

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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C.A. No. 11-56430

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ROTHWELL, LTD.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

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**PLAINTIFF-APPELLANT ROTHWELL, LTD.'S  
EXCERPTS OF RECORD  
VOLUME 3**

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Appeal from the Judgment of the United States District Court  
for the Central District of California  
D.C. No. 10-cv-00479-RGK-FFM  
(Honorable R. Gary Klausner)

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1 MR. WILLIAM COHAN: Thank you for your very long  
2 trip, Mr. Chaffe. Have a good trip back.

3 BRIAN JAY RAYMENT,

4 The witness, after being duly sworn, testified as follows:

5 THE CLERK: State your full name and spell your last  
6 name for the record.

7 THE WITNESS: Yes. It's Brian with an I. Jay is  
8 J-A-Y. Rayment, R-A-Y-M-E-N-T.

9 THE COURT: You may inquire, Counsel.

10 DIRECT EXAMINATION

11 BY MR. WILLIAM COHAN:

12 Q Good afternoon, Mr. Rayment. Can you tell the Court a  
13 little about your background and where you were born and  
14 raised, sir?

15 A Born in Ohio. Lived there. La Habra. Ridgewood, New  
16 Jersey. And then starting high school in Tulsa, Oklahoma.

17 Q Okay. And did you attend college?

18 A I did. Oklahoma State University for a political science  
19 history major. Graduated in '75 and proceeded to law school  
20 at the University of Tulsa after that.

21 Q And I take it you took a degree as an attorney?

22 A I did.

23 Q And did you become licensed to practice law?

24 A I did.

25 Q And was that in Oklahoma in 1982?

1 A It's -- that's correct.

2 Q All right. And from 1982 onward how have you been  
3 employed, sir?

4 A I started out as an associate with a firm Blackstock  
5 Haller and Joyce in downtown Tulsa. I became a partner  
6 there after about roughly five years. And then in '91 I  
7 left that firm to set up Kivell Rayment and Francis where  
8 I'm currently a partner with two other lawyers as partners.  
9 And we have roughly 12 associates.

10 Q And that is currently how you are engaged?

11 A That's correct.

12 Q Okay. Let me back up for a one moment. I think you said  
13 the name of the firm was Kivell Rayment and Francis?

14 A That's correct.

15 Q Is that Francis related in any way, shape or form to the  
16 Joe Francis whose trust we've been talking about?

17 A No, but he does have the same first name.

18 Q Okay. Just another Joe Francis?

19 THE COURT: Bring the microphone down towards you a  
20 little bit. Thank you, very much.

21 Go ahead.

22 MR. WILLIAM COHAN: Thank you, Your Honor.

23 BY MR. WILLIAM COHAN:

24 Q How did you initially become associated with the Joe  
25 Francis about whom there has been some testimony today?

1 A The short story is I met him through his parents.

2 Q And how did you become acquainted with either or both of  
3 Joe Francis' parents?

4 A Joe's father was using a company that I had an interest  
5 in to produce a product. There was a warranty problem with  
6 the material supplied by a third party, and my business  
7 partner referred him to me to help resolve that conflict.

8 Q And can you give us approximately what year this  
9 occurred?

10 A '93, '94. Maybe '92. Sometime in the early '90s.

11 Q Sometime in the early '90s. And about how old was Joe  
12 Francis, the one that we're talking about in this case, when  
13 you first met him?

14 A I believe he was around 18.

15 THE COURT: Gentlemen, just so we won't run into it  
16 every time, the Francis that's part of your firm, he's not  
17 part of this case at all. Is that correct?

18 THE WITNESS: Correct.

19 THE COURT: Okay. So we don't have to refer to him.

20 MR. WILLIAM COHAN: Okay. Thank you, Your Honor.

21 BY MR. WILLIAM COHAN:

22 Q So you met him then. And did you continue to do any  
23 legal work with or for Joe Francis' dad?

24 A I have represented his father since those years in the  
25 early '90s, and do still today.

1 Q So for the last more than 15 years Joe Francis' father  
2 has been a client of the firm?

3 A That's correct.

4 Q And has that been a significant amount of work?

5 A Yes.

6 Q Could you give an estimate of the amount of work that  
7 you've done overall and give us a percentage of the amount  
8 that you've done for -- I believe his name is Ray Francis?

9 A That's correct. Yeah. It could vary from year to year.  
10 But some years as much as 25 percent of my work for him.  
11 Probably, on the average, closer to ten.

12 Q Okay. And did there come a time when Joe Francis engaged  
13 your services as an attorney?

14 A Yes.

15 Q Do you recall the first engagement you had for Joe  
16 Francis?

17 A It would have been helping him out in connection with a  
18 company he owned by the name of Fall Line Entertainment.  
19 That company existed here in California at the time he  
20 contacted me. He was in the middle of litigation. And he'd  
21 asked me to do some contract work for him and representation  
22 of him in relation to that company. And then shortly  
23 thereafter Mantra Films was formed, and I assisted him in  
24 forming Mantra Films.

25 Q And were you ever a general counsel for Mantra Films?

1 A No. Although I did the work a general counsel would  
2 normally do in terms of review contracts, locate local  
3 counsel, things of that nature.

