechtenstein to have all three board members removed. The main events of relevance in this litigation are as follows:

    i) The first instance Liechtenstein Court dismissed the claim on 15 December 2015.

    ii) The Princess and Prince Abdul Aziz appealed, and on 6 April 2017 obtained an order that all of the board members should be removed from the board. Prince Mohammed was dismissed owing to a conflict of interest arising out of his dispute with the Princess, while Dr Beck and Dr Kolzoff were dismissed on the basis that the 1985 Regulation required their appointment to be approved by all of King Fahd's heirs.

    iii) Prince Mohammed, Dr Beck and Dr Kolzoff appealed to the Liechtenstein Supreme Court. Dr Beck's and Dr Kolzoff's appeals were successful, on the basis that Art. 9(4) of the Articles (which permitted the Foundation's board to appoint board members in circumstances in which the King was indisposed) prevailed over any contrary provision in a regulation or bylaws, including para. 2(c) of the 1977 Regulation (see above at [44]). Prince Mohammed's appeal was unsuccessful.

    iv) During the course of its judgment dated 7 September 2017, the Liechtenstein Supreme Court made certain observations about the propriety of Prince Mohammed, Dr Beck and Dr Kolzoff having caused the Foundation to make its claims for recovery of the properties transferred to the Princess, including Kenstead Hall. These observations

are said by the Foundation to include findings about the *purpose* of the Foundation, which have *res judicata* effect in the present proceedings. It will be necessary to consider them below (see at [189]).

v) Prince Mohammed thereafter appealed to the Constitutional Court, but again unsuccessfully.

Some Initial Observations

139. It is useful to pause there to take stock of some of the main points arising from the detailed chronology above. In my opinion, four main points deserve emphasis.

140. First, although the issue of consent of the Council of Heirs of King Fahd featured as a major topic in the parties' submissions and in cross-examination, in the end it seems to me this involved something of a misplaced emphasis. The issues which arise – whether a disposition took place contrary to the Foundation's purpose or was made by M^{e} Assaly acting in his excess of his powers – are issues of Liechtenstein law not Islamic or Shari'a law. The parties were effectively agreed on this. Indeed, the evidence of Dr Walser for the Foundation was emphatic that any decisions about transfers of the Foundation's properties were for the Foundation board alone, whatever the King's heirs may say about it. Thus, part of his argument was that para. 2(c) in the 1977 Regulation, which after the King's death purportedly required "*any … decision whatsoever concerning the Foundation*" to be made by the heirs acting unanimously, was void, because potentially it had the effect of usurping the function of the Foundation's board. Even if valid, it seems to me very unlikely as a matter of construction that para. 2(c) was intended to relate to matters ordinarily falling within the role of the board, as opposed to matters such as amending the Articles, which were previously matters for King Fahd before his death.

141. All that being so, the issue whether the King's heirs did or did not consent to the transfer of Kenstead Hall is not on its own determinative of anything. As regards the Foundation's purpose, if it is as the Princess contends, then whether the heirs consented or not is an irrelevance. Even if the purpose is as the Foundation contends, it was for the Foundation board, not the heirs, to decide whether the purpose was infringed.

142. As to the question of M^{e} Assaly's competence to act alone, the Foundation's own Closing Submissions rely on the heirs' lack of consent only indirectly. The point made is rather that M^{e} Assaly should have been able to infer, as should Mr Davies, that consent of the wider board – or at least of Prince Mohammed – had not been provided and would not in any event be forthcoming, only because *in his capacity as head of the Council of Heirs* Prince Mohammed had declined to provide consent.

143. I certainly think it correct that by October 2011 there was some doubt about whether Prince Mohammed and the heirs had consented to the transfer, including doubt about the status of the agreement which M^{e} Assaly thought had been clearly expressed in his original meeting with Prince Mohammed in Jeddah

in October 2005 (above at [71]). However, all that is irrelevant if under the constitution of the Foundation M[e] Assaly in fact had power to act alone.

144. The second point is a related one, about M[e] Assaly. I think it likely that he had a similar misplaced emphasis, although perhaps for understandable reasons given his background, in assuming at least initially that consent of the King's heirs might be a necessary step to his acting. It seems clear to me that he was concerned about this, and that is why he carefully recorded the outcome of his meeting in Jeddah (again, see above at [71]). The position of the heirs was not, however, the right question to be focusing on. The right question to be focusing on was who was empowered to make decisions under the law applicable to the Foundation, and within what parameters.

145. Nonetheless, M[e] Assaly's concern about the approach under Shari'a law obviously explains why, when the issue of the heirs' consent arose again in January 2010 (following Mr Davies' inquiries and the meeting with Prince Mohammed in Paris – see above at [88]), and in May 2010 (including at the meetings with Dr Al Rowaished in Geneva – see above at [109]), he was so concerned, so anxious to obtain clarity quickly, and ultimately so exasperated. He thought that consent of the heirs was needed, but considered he had already obtained it, and on that basis had transferred the German Property to the Princess in 2006. In a sense, however, he need not have worried, because his capacity to transfer the properties – including Kenstead Hall – was a matter of Liechtenstein law, and the heirs' consent was not directly relevant under Liechtenstein law (and not relevant at all on some permutations of it).

146. Third, I think the Foundation is likely correct that a misunderstanding arose between Prince Mohammed and M[e] Assaly in about June 2010, when M[e] Assaly was expecting Prince Mohammed to visit Geneva, and Prince Mohammed did not visit but instead sent M[e] Assaly a letter asking for information about a number of European properties (see above at [115]). Prince Mohammed seems to have intended that that would cover information about the properties to be transferred to the Princess. M[e] Assaly however seems to have assumed (I think reasonably given the circumstances and what he saw as a change of position since his original discussion in Jeddah) that those properties were excluded from Prince Mohammed's information request and presented an issue which required a more urgent resolution, which in the event was not forthcoming.

147. Fourth and finally, there is the position of Mr Davies and his knowledge. This is (or may be) relevant to the question of whether the Princess was acting in good faith (under Liechtenstein law), or was on notice of matters which preclude her from relying on M[e] Assaly's ostensible authority (under English law), in either case if M[e] Assaly did in fact act contrary to the Foundation's purpose or contrary to his internal competencies or powers.

148. In one sense, it seems to me that Mr Davies was in a similar position to M[e] Assaly, i.e. he was aware that no positive assent from King Fahd's Council of Heirs had been forthcoming prior to the transfer of Kenstead Hall, and thus aware also that there was some doubt about whether it would be provided. That put him on notice that there might be a problem if either (i) the heirs' consent was in some way required in order for the Foundation to act consistently with

its purpose, and/or (ii) the lack of such consent was in some way relevant to the question whether M[e] Assaly was acting in excess of his internal competencies. Neither point matters, however, if on proper analysis the Foundation's purpose is as the Princess contends, and if M[e] Assaly had power to act alone under the Foundation's constitution.

149. On both points, Mr Davies was at a disadvantage to M[e] Assaly, because he did not have copies of the Foundation's constitutional documents including in particular its Articles. The same logic applies, however. If on analysis they support the Princess's arguments on the questions of purpose and of M[e] Assaly's powers, then it does not matter that Mr Davies did not press to see them, because even if he had pressed harder for copies, they would only have affirmed his view that M[e] Assaly was duly authorised to act.

150. Having set out those introductory observations on the facts, I will now turn to address the questions of law which arise.

The Foundation's Primary case: Is the Transfer of Kenstead Hall Void?

The TR1

151. A good starting point is to recall that we are concerned with the validity of a transfer of an interest in immovable property in England. The validity of such a transfer is essentially a question of English law: see Dicey, Morris & Collins (16th Edn.) *("Dicey"),* Rule 140.

152. Kenstead Hall is registered land. That being so, the transfer was effected (or sought to be effected) by means of Land Registry Form TR1. This stated it was executed as a Deed; was signed by M[e] Assaly in the presence of a witness; and in the box marked "*Execution*", it said as follows:

> "*Signed as a deed on behalf of ASTURION FOUNDATION, a foundation incorporated in Liechtenstein, by MAITRE FAISAL ASSALY being a person who, in accordance with the laws of that that territory, is acting under the authority of the foundation*."

153. The operative provision of the TR1 is paragraph 7, which provides straightforwardly that the "*transferor transfers the property to the transferee*." This is stated (paragraph 8 – "*Consideration*") not to be for money or anything that has a monetary value.

Formal validity

154. A preliminary point was canvassed in argument, about the correct route for determining the formalities of execution of the TR1, given that the Foundation is a legal person organised under a foreign law. If the Foundation is properly characterised as an "*overseas company*" within the meaning of s. 1044 of the Companies Act 2006 ("*CA 2006*"), then the correct route is via ss. 44 and 46 CA 2006, as amended by reg 4 of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009. If it is not an

overseas company, then the correct route is via the provisions of s. 1 Law of Property (Miscellaneous Provisions) Act 1989.

155. In the end nothing turned on this, because the parties were agreed that there was no point to be taken about the formalities of execution of the TR1, beyond the question whether M[e] Assaly was authorised by the Foundation to execute it. Had it mattered, however, I would have been inclined to think that the Foundation was not an *overseas company*, because although it has separate legal personality, it has no members and is not in the required sense a body corporate (see Dicey, para. 32-341, and in particular fn. 1165, referring to the fact that public authorities and partnerships with separate legal personality do not qualify as *overseas companies*).

Section 26 Land Registration Act 2002

156. An initial question concerns s.26 of the Land Registration Act 2002. Both parties drew this to my attention, and referred me to the decision of Martin Rodger QC in the Upper Tribunal (Lands Chamber) in Ghai & Ors v. Maymask (228) Limited [2020] UKUT 293 (LC).

157. Section 26 provides as follows:

> "*Protection of disponees*
>
> *(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.*
>
> *(2) Subsection (1) does not apply to a limitation—*
>
> *(a) reflected by an entry in the register, or*
>
> *(b) imposed by, or under, this Act.*
>
> *(3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)."*

158. The concept of "*owner's powers*" is explained by reference to section 23, which provides that *"[o]wner's powers in relation to a registered estate consist of – (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description …*"; and section 24 then provides that a person is entitled to exercise owner's powers in relation to a registered estate if he is either the registered proprietor or entitled to be registered as the proprietor of that estate.

159. Emmet & Farrand on Title, at para. 9-014, explains that the protection afforded to a disponee by section 26 should undoubtedly apply to restraints which affect the capacity of a registered proprietor to effect a disposition. I agree. The idea is that the acquisition of title by a disponee should not be affected by some limitation on the power of the registered proprietor which is not reflected on the

register of title. An example might be a limitation on the power of trustees of land, designed to make the property inalienable for the duration of the trust. To put it another way, any limitation on the exercise of "*owner's powers*" which operates as a fetter on the exercise of the power *"to make a disposition of any kind permitted by the general law"* needs to be registered in order to be effective; otherwise, the disponee is entitled to proceed on the basis that there is no limitation and to take free of it.

160. In the Ghai decision, section 26 was relied on by the Judge as validating the disposition, but in a case where the deficiency was not a limitation or fetter on the exercise of "*owner's rights*", but instead a lack of authority arising from a lack of any standing to represent the disponor. What had happened was that LPA receivers had been appointed over an historic building owned by a company, and after appointment of the receivers, a company director purported to execute a transfer on the company's behalf. As to that, I agree with the criticisms made in Emmet & Farrand on Title and elsewhere that s.26 is *not* concerned with limitations on the power of disposition arising solely because of an agent's lack of authority. Instead, as I see it, it is concerned with a narrower concept, i.e. some aspect of the constitutional make-up of the registered owner itself which operates to limit its ability to exercise the usual range of powers available to such an owner to make a disposition of the registered estate. Ghai was not concerned with a limitation arising in that way. There was no limitation inhibiting the company's right to exercise the range of "*owner's powers*" ordinarily expected to be available to it; instead, the issue was about which human actors were legally entitled to exercise those rights on the company's behalf. For myself, I do not see that the protection afforded by s.26 is engaged in that sort of case.

161. What, though, of the present case? The Foundation's argument as to the invalidity of the disposition on Kenstead Hall is put on the basis of M^{e} Assaly's lack of authority, but that in turn is said to derive from two sources. One is that he acted in excess of any available authority because the transfer was outside the *purpose* of the Foundation; the second is that he lacked authority because he was not constitutionally able to act alone in effecting dispositions of the Foundation's assets.

162. The precise scope of s.26 was not the subject of detailed submissions, and so I express my view a little hesitantly, but it seems to me that the first of these *is* a matter which engages the protection of s.26. The second though is not.

163. I say that because to say that something (the disposition of Kenstead Hall) is outside the *purpose* of the Foundation is the same thing, it seems to me, as saying that the Foundation had no *capacity* under its constitution to bring it about. That is the same as saying (to use the language of s.26) that the Foundation's right to exercise the usual range of owner's powers as registered proprietor of Kenstead Hall was subject to a limitation affecting the validity of such disposition. If that is correct, then it seems to me we are in the territory covered by s.26.

164. I do not think it matters that the issue of *purpose* is also framed as one concerning M^{e} Assaly's authority (see above). If, all other things being equal,

M[e] Assaly *was* acting within his internal competencies and thus was properly authorised to represent the Foundation, I do not see how the Foundation could nonetheless still challenge the disposition of Kenstead Hall on the basis that it was outside the Foundation's purposes, and he had no authority in that sense. To put it another way, it seems to me that a disponor cannot escape the effects of an otherwise valid disposition by saying that its agent was not authorised, if the lack of authority arises solely from some feature of the disponor's own constitutional make-up which means it has no capacity in the circumstances to exercise the usual range of "*owner's powers*". Such a result would override the protection s.26 is designed to afford to disponees.

165. I would summarise the position in this way. In my opinion, as a matter of English law, which is the law relevant to the question of the transfer of title to Kenstead Hall, any constitutional limitation on the *purpose* of the Foundation cannot affect the validity of that disposition because it was not reflected on the register of title for Kenstead Hall. No relevant limitation having been registered, the Foundation is to be taken as having had available to it the full range of "*owner's rights*" usually available to an owner of a registered estate in freehold land in England, free of any limitation.

166. This result seems to me correct both in terms of interpretation of the statute, but also as a matter of policy. There are good policy reasons for a rule governing the disposition of registered estates in land in England which validates such dispositions if they are of a kind usually permitted under the general law, without the disponee having to be concerned about possible limitations on the range of powers available to the registered owner, unless such limitations have been registered. That is particularly so where the limitation is one arising under the constitutional framework of an overseas entity.

167. It follows from this, in my view, that the Foundation cannot say that there was simply *no transfer of title at all* to the Princess, because such transfer was outside the purpose of the Foundation. That is not the same, however, as saying that the transfer of legal title also automatically extinguished any prior equitable interest on the part of the Foundation, arising from the circumstances in which the transfer came about. In my opinion, that is a question of priorities, which falls to be determined not under s. 26 but instead under ss. 28 and 29. I will come back to this below (see [304(iii)]).

168. In any event, notwithstanding my conclusion on s.26, I now move on to consider below the question whether the transfer of Kenstead Hall was in fact (as a matter of Liechtenstein law) outside the purpose of the Foundation. I will also consider the separate, but overlapping, argument that M[e] Assaly was acting without authority because he was operating in excess of his internal competencies.

The Foundation's Purpose

The Purpose as an Expression of the Founder's Will

169. Dr Walser's view was essentially that the Foundation's purpose only properly crystallised in 1977, when the categories of eligible beneficiary and their respective interests or shares were first identified by means of the 1977

Regulation, and that had the effect of solidifying the Foundation's purpose at that point and in that way, in a manner which was thereafter immutable, even by King Fahd himself. That solidification came about because, although the King was given very wide powers to amend the Foundation's constitution under Article 13, he could only exercise them in a manner consistent with the Foundation's purpose. Since on this theory the heirs' interests formed part of the purpose, no amendment was possible if it was at variance with those interests.

170. I am unable to accept these basic propositions, and on this question of the Foundation's purpose, have come to the view that I prefer the opinions of Dr Bösch over those of Dr Walser. That is essentially because the views of Dr Bösch appear to me to be more coherent and logical, and much more closely aligned with what a straightforward interpretation of what the Articles suggest King Fahd himself must have intended as founder.

171. As to this, it is a principle of Liechtenstein law that the founder's will is of central importance and has to be the supreme guideline in the application of foundation law: see Liechtenstein Supreme Court in decision LES 1991, 91, p.106. It follows from this that the exercise of interpreting a foundation's constitutional documents is essentially an exercise in seeking to interpret what the founder wanted to happen.

172. One can start the process in reverse, and ask how likely it is that King Fahd intended the Foundation to have the purpose the Foundation says it has – that is to say, a purpose which inhibited the ability of the King, even during his lifetime, from requiring transfers of Foundation assets to be made as he saw fit, in whatever proportions he wished, including to those who after his death would become his heirs under Shari'a law.

173. It seems to me it must be very unlikely indeed that the King intended his abilities in relation to the Foundation to be constrained in that way. Such an interpretation, as Dr Bösch points out, would be entirely at variance with the constitutional structure of the Foundation, as expressed in particular in its Articles. The whole constitutional structure appears designed to vest as much power as possible in the King as founder, both as regards the organisation and management of the Foundation, and as regards disposals of its assets – whether during his lifetime or after his death.

174. As to the organisation and management of the Foundation, Dr Bösch emphasised the following points particularly: the King retained the power to appoint and to remove all or any one of the Board members (Article 9, para. 2); he retained the power to give directions to the Board of a binding character (Article 10, para. 4); he retained the power to amend the Foundation's organisation and the Articles in any manner consistent with its purpose (Article 13); and perhaps most fundamentally he retained the power to dissolve the Foundation (Article 13).

175. These provisions provide useful context for construing Articles 6 and 7, relevant to purpose. Given the retention of such wide founder's rights in connection with the organisation and management of the Foundation, it makes good sense to

think that King Fahd must equally have intended to retain as much power as he could, and as much flexibility, in connection with disposals of the Foundation's assets. It seems to me inherently unlikely that he intended to restrict his own ability to act. Indeed, I think it obvious that he intended the opposite.

176. Looked at in this way, Articles 6 and 7 operate coherently and in a manner which seems to me quite clear, as Dr Bösch explained:

i) The purpose of the Foundation is as expressed in Article 6. The purpose of the Foundation is to manage its assets and to make payments from those assets to the beneficiaries, within the meaning of regulations issued under Article 7. That is a sufficient statement of the Foundation's purpose. Indeed, that is the purpose of the Foundation as expressed publicly in the relevant entry in the Liechtenstein public register (see above at [58]).

ii) It is true that the Foundation's purpose as stated in Article 6 cannot be changed (i.e., it *solidified*), but built into it is an inherent flexibility as regards the identity of the Foundation's beneficiaries/their interests/the nature of any dispositions to them of Foundation assets, because of the King's ability to issue regulations under Article 7.

iii) Thus, although the King's initial regulation under Article 7 was the 1977 Regulation, naming himself as primary (and sole) beneficiary of the Foundation during his own lifetime, and his heirs under Shari'a or Islamic law as secondary beneficiaries after his death, he was fully entitled during his lifetime to amend that regulation however he wished. He could do so by further regulation requiring transfer of a particular Foundation asset, at his direction, to a person who would qualify as one of his heirs after his death, and that would not involve any infringement of the Foundation's purpose, because any such further regulation would itself be an expression of the purpose.

iv) Dr Bösch expressed the point as follows, in a passage in his First Report (para. 241) which I accept as an accurate reflection of the position under Liechtenstein law:

> *" … it makes no sense to suggest that a distribution or transfer of an asset of the Foundation pursuant to a regulation or instruction of King Fahd could be constrained by reason of its being found to be outside the 'purposes' of the foundation. That is because King Fahd as founder and principal beneficiary had the power during his lifetime to issue and amend at any time the very regulations that would specify the Foundation's purposes as provided in Art. 6 of the Articles."*

177. I am fortified in that conclusion for at least three additional reasons.

178. The first is that it is consistent with Dr Walser's own evidence about what King Fahd was entitled to do in his capacity as primary beneficiary during his lifetime. The second is that it is consistent with the way the Foundation actually

operated in practice. The third is that the limitation on the Foundation's purpose as proposed by Dr Walser leads to serious impracticalities, which indicates that it cannot have been what King Fahd intended.

179. As to Dr Walser's own evidence, he accepted that King Fahd as primary beneficiary could ask the board of the Foundation to exercise its discretion to make a distribution of any individual assets to him (which distribution he could then transfer to a third party). He also accepted that the process could be shortcut by King Fahd requesting the board make the distribution direct to the third party. But such freedom on the part of King Fahd to request transfers of Foundation assets as he saw fit seems to me inconsistent with the Foundation's purpose being defined in a way which (on the Foundation's argument) was expressly designed to impose limitations on his ability to bring about disposals of Foundation assets to his heirs, save in defined shares.

180. As to the historic practice regarding disposals of Foundation assets, I have mentioned above (see [47]) a series of disposals of individual Foundation assets undertaken during the King's lifetime, and managed by M^{e} Assaly, in a manner which on the face of it seems entirely inconsistent with the way the Foundation now puts its case.

181. As to the question of practical difficulties with the Foundation's interpretation, two may be mentioned.

182. To begin with, if correct, it would mean that every time an individual asset were to be distributed, a valuation would have to be undertaken not just of that asset but of *all* of the assets of the Foundation in order to determine whether the transfer amounted to a preference of one beneficiary over another. Further, a running total would have to be kept of past and possible future distributions in order to determine whether there was or was likely to be unequal treatment as between beneficiaries.

183. Such difficulties of valuation are familiar in the context of Shari'a rules on inheritance. The broad purpose of Islamic inheritance law is to remove discord by requiring the (whole) estate of the deceased to be distributed in accordance with fixed shares. To avoid issues of valuation, Islamic law provides that every asset is owned in common by the Shari'a heirs in accordance with their Shari'a shares. The essential understanding of each Shari'a heir owning their "*fractional share*" in *each* asset in the estate was accepted by both Shari'a experts. This means in practice that either assets are sold (and the proceeds divided) or specific distributions made to particular individuals by the unanimous agreement of all the heirs, in practice through the deceased's council of heirs. In the case of the Foundation's assets, of course the 1977 Regulation (above at [44]) indicated that unanimous consent of the heirs was to be a requirement only *after* the King's death. That seems consistent with the idea that a different, and less restrictive regime would apply *before* his death, with the traditional Shari'a rules then applying to such assets as were left in the Foundation *after* his death (excluding any in respect of which he had given a direction by way of regulation while alive: see Article 7).

184. More difficult still, if one accepts that during his lifetime King Fahd had the ability to request distributions to himself or to his order, is to understand what principle of law would prevent the King making requests (or justify the Foundation board refusing to accede to such requests) which would have the effect of reducing the Foundation's assets to nil. Dr Walser's answer was that there was some form of duty on the board to preserve a proportion of the Foundation's assets for the benefit of the heirs; but he was not able to offer a view about what that proportion would be, or how the board in practical terms would inform its decision-making.

Decisions of the Liechtenstein Courts

185. Faced with such problems, the Foundation relied on two decisions of the Liechtenstein Courts, the first dealing in general terms with the requirements for an effective expression of a foundation's purpose, and the second being a decision involving the present parties in their litigation in Liechtenstein (specifically, the decision of the Liechtenstein Supreme Court referenced at [138(iv)] above), which the Foundation argued made the issue of the Foundation's purpose *res judicata*. I will take these in turn.