4 Q Can you give us an idea of the time period during which  
5 you performed those services for Mantra Films?

6 A Roughly from its formation through the time that he  
7 brought in an in-house general counsel.

8 Q Which was approximately when?

9 A I believe it was in '03 that Ron Guttman was brought  
10 inside.

11 Q Okay. So I believe you said Ron Guttman, G-U-T-T-M-A-N?

12 A Correct.

13 Q Became general counsel for Mantra?

14 A Yes.

15 Q Okay. But prior to that time you were acting as general  
16 counsel?

17 A That's correct.

18 Q All right. So you've heard the testimony and you know  
19 about the settlement of the Trust in May of 1999, correct?

20 A Yes.

21 Q Did you have anything to do with introducing Joe Francis  
22 to Owen Foley who was the attorney who created trust?

23 A I did.

24 Q And how did that come about, sir?

25 A I was on a trip with Joe to actually go SCUBA dive in

1 both the Turks and Caicos and the Bahamas. And I had been  
2 down to the Turks and Caicos diving and fishing before and  
3 had met Owen Foley and the idea of the Trust had come up. I  
4 suggested introducing him to Owen to discuss that.

5 Q Had you previously been associated with -- well, had a  
6 client who introduced you to Owen Foley?

7 A I did.

8 Q Okay. I'm not going to ask you the name of the client.  
9 But is that how you met Owen Foley?

10 A That's correct.

11 Q And approximately how long before you introduced Joe  
12 Francis to Owen Foley did you first meet Owen Foley?

13 A That's a tough one.

14 Q Approximately?

15 A Within a few years of that.

16 Q Okay. Did you have -- did you have any other business  
17 relationship with Owen Foley other than meeting Owen Foley  
18 through a client of yours?

19 A Not at that time. I have since used his firm. Actually,  
20 an organization of which I'm on the executive committee has  
21 used his firm. His firm services.

22 Q Do you have an interest in real property in the Turks and  
23 Caicos Islands?

24 A I do.

25 Q And for how long have you had that interest?

1 A Two and a half years.

2 Q Just two and a half years?

3 A Yes.

4 Q So back in 1999 when you and Joe Francis went to the  
5 Turks and Caicos Islands, had you previously been there?

6 A I had been there fishing and diving.

7 Q Okay. And had you been there more than once in  
8 connection with business dealings?

9 A No.

10 Q Okay. So I won't invade the privilege.

11 But you introduced Mr. Joe Francis to Owen Foley for the  
12 purpose of enabling Mr. Francis and Mr. Foley to explore  
13 creating a trust for Joe Francis. Is that a fair statement?

14 A That's fair statement.

15 Q Okay. Did you have anything to do with the selection of  
16 Colin Chaffe as the trustee, or really Hallmark Trust of  
17 which Mr. Chaffe was a principal as a trustee?

18 A Only from the standpoint that Owen Foley had recommended  
19 him. And nobody knew any different, so he was selected.

20 Q Okay. And did you participate in selecting Hallmark?

21 A Not in the selection process, no.

22 Q Now, from the period of time May 24 of 1999, which I  
23 represent is the date that the Trust settlement was actually  
24 signed, to approximately March of 2002 when the Mexico  
25 property was acquired, do you recall what you did with

1 respect to this trust or any of the corporations which are  
2 owned by the Trust, meaning Island Films, Summerland,  
3 Rothwell?

4 A You're talking about from that period of a formation  
5 through '02?

6 Q Right. Through the point in time when, according to  
7 Mr. Chaffe, you suggested to Mr. Chaffe that Rothwell invest  
8 some money in the real estate in Mexico.

9 A Correct. There were some contracts that were assigned by  
10 Joe's companies to the Trust which provided the first  
11 revenue into the Trust.

12 Q Okay.

13 A I was hired by the Trust to facilitate putting those  
14 contracts in place.

15 Q And when you say you were hired by the Trust, who hired  
16 you?

17 A Rothwell. Well, by Colin Chaffe.

18 Q Okay. So that's how you had some contact with  
19 Mr. Chaffe?

20 A I should say Hallmark to be specific. But Colin Chaffe  
21 on behalf Hallmark.

22 Q So when you dealt with Hallmark, you dealt principally  
23 with Colin Chaffe?

24 A Yes.

25 Q Did Mr. Francis bring this Mexican property to your

1 attention and make a request of you in connection with that  
2 that you presented to Mr. Chaffe? And this is an investment  
3 opportunity as opposed to legal counsel, which is why I  
4 don't believe we're waiving the privilege because I don't  
5 think there is one there.

6 A Well, yes. I actually visited the property with him and  
7 with Mr. Hadid back before the Trust was ever involved in  
8 the process.

9 Q Okay. And is it correct that you suggested to Mr. Chaffe  
10 that this would be something the Trust ought to do given the  
11 fact that for \$1 million invested it was going to get a 5 or  
12 \$6 million increase in value?

13 A That was the expectation at the beginning, was to  
14 purchase the property and then it was going to be built.  
15 The house was going to be built upon it.

16 Q Okay. When did you become the -- when did you become one  
17 of the protectors of the Trust?

18 A Sometime in 2005.

19 Q Okay. And do you recall the circumstances under which  
20 you became a protector of the Trust?

21 A It had to do with the situation that existed between  
22 Mr. Trowbridge and Colin as far as the transfer of the  
23 ownership of the Hallmark Trust to Mr. Trowbridge. Some of  
24 the entities were still being administered by Mr. Chaffe.  
25 And my understanding was that there were issues arising out

1 of that pertaining to insurance, pertaining to control of  
2 the Trust organizations by the trustee if Mr. Chaffe, who  
3 was -- had sold his interest in the Trust organization, was  
4 going to still continue to serve on in a corporate capacity  
5 for these entities. And Mr. Trowbridge just wanted, as he  
6 put it, to get the blessing of everyone that that was a good  
7 situation. At that time I believe Pittsford Limited had  
8 fallen out of good standing. So it was not capable of  
9 providing what was needed.

10 So the concept was brought forth that I be appointed this  
11 protector to, in essence, bless that arrangement.

12 Q Did this idea originate with Brian Trowbridge?

13 A The document did. He wanted something to give him  
14 assurances that no one was going to come back and look at  
15 him later for why this was allowed to exist in that fashion.

16 Q Is Mr. Trowbridge an attorney licensed to practice in the  
17 Turks and Caicos Islands to your knowledge as of the time  
18 we're discussing now back in 2005?

19 A Yes.

20 Q Okay. So he was the only attorney who was acting on  
21 behalf of the Trust at that point to the best of your  
22 knowledge, correct?

23 A With regard to that situation, I think --

24 Q With regard to that situation?

25 A Yes.

1 Q Now, there was also testimony about the acquisition of  
2 the second lot, Lot 13B, in September of 2005. Were you  
3 involved in that?

4 A I was.

5 Q And how were you involved in that?

6 A Arranging the contracts and the closing purchase, if you  
7 will, of the property.

8 Q Just in the interest of saving time I'm not going to go  
9 over exhibits. I will just ask you your recollection about  
10 a power of attorney. Were you authorized back in 2002 to go  
11 to Mexico on behalf of the Trust, meaning Rothwell, Island  
12 Films, Summerland Holdings, et al., if I may put it that  
13 way?

14 A Yes.

15 Q Okay. And what was your mission?

16 A To establish a Mexican corporation that could, in turn,  
17 purchase the property.

18 Q And did you retain Mexican counsel, a Mexican lawyer to  
19 create this corporation in Mexico?

20 A I did.

21 Q Okay. And so you just engaged that person. You're  
22 not -- is it fair to say you're not a Mexican lawyer or  
23 expert in Mexican law?

24 A I do not speak Spanish. So no, I'm not a Mexico lawyer.

25 Q Okay. So you hired counsel down there. And to the best

1 of your knowledge and belief a corporation was formed and it  
2 acquired ownership of that property?

3 A It did. And that to assist in that arrangements were  
4 made for the purchase to be insured by Stewart Title, which  
5 is a U.S. title company that had offices in Mexico. So to  
6 insure trust was protected in his purchase and held the  
7 property, we brought Stewart Title in. I brought Stewart  
8 Title into play.

9 Q Yeah. I was wondering if that was the royal "we."  
10 So you actually saw the way to protect the trust's  
11 interests in Mexico where you didn't speak Spanish was to  
12 get Stewart Title involved?

13 A Yes. In this particular case the situation was a little  
14 more difficult because the property was located on the  
15 seaside and there were restrictions on ownership of the  
16 property by non-Mexican citizens and corporations.

17 Q And was that part of the reason why a Mexican corporation  
18 had to be created to own the property?

19 A Correct.

20 Q Okay. So you learned that much. And that transaction  
21 was consummated?

22 A Yes.

23 Q And it was your understanding that Mr. Francis would  
24 construct a residence on that property?

25 A Yes.

1 Q And was it your understanding that that residence would  
2 be owned by the Trust when it was built on the Trust  
3 property?

4 A Yes, by the Trust entity.

5 Q I'm trying to formulate a question that doesn't invade  
6 the privilege.

7 Did you have conversation with Joe Francis in which you  
8 advised him that he would have no ownership interest in this  
9 real estate when he spent -- he or his entity spent all this  
10 money building it on the construction of a residence on Casa  
11 Blanca de Punta Mita's property?

12 A I'm not sure how to get into the answer of that question  
13 without invading the privilege.

14 Q All right. Do you believe he understood the fact that he  
15 was no longer going to have any control over that property  
16 once it was improved and it was owned by Casa Blanca?

17 A I believe he understood he would have no ownership of the  
18 property. But he would have the ability to use it once he  
19 finished construction of the home.

20 Q Do you know whether he understood that that permission  
21 could be withdrawn by the trustee at any time?

22 A I believe he understood that because there were no  
23 documents in place that granted that right indefinitely.

24 Q And in your opinion was Mr. Francis a sufficiently  
25 sophisticated business person that he understood real estate

1 transactions and what needed to be in writing?