186. The first decision is Case GE 2019, 144, in which the Liechtenstein Supreme Court held that the founder's will was not sufficiently expressed because the foundation's constitution left it to the foundation board rather than the founder to nominate the foundation's beneficiaries. The Court said that:

> *" … the will of the founder [must be] expressed to such an extent that the purpose of the foundation can be sufficiently identified when interpreting the deed of foundation in accordance with the principle of will in order to be permanently ('solidified') implemented by the foundation bodies".*

187. Dr Walser's argument was that, by parity of reasoning, the will of the founder in the present case was not sufficiently expressed in Article 6.

188. I disagree. In agreement with Dr Bösch, I do not consider that Case GE 2019, 114 is a true parallel with this case. The defect in that case was that the will of *the founder* was not expressed sufficiently clearly. It was not good enough that there was a mechanism enabling the foundation board to nominate the beneficiaries, because even if it did so, that would be an expression of the will of the board, not the will of the founder. The present case is different, because the mechanism stipulated in Articles 6 and 7 taken together is one which involved the founder *himself* nominating the beneficiaries and their interests. That mechanism therefore *does* provide a way for the will *of the founder* to be sufficiently expressed. I do not see that it matters that a further document was needed (i.e., an Article 7 *regulation*) in order for the beneficiaries to be identified. Even before that happened, there was a mechanism under the Articles which required it to happen (see Article 7: "*It is the responsibility of the primary beneficiary to issue a regulation …*"), and therefore sufficient certainty: *certum est quod certum reddi potest.* To put it straightforwardly, the purpose of the Foundation was to make distributions of regular or extraordinary

benefits to the beneficiaries as indicated by the King under the mechanism in Article 7. That was a sufficiently clear expression of the will of the founder.

189. The further decision relied on is that of the Liechtenstein Supreme Court, in the appeal referenced above at [138(iv)] – i.e., the penultimate appeal in the chain of decisions dealing with the application by the Princess and her son to remove all three members of the Foundation's Board.

190. At p. 35, the Supreme Court said as follows (the emphasis in the quotation is taken from the Foundation's Closing Submissions):

> "*The power of amendment and revocation conferred on the economic founder as the principal beneficiary in Article 13 subpar. 1 of the Articles of Association … experienced a significant restriction in the following sentence, namely that 'all amendments to the Articles of Association total as well as partial … [shall] ensure that the objective of the Foundation is protected" and "[shall] in any event comply with the intention of the principal beneficiary stated in the by-law of the Foundation'. In the by-law, the King directed that after his death his statutory heirs under Islamic law would become the beneficiaries of the Foundation without any distinction. In connection with the property transfers to the first claimant instructed by the King and arranged by the then member of the board of trustees Faisal Assaly, the question thus arises as to whether these sales substantially reduced the assets of the Foundation, undermined the objective of the Foundation or resulted in unequal treatment of the beneficiaries (both claimants as well as the second respondent and a further eight descendants of the King are statutory heirs and hence have equal rights as beneficiaries of the Foundation).*
>
> *From this perspective, the instructions given to the member of the board of trustees, Faisal Assaly, by the King prove to be dubious, if not a violation of his power of amendment, so that the decision by the member of the board of trustees at the time to institute legal proceedings with the aim of transferring these properties back to the Foundation certainly appears to be based on a tenable interpretation of the law. A breach of duty by the second respondent is thus excluded as the lower courts have already ruled. The same applies to the third and fourth respondents.*"

191. The Foundation's submission was that this passage was final and dispositive on the question of the Foundation's purpose. It said the necessity of the finding is obvious: in the proceedings, the Princess was asking the Court to dismiss the existing board on the basis that they were acting improperly in challenging M^{e} Assaly's transfers to her. In order to dispose of that argument, the Court had to form a view on the Foundation's purpose.

192. I cannot agree. I agree with Dr Bösch that that is reading too much into what the Supreme Court said. It is true that the context was whether the then members of the board were acting improperly in initiating litigation against the Princess in order to seek to unwind the transfers made to her, but in order to answer that question the Supreme Court did not need to go as far as saying definitively what the Foundation's purpose was, only that the view of it taken by the members of

the board was sufficiently tenable to make it proper to have the argument. I think that is made clear by the reference in the first quoted paragraph to a *question arising* as to whether the transfers "*undermined the objective of the foundation*", and even more clearly in the second paragraph by the reference to the claims advanced by the board appearing to be based on a "*tenable interpretation of the law*."

193. I would also make the following point. In the first quoted paragraph, the reference to the 1977 Regulation (referred to as a "*by-law*") is only as follows (emphasis added): "*In the by-law, the King directed that after his death his statutory heirs under Islamic law would become the beneficiaries of the Foundation without any distinction".* That is of course correct, but this comment by the Supreme Court tells one little if anything about the circumstances of the present case, which are concerned with the legal effects, and compatibility with the Foundation's purpose, of a direction given by the King *while he was alive*. No attempt is made by the Supreme Court to analyse or express a concluded view about that fact pattern, which would have to include (for example) consideration of the express language of Article 7 (which as noted above provides that any regulation issued by the King will continue be binding on his heirs after his death, no matter what the circumstances). The comments made by the Supreme Court were very general. There was no attempt at any detailed or nuanced analysis of the purpose argument as it has been presented in this case. To my mind that makes it clear that there has been no binding determination of the issues this Court has to address.

The 2001 Instruction

194. A number of points are made about the status of this document and whether it is correct to characterise it as a "*regulation*" for the purposes of Article 7. I will come back to those points below. For now, however, and in light of my conclusions set out above, I will note that in my opinion, there was nothing in the 2001 Instruction which contravened the Foundation's purpose. In my view of it, the purpose was sufficiently flexible to permit King Fahd during his lifetime to require that individual properties owned by the Foundation be transferred to those who would become his heirs after his death, without reference to their Shari'a shares or any other principle of equality of treatment. As primary and indeed sole beneficiary during his own lifetime, and having reserved to himself extensive powers of control over the Foundation, it was entirely legitimate for King Fahd to direct that individual properties be transferred to individuals nominated by him. The purpose of the Foundation as stated in Article 6 was sufficiently pliable to allow that to happen, and deliberately so.

The Internal Competency Argument

The Issue of Principle

195. This is put in essentially two ways by the Foundation: (i) M^{e} Assaly went beyond the competency afforded him by the Foundation's constitution by acting in a manner contrary to its purpose; and (ii) M^{e} Assaly went beyond the competency afforded him by the Foundation's constitution by arrogating to

himself alone, impermissibly, the decision whether to effect a disposal of one of the Foundation's properties (Kenstead Hall) to the Princess.

196. Point (i) adds nothing to the points on the Foundation's purpose already made above. This section will therefore concentrate on point (ii). Expressed in more detail, this involves the following main submissions:

i) Under Article 8, it is for the Foundation council (i.e., the board) to make decisions about disposals of the Foundation's assets, not M[e] Assaly acting alone.

ii) That approach has been endorsed by the Liechtenstein Courts on two occasions: first, in the decision on M[e] Assaly's application to remove Dr Beck, rendered following M[e] Assaly's death (see [135] above), in which the Court said that grounds existed which would have justified M[e] Assaly's removal from the Foundation board; and second, the decision of the Liechtenstein Court of Appeal dated 6 April 2017 (see [138(ii)] above), which resulted in the removal of Prince Mohammed, Dr Beck and Dr Kolzoff from the Foundation board, during the course of which the Court of Appeal made certain observations about "*the principle of joint management*" applying to the Foundation board.

iii) It is true that the Articles allow for the board to delegate part or all of its powers to one of its members (see Article 10(3)), but that has not validly been done here as regards any power to dispose of the Foundation's property. That is because the 1988 Power of Attorney, insofar as it achieved any form of delegation to M[e] Assaly, was effective only to confer on him the power to manage and administer the Foundation's assets, and that did not include the power to dispose of them.

197. I have come to the view that I am not persuaded by these points, and prefer the case advanced by the Princess, to the effect that M[e] Assaly *was* acting within the internally specified competencies in effecting the transfer of Kenstead Hall.

198. To start with, and analysed as a matter of construing the will of the founder (King Fahd), it seems to me quite clear that the Articles, and the 1988 Power of Attorney, either individually or in combination, were intended to confer on M[e] Assaly the power to effect distributions of the Foundation's assets while acting alone.

199. Looked in context, a very clear picture emerges.

200. It is clear from the way in which M[e] Assaly operated under the 1978 Power of Attorney, even though it was ineffective, and even though M[e] Assaly was not a board member at the time, that King Fahd trusted him with responsibility to manage (and dispose of) the Foundation's assets (see above at [47]).

201. There is then King Fahd's 1985 Declaration (see above at [48]), declaring that M[e] Assaly was to be appointed Vice-Chair of the Board, and given joint signing power (with the Chair or any other Board member). That change was then

reflected in the 1985 version of the Articles (Article 10), and M[e] Assaly was re-appointed to the board as Vice-Chair following his earlier resignation.

202. Some three years later, in 1988, there was a further change, when the 1988 Power of Attorney was executed. A number of points of detail arise in connection with the 1988 Power of Attorney, which I will need to address below, but its significance it seems to me is that it was designed to concentrate further power, as regards the management and administration of the Foundation, in the hands of King Fahd's trusted adviser M[e] Assaly. The 1988 Power of Attorney is signed by Prince Mohammed and M[e] Christ, and on the face of it is a delegation to M[e] Assaly by the Foundation's board of "*its powers*." This was expressly permitted under Article 10(3), which allows delegation by the board of " *… part or all of the powers vested in it to one of its members, to the primary beneficiary, or to another person nominated by the latter*."

203. There was then a further step in 1993, when M[e] Assaly was granted sole signatory power and Article 10(2) was again amended.

204. The significance of this latter point was the subject of some debate at the trial. The question raised was whether the power conferred on M[e] Assaly under the amended Article 10(2) was intended to relate only to representation of the Foundation in its *external* affairs. The Foundation's contention was that although M[e] Assaly was certainly given a power of *external* representation, which he could exercise alone, he was not given such power as regards the Foundation's *internal* affairs – i.e., the intention was not to confer on him the power to adopt board resolutions on his own. I disagree however, and am persuaded by Dr Bösch's evidence on this point:

    i) I consider that the wider construction of the Article is consistent with its language. On the face of it, it deals *both* with management of the Foundation's affairs externally and internally. No attempt is made as a matter of language to separate them. On the contrary, the structure of the Article suggests they are to be looked at together. As regards the Foundation's *external* affairs, the change introduced in 1993 was that M[e] Assaly was to be "*entitled to sole signature*", whereas for the other board members, two signatures were to be required, one of which was to be that of the President (i.e., Prince Mohammed). As regards *internal* management – i.e., decision-making – the language of the Article was that the same structure would apply - "*The foundation council adopts its resolutions in accordance with this principle …*". Since no distinction is made as a matter of language between the external and internal functions of the board, it seems to me natural to construe the wording overall as saying that the same modalities would apply in the case of the Foundation adopting its internal resolutions, as in the case of its external relations.

    ii) I think that also makes sense in terms of the overall picture. The changes introduced by amendment to the Articles in 1985, and then by means of the 1988 Power of Attorney three years later, had resulted in an increasing concentration of power as regards the Foundation's operations in the hands of M[e] Assaly. The changes introduced in 1993

were a natural development of that same theme, and in that broader context it seems to me quite natural to think that in making them King Fahd's intention was to confer decision-making authority on M[e] Assaly to the fullest extent he was able to.

iii) It is said in response that the wider construction of Article 10(2) cannot be correct, because it would lead to the possibility of conflicting resolutions being made – one by M[e] Assaly, and another by Prince Mohammed acting together with another board member. I think that is correct as a matter of language; but the answer must be that there was no expectation that that would ever happen, because in practice the day-to-day management of the Foundation was to be the responsibility of M[e] Assaly, and King Fahd wished him to have all the powers necessary to manage the Foundation effectively.