2 A I believe he did.

3 Q Okay. Now, did you understand the importance of the  
4 trustee and protector of the Francis Trust being completely  
5 independent from Mr. Francis in order to achieve the  
6 benefits of asset protection that could otherwise be  
7 provided by a Turks and Caicos Islands discretionary trust?

8 A Yes.

9 Q And have you ever acted to control Rothwell's activities  
10 or any other entity owned or controlled by the Trust for Joe  
11 Francis' benefit, sir?

12 A Only indirectly to the extent he's a beneficiary to the  
13 Trust with the other beneficiaries. Not to the exclusion of  
14 the trustee. I have always viewed my legal services being  
15 provided to the Trust and its entities to be under the  
16 supervision of Mr. Chaffe.

17 Q And have you ever ordered or directed Mr. Chaffe to  
18 perform any acts at the behest of Joe Francis other than  
19 merely relaying the request that this Lot 14 and then later  
20 Lot 13B be purchased?

21 A I don't believe I have the authority to order him to.  
22 But I have not even at any point insisted that he do  
23 anything. I have had a lot of discussions with him about  
24 what might be done, for instance, with regard to both of the  
25 lot purchases. We discussed those.

1 Q Okay.

2 A And how that would affect the Trust and what that would  
3 end up looking like once it was completed.

4 Q Do you consider yourself to be a tax attorney?

5 A No, sir.

6 Q Do you give tax advice to clients?

7 A Only from a standpoint of general business. I do  
8 commercial law. And I know the difference between a Sub-S  
9 and C-corp. I know the difference between an LLC and an  
10 S-corp. And I form a lot of businesses. So I have to know,  
11 generally, tax consequences on business entities such as  
12 that. But when it comes down to keeping books and records  
13 for the companies and filing tax returns, no.

14 Q Okay. So you're not a tax return preparer?

15 A No.

16 Q Okay. Did you provide tax advice to Mr. Francis other  
17 than in connection with suggesting that he form corporations  
18 and make an S-corporation election so that losses and gains  
19 would pass through?

20 That maybe wasn't a real good question. Let me withdraw  
21 it and try again.

22 What, if any, tax advice have you provided to Joe  
23 Francis?

24 A Nothing specific as to taxes. The recommendation on the  
25 type of an entity to form, yes.

1 Q So nothing beyond that?

2 A Correct. Now, I did -- I will say the thing that came  
3 closest to being tax related was the transaction involving  
4 Asia Pacific.

5 Q Okay. And with respect to Asia Pacific, do you recall  
6 the circumstances under which you first heard of Asia  
7 Pacific?

8 A Yes. I was speaking with Mr. Chaffe about what avenues  
9 existed that he might be aware of that would provide tax  
10 advantageous results for Mr. Francis if he were to donate  
11 some funds or get some funds into the Trust. And the Asia  
12 Pacific opportunity was presented in response to that  
13 inquiry.

14 Q And that came to you through a recommendation from  
15 Mr. Chaffe?

16 A Yes.

17 Q And did you meet with any people from Asia Pacific in  
18 connection with this transaction whereby Sands and Mantra  
19 purchased sort of some insurance through Asia Pacific?

20 A I did. I met with Sherry Bright and Morgan Latell in  
21 Hawaii with Mr. Francis.

22 Q Okay. Did you -- strike that.

23 Did Morgan Latell represent to you that he was a  
24 certified public accountant?

25 A Yes. In fact, his letterhead I believe so stated.

1 Q Did you receive some sort of correspondence from him?

2 A Well, yes, in relation to the contract. But also in  
3 relation, I believe, to an opinion.

4 Q So did you get an opinion letter from him on his  
5 letterhead indicating he was a certified public accountant?

6 A There were one, maybe even two opinions. And to be  
7 honest with you, counsel, I can't remember if they came  
8 directly from him or if one was from BDO. But there were  
9 opinions that we -- that I asked for and were provided to us  
10 as to the legitimacy of the tax results of this transaction.

11 Q Okay.

12 THE COURT: Let's take a break at this time. Come  
13 back in 10, 15 minutes. We'll take up at a quarter of.

14 (Court in recess.)

15 THE COURT: The record will reflect the witness is  
16 still on the stand.

17 Counsel, you may continue your inquiry.

18 MR. WILLIAM COHAN: Thank you, Your Honor.

19 BY MR. WILLIAM COHAN:

20 Q Mr. Rayment, I would like to just quickly cover the last  
21 several years of existence of the Rothwell account.

22 First of all, do you know John Welker?

23 A I do.

24 Q Do you have any kind of business relationship with  
25 Mr. Welker?

1 A I do.

2 Q What is the nature of that relationship?

3 A He's my broker on one of my investment accounts.

4 Q And was he a broker of yours during the period of 2001  
5 through 2009 when Rothwell had an account with him?

6 A I don't remember the exact year it was set up, but  
7 most -- the vast majority of that time, yes.

8 Q Was Mr. Welker your broker before Rothwell retained his  
9 services?

10 A No. I believe I set up my account there after that.

11 Q And did you meet Mr. Welker through Mr. Francis?

12 A I did.

13 Q And did Mr. Francis force you to engage Mr. Welker's  
14 services?

15 A No.

16 Q You made an independent decision that you wanted to use  
17 his services as your stockbroker?

18 A Yes. He's a good broker.

19 Q Did you make a recommendation to Mr. Chaffe that Rothwell  
20 should use Mr. Welker as well?

21 A I did.

22 Q And was that so Joe could control it?

23 A No. The whole -- the whole reason for establishing the  
24 Trust as an irrevocable trust is so Joe Francis would not  
25 control it.