205. Insofar as Article 10(2) conferred on M[e] Assaly sole internal decision-making power, it appears to me correct that that must include the power to make decisions as to distributions of the Foundation's assets, even though the regime for "*Disbursements*" is dealt with in a separate section of the Articles, i.e., in Article 8. It is correct that Article 8(1) says it is for the "*foundation council*" to make decisions as to the amount and type of payments to beneficiaries, but all that does is to provide confirmation that the council is the relevant decision-making organ. It tells one nothing about how its decision-making is to be carried out. For that, one needs to look at Article 10(2), which is where the modalities of decision-making are described, and in my opinion such modalities include the possibility of M[e] Assaly adopting resolutions on his own, because that is what King Fahd wanted. I therefore reject the Foundation's contention that the procedures under Article 10(2) are displaced by a different regime under Article 8, when it comes to the making of decisions about distributions to beneficiaries.

206. Having established that framework, one can then consider the legitimacy of the actions of M[e] Assaly in determining, in October 2011, to execute a Form TR1 on behalf of the Foundation, in order to effect a transfer of Kenstead Hall to the Princess.

Execution of the TR1 – the 2001 Instruction as a "regulation"

207. In my opinion, M[e] Assaly was acting within the scope of his internal competence both in determining on the Foundation's behalf to execute the TR1, and then in actually executing it.

208. For the reasons already given above, it seems to me that M[e] Assaly was empowered both to make the decision, and to effect the transfer, under either or both of (i) the 1988 Power of Attorney, and (ii) Article 10(2) of the Foundation's Articles.

209. Moreover, it seems to me that he was in fact required to do so, under either or both of (i) Article 8(1), and (ii) Article 10(4).

210. I say that because in my opinion, and again in agreement with Dr Bösch, it is correct to classify the 2001 Instruction as a "*regulation*" for the purposes of Article 7 of the Foundation's Articles. That being so, the Foundation board was bound to give effect to it under Article 8(1) (which requires the Board to act "*Within the regulation issued by the primary beneficiary ....*"), and/or Article 10(4) (which provides that the Foundation board should administer the Foundation " … *in line with the instructions and directives of the primary beneficiary, the same being of a binding character in this context*"). Moreover, the late King's heirs had no standing to object, even after the King's death, in light of Article 7: "*This regulation is irrevocable and binding for the legal heirs of the primary beneficiary, no matter what circumstances, motives or facts have to be taken into consideration*".

211. To amplify, the experts were agreed that the question whether an instruction amounts to a *regulation* is essentially a matter of construction. In order to amount to a regulation the terms must be clear and precise, and the document must be mandatory in the sense of being intended to have a specific effect. The process of construction is again, essentially, a matter of determining the will of the founder (here, King Fahd). Whether something is a regulation or not is not so much a matter of any label given to it, but more a matter of its overall effect and meaning (as Dr Walser put it in cross-examination, "*It is also true to say that the content is in the end decisive if it is a regulation, bylaw or an article …"*).

212. Applying these principles, Dr Bösch's view was that the 2001 Instruction was a *regulation* for the purposes of Article 7. His opinion was that the 2001 Instruction was the clearest possible expression of the will of the founder. I agree. Although expressed in terms of a conferral of authority on M^{e} Assaly ("*This letter is my formal and binding authority …*"), the desired end-point was expressed in emphatic and entirely unambiguous terms, *viz.*, *"… to do all that is necessary to effect the transfer by way of gift of all my legal and beneficial ownership and interest of any nature in the property known as Kenstead Hall … to my wife, Princess Aljohara Al Abdul Aziz Al Brahim*." In light of this language, it seems to me there can be no doubt at all about what the late King wanted to happen to Kenstead Hall.

213. A related point was taken by the Foundation, but in somewhat muted form, about whether one can be confident that the 2001 Instruction continued to represent the King's will, given that the signed version was not in fact passed to M^{e} Assaly to act upon for a number of years, and appears to have been received by him only after the King's death in 2005. I see nothing in this point, however. It does not seem to me a reliable inference to think that the King, having signed the 2001 Instruction, then decided to resile from it, and that is the reason it did not emerge for a number of years. For one thing, had that been the intention, it is much more logical to think the King would have had the 2001 Instruction destroyed. For another, as I have already mentioned, the evidence of Mr Davies, which seems to me entirely plausible and which I accept, is that it is not unusual in the case of very wealthy families, for instructions even in relation to matters of importance to be overlooked or given low priority, sometimes for extended periods of time, even years.

214. Finally as to the effect of the 2001 Instruction, I have already dealt with the Foundation's purpose argument above and rejected it, but a particular manifestation of it in the present context was Dr Walser's point that Article 7 refers only to the King being able to issue "*a regulation*", in the singular. This was said by Dr Walser to reinforce his conclusion that the 1977 Regulation, once issued, had the effect of solidifying the Foundation's purpose at that stage, so that thereafter the King could not issue any further regulation, or at least could not do so if it would cut across the Foundation's purpose as solidified by the 1977 Regulation itself.

215. On this point, however, I find the analysis of Dr Bösch more persuasive. He accepted that the wording of Article 7 referred to "*a regulation*" in the genitive singular, but did not see that as a problem because of the general power the King reserved to himself under Article 13 to amend the Foundation's constitution or organisation however he wished. That included the power, even having issued the 1977 Regulation, to issue an amending regulation at some future stage. He was not inhibited in doing so for all the reasons already developed above (see [170] *et seq*.).

216. To summarise the overall chain of logic, in my opinion M^{e} Assaly in effecting the transfer of Kenstead Hall to the Princess was acting within the scope of his internal competencies vis-à-vis the Foundation because of the decision-making powers delegated to him under the 1988 Power of Attorney and/or conferred on him under the terms of Article 10(2), and he was effectively obliged to effect the transfer since the 2001 Instruction was a binding regulation issued by King Fahd under Article 7, and thus M^{e} Assaly was bound to implement it under Article 8(1) (which left at most only a residual discretion where the Foundation was in possession of a regulation issued by King Fahd), and/or Article 10(4) (under which instructions given by the late King were to have a "*binding character*"). That conclusion holds good even if the Foundation is correct that Article 10(4) is concerned only with the management and administration of the Foundation, and not with disposals of its assets (which in any event seems to me doubtful).

217. The Foundation made a number of points against this analysis, in addition to those already dealt with above. It is convenient to deal with them together under the following headings, before moving on.

The 1988 Power of Attorney

218. There is an issue as to the governing law of the 1988 Power of Attorney – is it the law of Liechtenstein or Swiss law?

219. This arises because of the following language which appears at the end of the 1988 Power of Attorney: "*These powers will not expire as a result of the death or incapacity of the agent, but will subsist under the terms of Articles 35 and 405 of the Swiss Code of Obligations*." This is relied on by the Foundation as justifying the conclusion that the 1988 Power of Attorney is governed by Swiss law.

220. I am not at all persuaded by that contention.

221. As to the principles relevant to choice of law, the parties were agreed, given the somewhat historic nature of the 1988 Power of Attorney, that these were the common law rules, not those in either the Contracts (Applicable Law) Act 1990, nor those in the Rome I Convention. At common law, the principle is that a power of attorney is to be governed in accordance with the laws of the country in which it is intended to be used, save to the extent that there is a contrary intention on the face of the document (Chatenay v The Brazilian Submarine Telegraph Company, Limited [1891] 1 Q.B. 79, at pp. 82-83).

222. The Foundation contended here that there was a contrary intention, *viz*. the reference to Swiss law set out above. I do not agree. The 1988 Power of Attorney was intended to operate as a delegation of the powers otherwise exercisable by the board of a Foundation incorporated in Liechtenstein. There is the strongest possible inference that it was intended to be governed by the law of Liechtenstein, because it was concerned with the internal management and operation of an entity existing under Liechtenstein law. In my opinion, one would need clear language to displace that obvious inference, from which one could see a clear intention to subject the 1988 Power of Attorney to the governing law of a different place. I think the limited reference to Swiss law made at the end of the document, which deals only with the matter of the 1988 Power of Attorney subsisting in the event of the death or incapacity of the agent, is a very flimsy basis for construing the existence of a positive choice of Swiss law to govern the whole of the agency relationship.

223. I think the truth is that the reference to Swiss law is an oddity and is most probably the result of an error, arising from the use of a template and the unthinking inclusion of inapposite boilerplate language. I think it best to regard it as mere surplusage, with no legal effect. In any event, and even if it has some effect, I do not consider that it has any bearing as regards the application of the law of Liechtenstein to questions of the construction and validity of the 1988 Power of Attorney.

224. A number of other points are then also taken in connection with the 1988 Power of Attorney itself:

    i) The first is the Foundation's argument that it is invalid, because a valid delegation of powers to a single board member would itself require a decision of the Foundation's board, and here there was no such decision because the 1988 Power of Attorney was signed only by two members of the four person board at the time (i.e., Prince Mohammed and M^{e} Christ), and that was not a valid decision because there was no majority. On this point, however, I am persuaded by the evidence of Dr Bösch. A number of points may be made. (1) Under Article 10(2) of the Articles, as explained above, the board was entitled to adopt resolutions "*in accordance with this principle*", which included where the resolution had the support of the President (Prince Mohammed) and another board member. (2) In any event, I agree with Dr Bösch's analysis that it was natural for M^{e} Assaly not to have joined in a decision for the purpose of conferring a general power of attorney on himself. He had an obvious interest in the outcome of the decision which made it inappropriate for him to vote. I also agree with Dr Bösch that the further board member

at the time, Dr Batliner, was effectively in the same position because under a contract of mandate with M[e] Assaly he was apparently bound to act in accordance with M[e] Assaly's directions. (3) As to the formalities of the decision-making process, resolutions could be adopted under Article 10(2), " *... during meetings or through written correspondence (circulars, telegrams, telex)*." I therefore see nothing in the Foundation's point that there is no evidence of "… *any of the essential trappings of a board meeting, such as the circulation of an agenda ...*". The Articles did not require such formality. Signature of the 1988 Power of Attorney itself was sufficient expression of consensus.

ii) The Foundation argues that, whatever else may have been delegated by the 1988 Power of Attorney, its wording was not sufficiently clear to include delegation to M[e] Assaly of the power to effect disposals of Foundation assets. I respectfully disagree. In agreement with Dr Bösch's analysis, I think the wording perfectly clear. It provides expressly that "*The Board of the ASTURION Foundation ... <u>hereby delegates its powers</u> to: His Excellency, Mr Faisal Assaly ...*" (my emphasis). That introductory language to my mind signals a very broad intention to delegate all of the board's powers, to the fullest extent permitted by law. It is true that the language then goes on to provide that the delegation is " … *for the purposes of the following ...*", and that the matters thereafter set out do not expressly refer to the making of disposals of Foundation property; but the first matter mentioned is as follows: *"... for the purposes of the following ... Govern, manage and administer, both actively and passively, all current and future assets and business ...*". Again, that is very broad language. I think it entirely natural to suppose that the idea of administering the Foundation was intended to include the disposal of its assets as required, to or for the benefit of its beneficiaries from time-to time. That was an essential part of the purpose of the Foundation. That construction is reinforced by the reference to the "*active*" administration of "*all current and future assets*", which strongly suggests administration of a fluid and changing pool of assets over time, rather than management of a static and unchanging collection. Although perhaps not directly apposite given the way the Foundation operated, I also think significant the reference later in the document to the relevant purposes including M[e] Assaly having the ability to "*carry out and accept the delivery of all bequests*". This again is consistent with the idea that part of his delegated function would include making distributions of the Foundation's assets, at the behest of King Fahd, at least in accordance with instructions given during the King's lifetime.

iii) Finally, Dr Walser in his evidence submitted that the law of Liechtenstein provides that a specific power of attorney is necessary in order to effect a gift (see Article 1008 ABGB). On this point, however, I again prefer the evidence of Dr Bösch, namely that the general law on the conferral of authority to an agent to make a gift has no obvious application in a case where the issue is about delegation of powers

already conferred on the board of a Liechtenstein foundation under its Articles.