1 Q And I have just been reminded that I didn't quite finish  
2 the area of inquiry that we were on before the break, which  
3 was you mentioned BDO and the Asia Pacific matter. I think  
4 you had testified about Morgan Latell being a certified  
5 public accountant and giving -- providing you with some sort  
6 of an opinion letter on the tax deductibility of the  
7 premiums that were paid by Mantra and Sands, the proceeds of  
8 which wound up in Rothwell's account?

9 A Yes.

10 Q And was it -- did I correctly state that Latell did opine  
11 that this is a valid deduction?

12 A Yes, he did. I'm trying to remember if he provided a  
13 written opinion or if it was another entity as well or both.  
14 But there was at least one written opinion to that effect.

15 Q Okay. Now, you mentioned BDO. Were you referring to the  
16 accounting firm BDO Seidman?

17 A Yes, sir.

18 Q And what, if anything, did BDO Seidman have to do with  
19 the Asia Pacific insurance transaction?

20 A It was my understanding that they were more or less the  
21 entity behind it backing the Asia Pacific entity.

22 Q So you believe that BDO Seidman had endorsed the tax  
23 deductibility of the premiums that were paid?

24 A That was my understanding.

25 Q And did you pass that understanding along to Joe Francis

1 at any point?

2 A Yes.

3 Q Okay.

4 A Through the opinions.

5 Q Okay. So did you offer any independent opinion of your  
6 own as to this transaction or the tax deductibility of it or  
7 any of the rest of it?

8 A The only opinion I rendered with regard to the  
9 transaction was the contract language and advice concerning  
10 what the contract language meant. Not the tax issues  
11 pertaining to the transaction.

12 Q Okay.

13 A There were payment terms. There were other terms of the  
14 agreement that I did address.

15 Q Okay. Now, during the remainder of the period from when  
16 you became protector to the time when there was a levy by  
17 the Internal Revenue Service on this account at Morgan  
18 Stanley, which was November 6 of 2009, did you have  
19 conversations with Mr. Francis in which he endeavored to  
20 influence you to act in some form or fashion to control  
21 Rothwell?

22 A Prior to the levy?

23 Q Yes.

24 A No.

25 Q Okay. And did Mr. Francis hire other attorneys to

1 represent him in connection with various and sundry legal  
2 matters throughout the time that you've known him and also  
3 done some work for him?

4 A Yes. Both during the time that I was quote/unquote  
5 serving as outside general counsel and since.

6 Q And were these numerous other lawyers who represented  
7 him?

8 A Yes.

9 Q And are you -- did you ever handle any litigation on  
10 behalf of Mr. Francis?

11 A I think the only litigation that I assisted in as a  
12 counsel of record was way back in the Fall Line  
13 Entertainment days back in the late 1980s. But since Mantra  
14 and Sands started doing business, I don't believe I have  
15 entered an appearance in any litigation.

16 Q And do you know whether Sands and/or Mantra have been  
17 engaged in litigation?

18 A Substantial.

19 Q Is that ten cases?

20 A I would say a lot more than that.

21 Q Okay. And you were not counsel on any of those cases?

22 A That's correct.

23 Q Did you have any role in assisting Mr. Francis in  
24 engaging counsel in those cases?

25 A In some. And again it depended upon the time period

1 involved. Yes. To a great extent early on in the 2000,  
2 2001, 2002 period. A lot less after Ron Guttman came on and  
3 took over that role.

4 Q And you said that Mr. Guttman took on that role in 2003?

5 A 2003 is my recollection, yes.

6 Q Okay. After the IRS levied on the Morgan Stanley account  
7 were you retained to represent Mr. Mr. Francis in seeking to  
8 invalidate the jeopardy assessment or the jeopardy levy?

9 A No, sir.

10 Q So he engaged other counsel to do that?

11 A He did.

12 Q And, of course, you're not counsel of record in this  
13 case, are you?

14 A No, I'm not.

15 Q Okay. Now, are you aware Mr. Francis has been indicted  
16 in Clark County, Nevada -- let me just ask you that  
17 question.

18 Were you aware that Mr. Francis was indicted for drawing  
19 and passing a check without sufficient funds on a drawing  
20 bank with the intent to defraud involving the Wynn casino in  
21 Las Vegas?

22 A I knew there were charges arising out of the Wynn  
23 situation. I didn't know exactly what the charges were.

24 Q Do you have volume 2 up there, Mr. Rayment?

25 THE CLERK: Which volume 2?

1 MR. WILLIAM COHAN: Volume 2. It will be Exhibit  
2 142. The one that contains Exhibits 135 through 147.

3 THE WITNESS: I have that, sir.

4 BY MR. WILLIAM COHAN:

5 Q Oh, I'm sorry. Plaintiff's volume 2. My apologies.  
6 Inviting your attention to Exhibit 142, if I may?

7 A Yes.

8 Q Have you seen that Indictment before?

9 A I don't believe I have.

10 Q Is this -- do you understand that this is the Indictment  
11 that is currently pending against Mr. Francis and has been  
12 since February of 2011?

13 A I assume it is. Like I said, I have not been involved in  
14 that litigation. And I don't believe I have seen this  
15 document before.

16 Q Do you know whether Mr. Francis is represented by counsel  
17 in that matter?

18 A Yes, I believe he is.

19 Q Did you have anything to do with assisting him in  
20 selecting counsel?

21 A No.

22 Q The date --

23 MR. WILLIAM COHAN: I move the admission of Exhibit  
24 142, Your Honor.

25 MS. MAKAREWICZ: No objection.

1 THE COURT: Received.

2 (Exhibit No. 142 admitted.)

3 BY MR. WILLIAM COHAN:

4 Q This is file February 2, 2011. A few weeks after this  
5 Indictment in February of 2011 did the character of your  
6 relationship with Mr. Francis change dramatically?

7 A Yes.

8 Q Let me invite your attention to what has already been  
9 admitted as Exhibit 143. Take a look at the very first page  
10 if you would, please, sir.

11 A Yes.

12 Q Now, this is just 17 days, I believe, after the  
13 indictment in Las Vegas. If I am doing -- actually, 16  
14 days, I guess.

15 Do you recall receiving what's been marked for purposes  
16 of identification as Exhibit 143, also as FGW00001?

17 A Yes.

18 Q And did you receive this e-mail that's addressed to  
19 B-R-A-Y-M-A-N-T at Kivell.com?

20 A Yes.

21 Q And did you receive it on or about February the 27th in  
22 evening?

23 A That would be -- I assume that would be case, yes.

24 Q That's the date that is shown on there, is it not?

25 A Right.

1 Q Okay. And you believe you saw it shortly after this time  
2 when it was apparently sent?

3 A Yes.

4 Q Did you ever have any idea before you received this that  
5 Mr. Francis is about to launch a campaign against you, so to  
6 speak?

7 A I don't remember if there was an e-mail that preceded  
8 this one. But my deposition had been taken, I believe, that  
9 Friday the 25th, if I'm not mistaken. I may be wrong on my  
10 dates. But within a few days of this. And Mr. Francis had  
11 asked me to come up and visit him. And I was exhausted and  
12 did not do so. And then there was a subsequent discussion,  
13 which I'm not sure whether it would qualify as privileged  
14 communication, about his business. But he subsequently  
15 advised me that Mr. Fisher would be handling things.

16 Q Okay. And you received this e-mail and the  
17 representation to you that: "Brian, I have been informed  
18 that you've been fired by the Trust for cause."

19 Had you been fired by the Trust in any way, shape or form  
20 as of February 27, 2011?

21 A No.

22 Q And do you know what precipitated this claim that you'd  
23 been terminated by the trustees and that new president of  
24 Rothwell was Howard Fisher?

25 A I don't know what is going on in his mind that caused

1 this. I just know what was stated to me and what's occurred  
2 since with regard to perhaps defining what his ideas or  
3 goals were.

4 Q And do you see the capitalized statement: "The new  
5 president of Rothwell." And then I believe in regular  
6 letters is "Howard Fisher" capitalized?

7 A Yes.

8 Q And to the best of your knowledge and belief isn't it  
9 correct that Mr. Chaffe is the director of Rothwell and was  
10 during that time and still is?

11 A Yes.

12 Q Now, did you have communications with a Mr. Fisher,  
13 Howard Fisher, beginning at or about this date of February  
14 27, 2011?

15 A Yes.

16 Q Inviting your attention further into this.  
17 Now, inviting your attention to the third page of this  
18 Exhibit 143, do you have that one before you?

19 A I do.

20 Q Inviting your attention to statement: "Money has been  
21 misappropriated from the Trust it seems."

22 Are you aware of any evidence that any money had been  
23 misappropriated from trust?

24 A No.

25 Q Inviting your attention to the next page. Do you see the

1 language in capital letters: "Brain, you are a fucking liar  
2 and you know it," exclamation point?

3 A I do.

4 Q That got your attention?

5 A That did.

6 Q And the representation was made here, continuing on this:  
7 "To the contrary, you told me that you had not been paid a  
8 dime."

9 Did you communicate with Mr. Francis as to amounts that  
10 you were paid for services you were performing for him and  
11 for Rothwell and for the Francis Trust?

12 A Separately, yes.

13 Q Okay. When you went to Mexico, for example, in 2002 were  
14 you paid for your time and efforts?

15 A Yes, I was.

16 Q And by whom or by what entities were you paid?

17 A I was paid by the Trust for the lot transactions.

18 Q Okay. Were you paid by Mantra and/or Sands for the  
19 contractual work you did concerning the, I guess, dispute  
20 between Mr. Francis and Mr. Hadid?