225. My conclusion about the governing law of the 1988 Power of Attorney makes it strictly unnecessary for me to express any conclusions about Swiss law, but I will say that had I formed the view that Swiss law was the relevant governing law, I would have come to the same position overall as under the law of Liechtenstein.

226. The Foundation's expert on Swiss law, Dr Fountoulakis, had some observations about the formal validity of the 1988 Power of Attorney (that it was not executed as a Deed and did not sufficiently clearly identify the Foundation as the donor), but these were not pressed very hard and I did not consider them persuasive (Swiss case law was against the first, and on examination the second is not a good point because it is not the Foundation but the board that was delegating its powers). Dr Fountoulakis also suggested that in the circumstances a contract of mandate must have arisen under Swiss law between the Foundation and M[e] Assaly, which was significant since under Swiss law the holder of a contract of mandate will require special authority to perform certain tasks, including alienating land or making gifts (Civil Code, Art. 396). On this point though I prefer the view of Prof. Müller that it is very unlikely that any Swiss law contract of mandate arose: Prof Müller said that would not follow automatically from the existence of a power of attorney and one would need additional elements to justify it. There are no obvious extra elements here connected to Switzerland or justifying the existence of an additional Swiss law contract, because the delegated powers all concerned management of a foundation in Liechtenstein. As to the question of the proper construction of the 1988 Power of Attorney, I reach the same view on it as under the law of Liechtenstein (see above) essentially for the same reasons. Prof Müller's evidence, which I accept, was that the surrounding circumstances are generally to be taken into account in construing a document. Dr Fountoulakis thought it legitimate to consider the surrounding circumstances in case of ambiguity. Here, I think the language of the 1988 Power of Attorney clear, but if necessary, I consider the circumstances surrounding its execution put its meaning beyond any real doubt.

Non-delegability of duties/decisions of the Liechtenstein Courts

227. Relatedly, the Foundation argues that the Foundation board was not able to delegate to M[e] Assaly the competence to decide on distributions. It said that such decisions were for the board as a whole, and pointed to certain observations of the Liechtenstein Court (see in particular at [135] above) in which M[e] Assaly's failure to engage with his fellow board members has been criticised.

228. To start with the issue of principle, I am entirely unpersuaded by the submission that the competence to decide on distributions was not delegable:

i) Article 10(3) of the Foundation's Articles is quite clear about it: it provides that the council (i.e., the board) may transfer to any one of its members " *... the exercise of part or all of the powers vested in it*." That must include the power to make decisions about distributions.

ii) The conclusion is reinforced by consideration of the relevant provision of the PGR, Article 181, which provides (in effect) for the principle of collective management by a foundation's board, unless "*the articles of association … specify otherwise*." Here, they do. In my view, the terms of Article 181 are quite inconsistent with the idea that there is any inhibition in principle as regards the delegation of powers by a foundation board to an individual member, including as regards the making of decisions about distributions of foundation assets.

iii) Finally, as Dr Bösch explained, Article 561 of the old PGR, and Article 552(28) of the new PGR, allow the founder to institute a separate foundation organ – aside from the board – to determine distributions. This again is consistent with the idea that there is no overriding or mandatory provision of Liechtenstein law to the effect that decisions about distributions are exclusively the domain of the foundation board acting as a collective, and therefore cannot be delegated to any individual board member.

229. There are then the two decisions of the Liechtenstein Courts the Foundation relies on. On proper analysis, however, I am not persuaded that either cuts across the position set out above or supports the proposition that in making the decision to transfer Kenstead Hall, and in transferring it, M^{e} Assaly was acting in excess of his competencies vis-à-vis the Foundation.

230. The first decision is that of the Liechtenstein Court referenced at [135] above, by which it refused (following his death) M^{e} Assaly's petition for the removal of Dr Beck, and made an order for costs against M^{e} Assaly's estate. In the course of its decision, the Court made the following observation I have already set out above, namely:

> *"The failure to document the business activities and to obtain formal resolutions from the board of trustees when selling assets of the foundation would have been grounds for his removal from office."*

231. The Foundation relied on this passage as endorsing the proposition that only the board as a whole could make decisions about distributions of the Foundation's assets. I do not think the logic of it can be stretched that far, however.

232. The context is instructive. It is apparent from earlier parts of the decision (p. 7) that a particular complaint of Prince Mohammed and Dr Beck was about lack of access to proper records of the Foundation:

> *"The trustees … do not have any of the foundation's business documents. They are not even aware of the foundation's bank account number. Despite requests to do so, Respondent no. 2 [M^{e} Assaly] failed to relinquish any of the business documents to the other trustees."*

233. This same deficiency seems to have been critical to the conclusion that, had he not died, there would have been grounds for M^{e} Assaly's removal from office.

The relevant conclusion, stated at p. 9 of the short reasons in a paragraph which also deals with costs, was stated as follows (my emphasis);

> *"Costs are awarded on the basis of Art. 78 of the Liechtenstein Law on Non-Contentious Proceedings (Ausserstreitgesetz): the Applicants' request for release of the business documents is upheld. Likewise, their application for the removal of Respondent no. 2 would have been accepted as his failure to release business documentation as a basis for the exercise of joint management rights or, at least, for efficient monitoring of the activities of the trustee with de facto management rights constitutes a breach of duty. The Applicants disclosed their costs correctly and in good time."*

234. The underlined words are important. In my opinion they make it clear, as Dr Bösch submitted, and as I have already found above, that in principle there is no objection under Liechtenstein law to the idea of a single foundation board member exercising decision-making powers, including as to the making of distributions. But if that is the decision-making structure, it does not absolve the other board members of the duty to monitor the activities of the foundation, and that in turn requires the board member to whom powers have been delegated to keep records and to keep the other board members informed. That is what M^{e} Assaly had failed to do, as I think a fair reading of the full passage containing the quotation referenced above (at [230]) makes clear (my emphasis):

> "*Under Art 182 PGR trustees must manage the foundation with the appropriate standard of care; specifically, the must observe the principles of prudent and conscientious business management and representation. If two trustees allow the third one to conduct the foundation's business on his own in the absence of any authorisation under the statutes or a resolution, this puts them in breach of their duties of collective management. Even if (de facto) management duties are lawfully transferred to one of several trustees, the other trustees are still obliged to monitor the trustee to whom such powers have been transferred effectively (LES 2013, 73). It follows from this that the trustees – particularly [Prince Mohammed] – are under an obligation to participate in the management of the foundation if they do not want to be in breach of their duties. By the same token, it also means that he must concern himself with the corresponding business documents and take appropriate measures to obtain them of necessary. [M^{e} Assaly] was under an obligation to document the foundation's business and to duly notify the other trustees of his activities so that they were also able to comply with their duties. This was neglected in the present case. The late [M^{e} Assaly] did not even consider it necessary to obtain formal resolutions from the board of trustees for his activities in the present case. The failure to document the business activities and to obtain formal resolutions from the board of trustees when*

> *selling assets of the foundation would have been grounds for his removal from office.*"

235. There is no detailed consideration in the decision of the Foundation's Articles or of the 1988 Power of Attorney. Thus, I can detect in it no clear and reasoned finding that M[e] Assaly was acting in excess of his competencies in making decisions alone. The general reference at the end of the above passage to a lack of board resolutions is not sufficiently clear to amount to such a finding. The real gravamen of the criticism, it seems to me, is a broad one about M[e] Assaly's record keeping and his failure to keep his fellow board members sufficiently informed – although there is also criticism of the other board members as well, for failing to be sufficiently proactive. In any event, the real point is one about availability of documents and the flow of information, so as to enable all board members to comply with their general duty under Art. 182 PGR to manage the Foundation with the appropriate standard of care.

236. I do not see why any shortcomings of M[e] Assaly in that regard should invalidate the decision taken by him to transfer Kenstead Hall, if otherwise consistent with his powers under Article 10(2) or his delegated authority under the 1988 Power of Attorney. The Liechtenstein Court did not suggest any such problem, and it would have been an obvious point to make. In argument, Mr Mumford KC for the Foundation relied on a statement in a decision of the Liechtenstein Constitutional Court (GE 2009, 304 – see Guiding Principle 1a), to the effect that all members of a foundation board should at least be aware of a resolution and be able to participate in it, and that resolutions in which not all foundation members could participate should be regarded as null and void. It is not however clear to me how that principle applies in this case, if it is correct that M[e] Assaly had power under the Foundation's constitution to make decisions alone, and if in fact all powers of the board had been effectively delegated to him under the 1988 Power of Attorney, and if in fact the 2001 Instruction was a regulation which he and all the other board members were bound to follow in any event. Furthermore, as Mr Reed KC pointed out in his submissions, this is not a case in which there was any secret about the plan to transfer Kenstead Hall to the Princess. Prince Mohammed knew about it and it would equally well have been possible for him to have engaged the constitutional processes of the Foundation if he had wished to. There is no sense in which he was precluded from doing so.

237. The further decision specifically relied on by the Foundation is that of the Liechtenstein Court of Appeal, in the proceedings brought by the Princess and her son to remove the Foundation's board (see above at [138(ii)]). The Foundation referred to the following statement in the decision at p. 28, para. 12.5:

> " *… the Respondents must first in principle be granted that in internal relationships with a multi-level Foundation Board the principle of joint management applies … regarding which the former member of the Foundation Board Faisal Assaly flouted …*".

238. In my view this takes one no further. The principle of joint management is not inconsistent with the idea of decision-making powers being validly conferred on or delegated to an individual board member, subject to a general duty on the part of the board as a whole to monitor the activities of the individual member, and a corresponding obligation on the part of the individual member to keep records and report on his activities. But a failure in either respect would not automatically invalidate any decision taken or action implemented, or justify the conclusion that in taking the decision or implementing the action the individual member was acting in excess of his competencies.

Summary

239. The position I have reached so far makes it strictly unnecessary for me to consider the further arguments relied on by the Princess to defeat the Foundation's primary claim, i.e. that even if M[e] Assaly was acting contrary to the purpose of the Foundation or otherwise in excess of his powers *stricto sensu*, that did not matter, either because of M[e] Assaly's power of representation under the law of Liechtenstein, or by operation of the English law concept of ostensible authority. Since the relevant points were developed at some length, however, I will go on to consider them.

Representative Authority/Ostensible Authority

The Argument based on the law of Liechtenstein

240. A main part of the Princess's case was that under Liechtenstein law, the question of M[e] Assaly's authority is not just a question of whether he was acting consistently with the Foundation's purposes, and within the scope of his internal competencies, but is also a matter of whether the Foundation can show that third parties dealing with him - i.e., the Princess and her agents - were *not* doing so in good faith. The Princess's case was that the Foundation could not show a lack of good faith, according to the relevant standard under Liechtenstein law, and so M[e] Assaly should be regarded as having authority under Liechtenstein law, even if he was in fact acting outside the purposes of the Foundation and in excess of his internal competencies.