21 A Yes.

22 Q Okay. So depending upon the entity or the individual for  
23 whom you were performing the work, that entity would  
24 typically pay you?

25 A That's correct.

1 Q Okay. And is it your testimony that you communicated the  
2 payments that you were receiving to Mr. Francis?

3 A Yes. And I believe the comment about not being paid a  
4 dime had to do with the fact that I had been out here for a  
5 week on depositions and there were no funds to pay me for  
6 that.

7 Q And do you know what, if any, basis Mr. Francis has or  
8 claims to have for the allegations here on this page 4:  
9 "You have stolen funds from this trust? Colin and Owen will  
10 send you a letter tomorrow demanding the return of those  
11 funds immediately"?

12 A The only funds I received from the Trust were payment of  
13 the attorneys fees.

14 Q Okay.

15 A Which amounted to \$100,000 in relation to this case.

16 Q Are you still owed funds for your work on this case?

17 A I am.

18 Q Are they more than \$100,000?

19 A I don't know the exact amount, but pretty close to that.

20 Q Inviting your attention to the statement: "Colin and  
21 Owen will send you a letter tomorrow demanding the return of  
22 those funds immediately."

23 Did you ever receive any such letter?

24 A No.

25 Q Okay. Has anyone on behalf of the Trust ever demanded

1 that you refund anything to anyone?

2 A No one on behalf of the Trust.

3 Q Right. Thank you.

4 Inviting your attention to FGW00005. Did you see this  
5 e-mail to me? "Bill, you are fired if you don't call me  
6 now"?

7 A Yes.

8 Q Okay. To the best of your knowledge and belief, have I  
9 been fired?

10 A No.

11 Q Inviting your attention to page 24. Do you have that  
12 before you?

13 A FG24?

14 Q FGW00024. The 24th page of Exhibit 143.

15 A Yes.

16 Q Plaintiff's 143. Do you have that before you?

17 A I do.

18 Q Do you recognize this?

19 A I do.

20 Q Do you recall receiving it on or about March the 9th of  
21 this year?

22 A Yes.

23 Q Do you recall being told that you were refusing to return  
24 calls because Joe's lawyer, Howard Fisher, could protect the  
25 beneficiaries?

1 A I recall him saying that. I don't agree with the  
2 content.

3 Q Did you tell Joe Francis that you were refusing to step  
4 down as protector because Joe's father told you not to step  
5 down?

6 A No.

7 Q Inviting your attention to the statement: "This is about  
8 to get real ugly and will destroy my relationship with you  
9 and my parents forever. You have no idea what is coming  
10 your way."

11 Did this language concern you?

12 A Yes.

13 Q Inviting your attention to FGW00032.

14 A Yes.

15 Q Do you have that?

16 A I do.

17 Q I want to invite your attention to some of this. First  
18 of all, do you recognize this document as one that you wrote  
19 on or about March 10th of this year?

20 A Yes.

21 Q Inviting your attention to statement numbered paragraph  
22 1: "I am no longer the attorney for Mr. Francis or any of  
23 his entities and it is likely that my communications to and  
24 from you and Mr. Francis will be determined to be no longer  
25 privileged. Therefore, I may be subject to

1 cross-examination about them when I testify in the Rothwell  
2 case."

3 A Yes.

4 Q And the next paragraph. So you warned Mr. Fisher and  
5 Mr. -- well, I guess you weren't communicating. This was  
6 not sent directly to Mr. Francis, was it?

7 A No. I ceased communicating with him. I communicated  
8 just through his counsel.

9 Q Okay. You came to understand that Mr. Fisher was  
10 representing Mr. Joseph Francis at this time?

11 A Yes, sir.

12 Q This time being by March of this year?

13 A Yes.

14 Q Okay. And you stated: "Despite your statements to the  
15 contrary," referring to Mr. Fisher, "your client," referring  
16 to Mr. Francis, "has threatened me, told me that I've been  
17 fired as protector by the trustees, which is not a power the  
18 trustee has, and that I should contact you if I have  
19 questions. He has also told me that Mr. Cohan and I report  
20 to you."

21 Okay. Did we ever, either you or I, to the best of your  
22 knowledge and belief ever report to Mr. Fisher?

23 A No. We've tried to reason with him and provide him with  
24 some information, but that is it.

25 Q And you also state in here in the same paragraph: "You

1 have indicated that it is your intent to replace the trustee  
2 and the protectors and that you are seeking my assistance in  
3 doing so."

4 Was that a true statement at that time?

5 A Yes.

6 Q Did that course of conduct by Mr. Fisher and Mr. Francis  
7 continue after this letter?

8 A Yes.

9 THE COURT: What page is that again?

10 MR. WILLIAM COHAN: This is page FGW000032, Your  
11 Honor.

12 THE COURT: Go ahead.

13 BY MR. WILLIAM COHAN:

14 Q Paragraph number 3: "The primary issue in the Rothwell  
15 case is whether or not Rothwell is Mr. Francis' nominee. In  
16 other words, whether or not he controls it. Mr. Francis has  
17 not controlled Rothwell, and virtually all witnesses to date  
18 have confirmed this fact. Why he, with your assistance,  
19 would now attempt to assert control is beyond my ability to  
20 comprehend."