241. This argument was based on Article 187a of the PGR. I set this out below, together with the Article 187, so as to show the overall context:

> "*Article 187: Power of attorney of the governing bodies and representatives*
>
> *(1) The governing bodies as well as the other persons appointed for the entire business management and representation (representative bodies) shall be authorised by law vis-à-vis bona fide third parties to conclude all transactions for the legal person. This is subject to the provisions of law and the articles of association regarding the manner in which representation is exercised.*
>
> *(2)* [*Not relevant*]

> *(3) In the relationship between the representative bodies and the legal person, the representative bodies are obliged to comply with the* restrictions *imposed by the articles of association or corresponding resolutions of the competent bodies imposed by the articles of association or corresponding resolutions of the competent bodies within the framework of legislative provisions.*
>
> *(4)* [*Not relevant*]
>
> *(5) The power of representation of the persons authorised to act shall be based on the power of attorney granted to them; in case of doubt, it shall extend to all legal acts which the execution of such transactions customarily entails.*
>
> *Article 187a: Limitations of the representation effect*
>
> *(1) The legal person shall not be bound by acts of representative bodies which exceed the powers which are or may be assigned to these bodies by law.*
>
> *(2) The legal person shall not be bound by acts of representative bodies which exceed the scope of the object of the company if the legal person proves that the third party was aware or should have been aware under the circumstances that the object of the company was exceeded by the act. Disclosure of the articles of association and corresponding resolutions of the competent bodies shall not be sufficient as evidence.*
>
> (3) *If the representative body exceeds its powers internally defined by the articles of association or by resolutions of the competent bodies, the legal person shall not be bound by such actions if it proves that the third party was aware or should have been aware under the circumstances that the internally defined powers were exceeded by the act.*"

242. To amplify, the Princess' argument relying on Art 187a is broadly as follows:

i) Art 187a is intended to deal with the situation in which a "*representative body*" of a "*legal person*" – a "*representative body*" including for example a board or council member – acts in a manner which is either inconsistent with the objects of the legal person or in excess of his powers under its constitution. The effect is that the legal person will still be bound by such acts, unless it can show – the burden being on the legal person for these purposes – that the relevant third party dealing with the "*representative body*" was aware or should have been aware that there was an issue.

ii) Liechtenstein law makes no distinction, in a case where there *is* such an issue but the burden of proof is *not* discharged, between the actual authority of the "*representative body*" or what English law would call

his ostensible authority. The legal person is simply regarded as being bound because, in the circumstances, the acts of the "*representative body*" are regarded as having that effect in law – he is said to have *representative authority*.

iii) Thus, says the Princess, M[e] Assaly should be regarded as having bound the Foundation by his acts, because whatever shortcomings there were as regards the Foundation's purpose or his internal competencies, on the facts he had the appropriate representative authority.

The Argument based on English law

243. If that is wrong, argues the Princess, and if one is required to distinguish between M[e] Assaly's actual authority under Liechtenstein law, and the question whether he should be regarded as having ostensible authority – which the Princess accepted would be a matter of English law – then on the facts M[e] Assaly *did* have ostensible authority to effect the transfer of Kenstead House, and so the Foundation should be regarded as bound by that transfer.

Discussion and Analysis

244. In short, I am not persuaded by any part of this analysis.

245. To begin with, I do not consider that any question which arises as a result of M[e] Assaly in fact acting contrary to the Foundation's purpose, or in excess of his internal powers, can be resolved by reference to the law of Liechtenstein.

246. This is really a question about choice of law.

247. It is useful to characterise as precisely as possible the issue or issues to be addressed. That will lead one to the relevant choice of law rule (Dicey para. 2-038). Here, characterised in a manner consistent with the English conflict of laws rules, it seems to me that in this case the Court is in fact presented with two core issues. One is about whether M[e] Assaly was a person authorised to represent the Foundation. The second is about the validity (or otherwise) of a transfer of title to registered land in England.

248. As to the first issue, it seems to me that the relevant choice of law rule is that providing that the extent of the authority of an officer of a foreign corporation is governed by the law of the place of incorporation (see Dicey, Rule 187(2) and the commentary at para. 30-030, including the long line of cases there cited on the point at footnote 113, starting with Banco de Bilbao v. Sancha and Rey [1938] 2KB 176 (CA)). But that is directed towards authority only as a matter of the internal management and organisation of the foreign corporation, and is nothing to do with the question of its external relations with third parties.

249. In other words, the choice of law rule directs the inquirer to the foreign law – here, the law of Liechtenstein – only to determine whether the officer is *actually* authorised. As to that, I think the Foundation is right to say that the question of *actual* authority in this sense corresponds with the idea of what the Foundation actually consented to. Beyond the boundary of matters it actually consented to

as a matter of its internal relations, the choice of law rule is not relevant, and thus neither is the law of the place of incorporation.

250. One is then however presented with a different issue, and a different choice of law rule. That issue is about the circumstances in which an action which was not consented to is to be regarded as binding anyway. Specifically in this case, the issue is whether a purported transfer of title to land in England should be regarded as binding.

251. The relevant choice of law rule governing questions of title to land in England points the inquirer to English law as the applicable law (see Dicey, Rule 140). I therefore consider that English law should be applied to determine the effectiveness of the transfer of Kenstead Hall, including whether it should be regarded as effective in law, even if actioned by M[e] Assaly outside the scope of his *actual* authority. I note that in a commercial case, dealing with a similar rule of Dutch law concerning the representative authority of corporate agents, Andrew Smith J took essentially the same view: see Credit Suisse International v. Stichting Vestia Group [2014] EWHC 3103 (Comm), at [280]-[286].

252. Where then does English law take one in this case, and is there scope for the English law principle of ostensible authority to fill the gap created by M[e] Assaly (on this hypothesis) having acted in excess of his actual authority?

253. To start with, and before coming onto the question of ostensible authority, it seems to me that one must return to the effect of s.26 LRA 2002 (see above at [156]).

254. In my opinion, this provision deals directly with the legal effects of any lack of *actual* authority on the part of M[e] Assaly stemming from his acting inconsistently with the Foundation's purpose. For the reasons already explained in detail above, my view is that any lack of authority arising solely from that source would be irrelevant as regards the validity of the transfer of legal title to Kenstead Hall, because it would be entirely a function of a lack of capacity by the Foundation which operated to limit the scope of its usual powers as owner of the registered estate, and that lack of capacity not having been reflected on the register by means of a restriction, the Princess would take free of it under s.26.

255. What though if the source of M[e] Assaly's lack of actual authority were him acting in excess of his internal competencies? I do not see that Section 26 LRA 2002 operates in that sphere. The Princess's case was that she could be rescued by the doctrine of ostensible authority, but I disagree. I do not consider that the facts of this case are compatible with the proper operation of the doctrine of ostensible authority.

256. As to statements of the doctrine of ostensible or apparent authority, the *locus classicus* is the dictum of Diplock LJ in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 at 503, where he said it represents:

> *"… a legal relationship between the principal and the contractor created by a representation, made by the principal to the*

> *contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract*."

257. The doctrine in its classical form, as summarised here, seems to have two key characteristics: (i) a representation by the principal that the agent has authority to enter into a contract on his behalf; and (ii) reliance by the third party, in the form of the third party entering into the putative contract.

258. Neither of those characteristics is present in this case, because no contract was entered into or even purportedly entered into. Instead, we are concerned with a voluntary disposition of one of the Foundation's assets for nil consideration – effectively a gift.

259. The editors of Bowstead & Reynolds on Agency (22nd Edn), para. 8-011, acknowledge that the doctrine may in some cases operate outside the classic scenario where the issue is whether a contract has been entered into, but they are clear, on the authority of High Commissioner for Pakistan in the United Kingdom v. Prince Muffakham Jah [2019] EWHC 2551 (Ch), [2020] 2 WLR 699 at [247], that it has no operation where the issue is whether a gift has been validly made. They say:

> "*The doctrine can also apply in respect of transfers of property, and sometimes in other contexts as well, including in a limited way in tort and the giving and receiving of notices. However, subject to true estoppel and restitutionary defences, the recipient of a gift from an agent purportedly on behalf of a principal needs to prove actual authority in the agent, not apparent.*"

260. Consistently with this Bowstead Article 83, which deals with dispositions of property, is as follows (my emphasis added):

> "*A principal is bound by dispositions of property made by an agent within the scope of such agent's actual authority or which are ratified, and, where for value, within the scope of the agent's apparent authority*."

261. The commentary at para. 8-126 then provides:

> "*Where the disposition is made by the agent and received by the donee as a gift, the broad concept of apparent authority does not operate to protect the done. In such cases, while a true*

> *representation by the principal of entitlement in the agent to make a gift that is actually relied upon by the donee might suffice to defeat the principal's ownership, the weak form of estoppel that lies behind apparent authority would not. In particular, the reliance element within apparent authority is nominal where there is a contract, but could not be allowed to be nominal where the third party has given no value …* ".

262. The consistent and logical theme, it seems to me, is that the doctrine of ostensible authority operates in a transactional environment in which there is a degree of give and take – i.e., a representation by the principal that the agent has authority to enter into commitments (usually contractual, but not always so) on its behalf, and on the side of the third party the assumption of some corresponding commitment (which may involve entering into a contract containing ongoing obligations, or may involve a one-off payment of money). Whichever way one looks at it, however, such characteristics are missing in this case, because the transfer was for nil consideration, as the TR1 itself expressly (and accurately) stated (see above at [153]). Thus, even if one assumes there was a relevant representation by the Foundation as to the scope of M^{e} Assaly's authority, I am not persuaded there was the appropriate element of reliance on the part of the Princess.

263. In her submissions, the Princess sought to counter this by saying there *was* a representation, *viz*. the statement as to M^{e} Assaly's sole signing right set out in the Liechtenstein public register, which she relied on "*by entering into the transfer [i.e. of Kenstead Hall] on the strength of that representation*." I see this as something of a distortion, however. It seeks to portray the transfer as having a transactional or contractual character, which in my opinion it did not have. It was essentially a unilateral act, carried out by M^{e} Assaly in order, as he saw it, to implement the King's instruction to him. The Princess did not *enter into* the transfer of Kenstead Hall in any meaningful sense. She was not a party to a bargain to that effect. She did not promise to do anything in return, and neither did she pay anything for the asset she was receiving. Instead she was essentially a passive recipient. There was no transactional aspect to it.

264. It is possible that some other form of estoppel might have been available to the Princess, operating outside the space occupied by the doctrine of apparent or ostensible authority *per se*. There would still be a difficulty though in showing reliance. As to that, it was suggested in submissions that the Court could infer reliance in the sense that the Princess, who had taken over paying expenses associated with the upkeep of Kenstead Hall at some point after the 2001 Instruction, would not have continued to pay such expenses after 2011 if there had been any doubt about the ability of M^{e} Assaly to transfer it to her. The pleaded case on reliance was not advanced in that way, however, because it was put as a case on ostensible authority. Thus the pleaded case (Amended Rejoinder at para. 29(b)) was that a showing of detrimental reliance was not in fact necessary, but that the Princess had relied on the apparent authority of M^{e} Assaly when, through her solicitors, the transfer was being agreed (the point already addressed above). This though says nothing about reliance in terms of continued payment of expenses, and there was no direct evidence from the

Princess on the point. In the circumstances, I am not satisfied on the evidence that the continued payment of expenses in connection with Kenstead Hall was sufficiently closely connected with any representation about the extent of M[e] Assaly's authority for me to find that it was inspired by reliance on that representation – as opposed to, for example, flowing from long-standing arrangements which involved those who enjoyed the use of certain properties reimbursing expenses associated with their maintenance and upkeep, whoever was the legal owner.

Some points about ostensible authority (and on the facts)

265. I could stop at that point, but a number of other issues were canvassed on the topic of M[e] Assaly's ostensible authority, which I should comment on briefly.

266. First, the Foundation challenged the proposition that there was any relevant holding out of M[e] Assaly as having authority to effect a transfer of Kenstead Hall, by way of gift or otherwise. This was put on the basis that although M[e] Assaly had sole signing rights under the Foundation's constitution, and although that was reflected in relevant entries in the Liechtenstein public register (see above at [60]), that was not a representation that M[e] Assaly was actually authorised to make use of those signing rights in any particular way. In making this argument the Foundation drew a parallel with an Australian case, Northside Developments Pty Ltd *v* Register General [1990] HCA 32. There, a Mr Sturgess who was director of the Appellant company, together with his son who was described as company secretary, executed an instrument of mortgage under the common seal of the company in favour of Barclays, but the lending then made available was advanced not to the company but to another entity controlled by Mr Sturgess. When the mortgage was challenged, Barclays relied on the apparent or ostensible authority of Mr Sturgess and his son to have executed it. This argument was rejected. The Court held that neither the office of director held by Mr Sturgess (see at [31]), nor the office of secretary apparently held by his son (see at [30]), nor their possession of the company seal, involved them being held out by the company as having authority to enter into transactions such as the mortgage. At [31] Dawson J said: " *… the position of director does not carry with it any ostensible authority to act on behalf of the company … in the absence of some representation made by the company, a director has no ostensible authority to bind it.*"

267. I think the difference in the present case is that there *was* a holding out which amounted to a relevant representation. I do not see a parallel with the possession of the company seal by Mr Sturgess and his son in the Northside case, which was the main point emphasised by the Foundation in its submissions. In my opinion, there is an obvious qualitative difference between possession of a company seal on the one hand, which tells one nothing about the authority of the possessor of the seal actually to make use of it; and on the other, a public statement of the nature made here by the Foundation, by means of an entry in the relevant register, that M[e] Assaly could "*sign individually*". That, it seems to me, is precisely the sort of representation that was missing in the Northside case: given its natural meaning, it is a representation specific to M[e] Assaly that he was entitled, on his own and by means of his sole signature, to act for the Foundation and incur liabilities on its behalf. It was a representation made

publicly and intended to be seen and relied upon by third parties. I therefore reject the Foundation's argument on this point, and think it correct to say that there *was* a holding out by the Foundation as to the extent of M[e] Assaly's authority, including, it seems to me, as regards him having authority to effect transfers of the Foundation's assets by way of gift.

268. The second point to mention concerns the Foundation's allegation that the Princess, either directly or via her agents, was on notice of matters that created doubts about the extent of M[e] Assaly's actual authority, and being so aware, could not rely on his apparent or ostensible authority.

269. To start with on this topic, there was initially a question between the parties as to the correct legal test: was it that in East Asia Company Limited v. PT Satria Tiratama Energindo (Bermuda) [2019] UKPC 30 (i.e., whether the Princess failed to make the inquiries that a reasonable person would have made in the circumstances to verify M[e] Assaly's authority), or that stated by Lord Neuberger in Akai Holdings Ltd v. Thanakharm kasikorn That Chamchat (2010) HKCFAR 479 (i.e. did she actually know that M[e] Assaly lacked authority or was she dishonest or irrational in assuming that he had it)? In oral closing submissions however the Princess accepted, following the decision of the Supreme Court in Philipp v. Barclays Bank UK PLC [2023] UKSC 25, that the correct test in English law is now that in the East Asia case.

270. I would also make the following points:

i) The Foundation's case was that the Princess was on notice of matters serving to limit the scope of M[e] Assaly's authority stemming from two sources. The argument was based primarily on the knowledge and state of mind of Mr Davies.

ii) The first source concerns knowledge of the Foundation's purpose – *i.e.*, knowledge that the purpose included the possibility of distributions to the King's heirs *only* in accordance with their Shari'a shares or perhaps in equal shares. Of course I have rejected that view of the Foundation's purpose, but even if I am wrong on that, it seems to me that logically any suspicion or even knowledge about it on the part of Mr Davies or indeed anyone else would be irrelevant to the question whether there was a valid transfer of the legal title to Kenstead Hall under English law. I think that follows given my conclusion about s.26 LRA 2002. Any question of knowledge or suspicion concerning the purpose of the Foundation is obviously a function of a limitation on the right of the registered owner to exercise its usual "*owner's powers*", and as such, the transferee takes legal title free of it unless the limitation appears on the register.

iii) The second source concerns knowledge of limitations on the competency of M[e] Assaly as a matter of the internal management and organisation of the Foundation. Again, I have already expressed the view that there were no such limitations, on a proper construction of the Articles, and so there was nothing for Mr Davies to be on notice of. If I am wrong about that, however, and if the Foundation is correct that approval of the wider board was needed, then I would say that the

Princess (via Mr Davies and perhaps otherwise) *was* on notice of matters which sufficiently called into question the extent of M[e] Assaly's authority, because Mr Davies was aware that the Foundation had a board, that Prince Mohammed was on it, and that there was at least a serious question about whether Prince Mohammed consented to the transfer, because he was also a key member of the Council of Heirs, which had been asked to confirm its position and had not done so.

Summary and Conclusion on the Foundation's Primary Case

271. Pausing there, the overall result in my opinion is that the Foundation's primary case, i.e. that the transfer of Kenstead Hall was void, must fail:

i) Section 26 LRA 2002 precludes any complaint that M[e] Assaly was acting in a manner contrary to the Foundation's purpose, because any such limitation was not reflected in a restriction on the register (see [156] *et seq.* above).

ii) In any event, my opinion is that in effecting the transfer of Kenstead Hall, M[e] Assaly did not act contrary to the purpose of the Foundation (see [169] *et seq.* above).

iii) Neither do I consider that M[e] Assaly acted in excess of his internally specified competencies, because he was competent acting alone both to decide to implement a regulation made by King Fahd (to the extent such a regulation allowed space for the exercise of any residual discretion), and actually to do so – in the present case by executing the TR1 (see [195] *et seq*. above).

iv) If those points are wrong then (broadly) I do not consider that any issue arising from M[e] Assaly's lack of authority can be addressed by reference to Article 187a of the PGR, because the law which applies to such issues is English law. Under English law, although s.26 LRA 2002 would serve to validate any disposition of the legal title to Kenstead Hall made contrary to the *purpose* of the Foundation, it would not serve to validate any disposition made by M[e] Assaly in excess of his internal competencies as a member of the Foundation's board or as a delegee of its powers. Neither would the English law doctrine of ostensible authority be available on the facts, given that the transfer of Kenstead Hall was a voluntary disposition effectively by way of gift.

The Foundation's Secondary and Tertiary Claims

The Foundation's Claims

272. The Foundation also advanced a series of secondary and tertiary claims. As will appear below, in my opinion some overlapping themes emerge and so I will deal with these claims together.

273. The secondary claims accept the principle that the transfer of Kenstead Hall to the Princess *was* effective to transfer title, but seek to rescind the transfer on the

basis that a continuing equitable interest on the part of the Foundation, which subsists despite the transfer, renders it voidable and liable to be set aside in equity.

274. The tertiary claims, by contrast, assume that the transfer of title to the Princess cannot be set aside, and so are intended to be personal claims for the recovery of money, representing the value of Kenstead Hall.

275. The claims can be described as follows:

Secondary Claims

i) A claim founded on the principle that a gratuitous disposition of property which involves a breach of fiduciary duty is liable to be rescinded without any requirement to show wrongdoing on the part of the donee: see, e.g. Baron v Willis [1900] 2 Ch at 130-137, and Willis v. Baron [1902] AC at 276-278, 280-282. Here, it is said that M^{e} Assaly, in effecting the transfer of Kenstead Hall, acted in breach of duties which are properly characterised as fiduciary.

ii) A claim based on the principle that a gratuitous disposition may be set aside where the donor is acting under a mistake, provided the mistake is of a sufficiently serious character that it would be unjust for the donee to retain the property received: Pitt v. Holt [2013] UKSC 26, [2013] 2 AC 108, at 103-142. Here, it is said that in effecting the transfer of Kenstead Hall, M^{e} Assaly was acting under such a mistake, in believing that he was entitled or obliged to transfer Kenstead Hall to the Princess, when in fact he was not so entitled or obliged.

Tertiary claims

iii) A claim in unjust enrichment, arising as a result of the Princess having been enriched by the receipt of Kenstead Hall at the expense of the Foundation, in circumstances which render the retention of Kenstead Hall unjust. Such circumstances are said to be that the transfer arose as a result of M^{e} Assaly's breaches of duty and/or lack of authority and/or mistake as to what he was entitled or obliged to do, each of which factors would constitute an unjust factor in the relevant sense: see, e.g., Moses v. Moses [2022] UKPC 42 at [68], Refco Limited v. Varsani [2012] EWHC 2168 (Ch) at [85]-[90] and Hampton Capital Limited [2015] EWHC 1905 (Ch) at [24]-[30].

iv) A claim in damages for knowing receipt, arising on the basis that the transfer of Kenstead Hall involved a breach of (in effect) fiduciary duty by M^{e} Assaly (as in (i) above), and the retention of Kenstead Hall by the Princess would be unconscionable now that she knows (even if she did not know it before) that the asset received by her is traceable to a breach of fiduciary duty: see, e.g., Agip (Africa) Ltd v. Jackson [1990] 1 Ch 265, at 291G.

276. The Princess made a number of points in response. Given the findings of fact I have already made, I think I need not comment in detail on all of them, but in light of the arguments addressed to me will deal with two which deserve comment.

The Princess's Arguments

277. The first argument is again about choice of law. It concerns the Foundation's claims at (i) and (iv) above. They are put differently, but each relies on the proposition that M^{e} Assaly was guilty of a breach of a duty which English law would characterise as fiduciary.

278. The counter-argument from the Princess was that the duties owed by M^{e} Assaly were duties owed under the law of Liechtenstein; and Liechtenstein law, as the experts were agreed, does not recognise any concept of fiduciary duty. The Princess accepted that, prior to the entry into force of the Rome II Regulation, the English Courts had a practice, when faced with relevant duties owed under foreign law, of asking whether they were sufficiently close to what English law would characterise as fiduciary duties that they could be regarded as such, for the purpose of (say) a claim for knowing receipt, even if they were not so characterised under the relevant foreign law (see, for example, Kuwait Oil Tanker SAK v. Al Bader [2000] 2 All ER (Comm) 271). But the Princess argued that that practice had not survived the entry into force of the Rome II Regulation, which (under Article 4 and Article 10) points one in the direction of the *lex causae*, and if (as here) the *lex causae* is the law of Liechtenstein, then that is the end of it, and there is no scope remaining for the English Court to look to transpose into an English law fiduciary duty a duty owed under foreign law which is not, on its own terms, considered to be fiduciary in nature (see Dicey at 36-072).

279. The Princess's second argument is about the LRA 2002. It concerns the Foundation's claims (i), (ii) and (iv) above, each of which relies for its success on the idea that the Foundation retained some form of equitable interest in Kenstead Hall, despite its transfer to the Princess. That is no less true of claim (iv), the personal claim for damages for knowing receipt, than of claims (i) and (ii), because as the Court of Appeal and now also the Supreme Court have recently confirmed, even a personal claim for damages for knowing receipt is dependent on the claimant showing a continuing proprietary interest in the asset transferred (see Byers v. Saudi National Bank [2022] EWCA Civ. 43, [2022] 4 WLR 22, at [74], and [2023] UKSC 51 at [97] and [201]), and consequently no such claim can lie where, upon acquisition, the defendant obtained an unimpeachable title to it.

280. The Princess' argument is that, as regards claims (i), (ii) and (iv), she did acquire an unimpeachable title to Kenstead Hall, as a result of the operation of s.26 LRA 2002 (analysed above at [156] *et seq*.). By means of s.26(1), she argues, she acquired title free of any limitation affecting the validity of the disposition, and by means of s. 26(3), her title as disponee cannot be questioned. Therefore the Foundation's claims fail.

281. My view of these two arguments is as follows.

Choice of Law

282. In my opinion, the Princess' argument on the choice of law issue does not arise on the facts. It would arise were it true that claims (i) and (iv) each fell within the scope of the Rome II Regulation, and were the *lex causae* for those claims, applying the choice of law rules under Rome II, the law of Liechtenstein. However in my opinion, the correct analysis is that claim (i) falls outside the scope of Rome II, because it is claim brought to vindicate rights in property; and although claim (iv) likely does fall within Rome II, the *lex causae* identified using the choice of law rules in the Regulation is English law, not the law of Liechtenstein.

283. Taking these points in turn, it seems to me that claim (i) is essentially in the nature of an equitable tracing claim. The choice of law rules under Rome II apply in the case of non-contractual obligations, and not to claims based on the assertion of rights in property.

284. The Editors of Dicey provide the following guidance as to what may amount to a property claim, as opposed to a claim in unjust enrichment, at para. 36-096, in their discussion on tracing:

> *"It may be necessary for a person to demonstrate that the assets received by the assets received by the defendant are the claimant's property. If the question is whether the claimant was originally the owner of that property, or whether his equitable interest is defeated by, for example, a bone fide purchaser for value without notice, the claim is one of property law."*

285. Applying this guidance, Henshaw J in Kazakhstan Kagazy and Ors v Arip and Ors [2021] EWHC 3462 (Comm) held that an equitable tracing claim was essentially a proprietary one and thus fell outside the scope of the choice of law rules in the Rome II Regulation.

286. I think the same result should follow here, at least as regards claim (i). The core allegation underpinning claim (i) is that the Foundation's property – i.e., Kenstead Hall – was transferred away in breach of duty and for no consideration; and that in consequence, the Foundation has a subsisting equitable interest in Kenstead Hall which justifies the transfer of legal title being reversed. Moreover, one of the key lines of defence advanced by the Princess, as I have mentioned, is that she has acquired an unimpeachable title, and so the transfer cannot or should not be reversed.

287. I conclude that claim (i) falls outside Rome II. In my opinion it is squarely a claim to assert an ownership interest in real property in England, and thus is to be governed by English law (see Dicey, Rule 140, referenced above at [151]).

288. Claim (iv) is more difficult to classify. It is essentially a personal claim for damages, although it has what might be termed a proprietary base. This is made clear by the decisions of the Court of Appeal and Supreme Court in the Byers decision, which I have mentioned above. That is because of what the claim for damages is actually for, and how it arises. Where a defendant is made

personally liable in equity for knowing receipt, the liability arises from having been in receipt of the claimant's property, knowing that it was transferred in breach of trust. Thus, the liability may be personal in one sense, but it arises from the fact that the defendant is in law to be regarded as the custodian of assets which in truth are not the defendant's assets at all but continue to belong in equity to the claimant (see per Nugee J as he then was in Courtwood Holdings SA v. Woodley Properties Limited [2018] EWHC 2163 (Ch) at [59], quoted with approval by the Court of Appeal in Byers at [74]).

289. Nonetheless, it seems to me difficult to characterise a claim for damages for knowing receipt as solely proprietary in nature. At its heart seems to be the idea that, in certain circumstances, and depending on their knowledge of the prior interest of another in it, the recipient of property comes under an obligation to that other to act in a certain way – i.e., to return the property to them rather than retain it (see the Byers case in the Court of Appeal, per Newey LJ at [2022] EWCA Civ. 43, [76]). If that is correct, then such claims for damages seem naturally to fall within the scope of Rome II (as indicated by Dicey, para. 36-062), although there is some doubt whether they properly fall within the general choice of law rule in Article 4, or the special choice of law rule for unjust enrichment in Article 10. I would tentatively think the former, because one is really concerned with a species of wrongdoing – i.e. a claim for damages for failing to return property belonging to another when under an obligation to do so.

290. In the present case, however, I do not think it matters, since under either Article 4 or Article 10 I arrive at the conclusion that English law is the applicable law. I say that because in my opinion, given that one is here concerned with a failure to restore title to real property situated in England, any tort/delict (Article 4), and/or any claim in unjust enrichment (Article 10), is manifestly more closely connected with England than with any other country. Consequently, the relevant choice of law rules require the application of English law: see Article 4(3) and Article 10(4).

291. In summary, it seems to me that English law is the governing law of both claim (i) and claim (iv), although one arrives there via different routes.

292. I should add that in my view English law also governs claims (ii) and (iii). No-one proposed that any law other than English law was relevant to claim (ii) (mistake). As to claim (iii) (unjust enrichment), the Foundation's case was that this fell within Rome II, Article 10 and that English law was applicable under either Article 10(3) (on the basis that the unjust enrichment took place in England), and/or Article 10(4) (already mentioned above). I agree, although I would prefer to state my conclusion on the basis of Article 10(4), since it seems to me clear that in circumstances where the unjust enrichment is said to have arisen from a transfer of registered land in England, the close connection to England is obvious.

293. The remaining question then is how the Court should decide whether there has been a breach of fiduciary duty in connection with claims (i) and (iv), and whether or not that is to be done using the technique applied in Kuwait Oil Tanker SAK v. Al Bader, i.e., by looking at the foreign law duties said to have

been breached, and considering whether they are of such a character that English law would regard them as fiduciary in nature.

294. I think the position is clear as regards claim (i): since it is a proprietary claim not falling within Rome II, that technique is available and indeed on the authority of the Kuwait Oil Tanker case is required.

295. What of claim (iv) – is the position different? The Princess, relying on Dicey at para. 36-072, suggests it is. There the commentary (footnotes omitted) suggests the following, although no authority is quoted which is directly on point:

> *"Where the Rome II Regulation applies, however, there appears to be no basis for the court routinely to 'translate' foreign duties into fiduciary duties and it should apply the lex causae directly."*

296. It seems to me, however, that where, as here, the *lex causae* identified under the Rome II choice of law rules is *English law*, albeit that (i) liability under English law is dependent on showing a breach of fiduciary duty arising in respect of a prior relationship, and (ii) that prior relationship exists under a foreign law, then it should be appropriate to examine whether the duties owed in respect of that prior relationship are such that they can be characterised as fiduciary for English law purposes. That *is* to apply the *lex causae*, albeit that its application requires an examination of duties owed under a foreign law, in order to assess how to characterise them for the purposes of the alleged English law liability. Any other result, it seems to me, would potentially in this case produce the perverse outcome that *a proprietary claim* based on a breach of duty owed under foreign law but not classified as fiduciary under that law could in principle succeed (i.e. claim (i)), whereas a *personal claim for damages* falling within Rome II, but entirely dependent on the existence of essentially that same proprietary interest, would necessarily fail (i.e. claim (iv)). I do not see how that could be a correct outcome, and for my own part, prefer an approach which results in consistency among such closely related claims.

Land Registration Act 2002

297. The remaining question then is whether claims (i), (ii) and (iv), if otherwise valid, would be defeated by operation of s.26 LRA 2002.

298. In my view the answer is no. On the facts, as I will explain briefly below, I do not consider that claims (i), (ii) and (iv) are viable in any event; but had they been viable, they would not in my view have been defeated by the operation of s.26.

299. Section 26 itself makes clear (s. 26(3)) that it has effect only "*for the purpose of preventing the title of a disponee being questioned*", but does not "*affect the lawfulness of a disposition*." This obviously contemplates that claims might arise from activities associated with a transfer of title to registered land, and which will subsist, despite the transfer of title itself being effective. Such claims might perhaps be against the transferor (if a trustee), or against the transferor's

agent, or indeed against the transferee, if the transferee is fixed with some form of liability (perhaps ancillary liability) for the wrongdoing in question.

300. It seems to me the question is how such claims are accommodated within our legal framework for managing transfers of registered land.

301. The problem is that, on the one hand, the unlawfulness associated with a transfer might be of a type which would ordinarily result in the claimant retaining some form of equitable interest in the property transferred. That is so in this case, at least as regards claims (i), (ii) and (iv).

302. On the other hand, such interests will by definition not appear on the register, and the overall approach of our system of land registration is that interests which do not appear on the register are generally not protected, unless they are overriding interests on the part of a person in actual occupation. Relying on this general principle, the Princess argues that, come what may, she has acquired an unimpeachable title to Kenstead Hall under s. 26 LRA 2002, free of any residual equitable interest on the part of the Foundation.

303. I do not agree with that analysis, however, in short because the transfer to the Princess was a voluntary one, for which she gave no monetary value or other consideration.

304. To amplify:

i) I think it correct to characterise the equitable interests contemplated by claims (i), (ii) and (iv) as proprietary interests said to stand in priority to the legal title transferred by the Princess. As regards the claim for knowing receipt (claim (iv)), that conclusion would seem to me consistent with Newey LJ's statement in the Byers case at [75], that " ... *it makes sense to think of a knowing recipient owing such duties [i.e., custodial duties* – see *above at [289]] in circumstances where the property is subject to an interest having priority to the recipient's*" (my emphasis). I do not see why logically claims (i) and (ii) should be any different.

ii) To my mind, all three claims therefore assume a subsisting equity on the part of the Foundation, and thus an equitable interest at the point of transfer which stands in priority to the interest acquired by the Princess, and which in the case of claims (i) and (ii) entitles it to unwind the transfer, and in the case of claim (iv) entitles it to damages corresponding to the value of the interest transferred.

iii) Priorities are dealt with not in s. 26, but in ss. 28-29 LRA 2002. Leaving aside the special category of overriding interests, the broad scheme of those sections, as I understand it, is that a prior interest in registered land existing before a relevant transfer is protected if shown on the register. The transferee will then take subject to it. But if the prior interest is *not* shown on the register, and *if* the transfer is made "*for valuable consideration*" (see s. 29(1)), then it is postponed (i.e., stands behind) the new interest created as a result of the transfer.

iv) The upshot, it seems to me, is that an equitable interest in registered land which would otherwise subsist will effectively be lost on transfer if not registered and even if the transferee is on notice of it, *provided* the transfer is made for valuable consideration. But if it is not made for valuable consideration, then the original order of priorities remains, and the transferee cannot resist a claim based on the prior interest by relying on s. 26.

v) In Ali v. Dinc & Ors [2020] EWHC 3055, Dame Sarah Worthington (Sitting as a Deputy High Court Judge) said at [313] that " *... in my view s. 26 is directed at protecting the disponee's title (i.e., his legal title), not its priority*". I respectfully agree, and so I think the Princess is wrong to say that, come what may, she acquired an unimpeachable title to Kenstead Hall which cannot be subject to attack, whatever the circumstances in which it came about and whatever breaches of duty were involved in making it happen.

Conclusions on the Foundation's Secondary and Tertiary Claims

305. In light of those observations, my conclusions on the Foundation's secondary and tertiary claims may be briefly stated:

i) Claim (i) (voluntary disposal in breach of fiduciary duty): In my view this fails because there was no breach by M^{e} Assaly of any duty which is properly characterised as fiduciary for the purposes of English law. At most, there was a general failure in terms of record keeping and provision of information (see [235] above). But there was no improper disposal of the Foundation's assets either in contravention of the Foundation's purpose or in excess of M^{e} Assaly's internal competencies.

ii) Claim (ii) (mistake): In my view this fails for similar reasons. There was no mistake by M^{e} Assaly about either his entitlement or obligation to transfer Kenstead Hall. He was both entitled and obliged to act as he did. Consequently, there was no mistake of sufficient seriousness to create an equity entitling the Foundation to rescind the transfer of Kenstead Hall to the Princess.

iii) Claim (iii) (unjust enrichment): In my view this fails also. There was certainly enrichment, but it was not unjust.

iv) Claim (iv) (damages for knowing receipt): In my view this fails for essentially the same reasons as claim (i). There was no breach by M^{e} Assaly of any obligation properly classifiable as fiduciary under English law.

306. If however I am wrong about claims (i), (ii) and (iv), so that the Foundation *did* have the benefit of an equity at the point of transfer, such equity would not (as the Princess alleged) have been lost on transfer, but would instead stand in priority to any interest of the Princess, even though not registered, because the transfer to the Princess was not a transfer for value.

Conclusion

307. My overall conclusion is that the claims by the Foundation fail. I should be grateful for assistance from counsel in drawing up an Order which reflects that outcome.