21 Did you have further discussion of this subject with  
22 Mr. Fisher after you sent him this e-mail?

23 A Yes, I believe I did.

24 Q Next you state: "However, the fact that he is trying to  
25 assert control and that you are helping him do so places me

1 in a position to resist your efforts in order to preserve  
2 the assets of the Trust and Rothwell."

3 Did you have further discussion with Mr. Fisher about  
4 this issue?

5 A Well, I don't remember when the conversations terminated.  
6 But this went on for quite some time.

7 Q Okay. There are more e-mails we'll get to.

8 Then you state: "Believe me, Howard, I would like  
9 nothing more than to be finished with Mr. Francis as I do  
10 not enjoy threats against me and my family that I have  
11 endured over the past weeks. My problem is that if I  
12 succumb to these threats, then I place the assets of the  
13 Trust at risk."

14 A Yes, sir.

15 Q Is that why you have refused to abandon your role as  
16 protector of the Francis Trust?

17 A Yes.

18 Q Inviting your attention to FGW00056.

19 A Okay.

20 Q Do you see an e-mail that's been printed out here dated  
21 March the 18th to J. Rayment, James Rayment, A.E. Rayment,  
22 and to you as well, Brian Rayment?

23 A Yes.

24 Q "Subject Re: Plot to steel my trust"?

25 A Yes.

1 Q Steel spelled S-T-E-E-L.

2 Who are John, James, and Ali identified as being the  
3 persons addressed by this e-mail?

4 A My children.

5 Q So you have three children?

6 A Yes, sir.

7 Q And what were their ages in March of this year?

8 A 27, 24, and 17.

9 Q Did you invite Mr. Francis to communicate directly with  
10 your children?

11 A No.

12 Q A statement is made here that, referring to you: "He has  
13 refused to give any information to my new legal team."

14 Did you provide information to Mr. Fisher on numerous  
15 occasions about the Trust and about Rothwell?

16 A Yes.

17 Q Did you provide all the documentation that was requested  
18 of you?

19 A All that was available and requested, that's correct.

20 Q Okay. Inviting your attention further down the page. I  
21 guess this is -- actually, I should have started here  
22 because it's the day before: "Brian, why will you not  
23 follow my wishes? This makes no sense that you tell my  
24 attorneys that the reason that you will not comply with my  
25 wishes is that my father, Ray Francis (who has no right to

1 anything) is directing you not to do so."

2 Do you have any knowledge with respect to whether Ray  
3 Francis has an entitlement or lack of an entitlement to  
4 distribution or distributions by the Francis Trust?

5 A He has the exact same rights that Joe Francis has with  
6 regard to the Trust.

7 Q And those are?

8 A To receive a distribution at the discretion of the  
9 trustee.

10 Q Which means that he may or may not receive any such  
11 distribution ever?

12 A Correct.

13 Q Okay. Did you tell Joe Francis that you were refusing to  
14 resign because Ray Francis, Joe's father, was directing you  
15 not to do so?

16 A No. I told him I was refusing to resign because it would  
17 show that he is controlling the Trust, and that his father  
18 agrees that I should not resign.

19 Q Okay. Do you recognize -- I'm inviting your attention  
20 again to FGW00056. The carbon copies going to Ray at  
21 universitymedical.com, do you know who that is?

22 A That's his father.

23 Q Okay. And Marie Francis at cox.net?

24 A Marie. That's his mother.

25 Q And Babette Francis?

1 A His sister.

2 Q Okay. Do you know who the rest of these addressees are?  
3 Caroline Bolt?

4 A The next two are his other two sisters. I don't know the  
5 next one. Gregory Hunt is his brother-in-law. And then  
6 there's Howard Fisher and Mac, who are his two counsel.

7 Q Mac being Mr. McPherson, an attorney?

8 A Yes, sir.

9 Q Okay. I want to invite your attention into the text of  
10 this where he states: "You need to resign now. You have no  
11 right to my money. If, and I mean if, my dad is directing  
12 (like you say he is), he needs to know that the next time I  
13 will see him in is his funeral. I am going to start  
14 e-mailing you wife and kid about everything I know about  
15 you, Brian."

16 A Yes.

17 Q Did you try to discourage him from doing this?

18 A I didn't communicate with him. I felt like it would just  
19 serve no purpose at this point.

20 Q Inviting your attention FGW00059.

21 A Yes.

22 Q Did you receive this -- a copy of this e-mail from Ray  
23 Francis to Joe Francis as an attachment to an e-mail that  
24 Joe Francis sent to his dad Ray Francis, and you were copied  
25 on it apparently? This is on or about March 20th. Do you

1 recall receiving this?

2 A Yes.

3 Q The one that begins: "Joe, we have all had enough of  
4 your bullshit. You remember when you tried to annihilate me  
5 and your mother and sisters at your house in Mexico?"

6 Do you have any knowledge of these events?

7 A Only through communications.

8 Q Did you talk with Ray Francis or Maria Francis about a  
9 potential physical threat to you or members of your family?

10 A Yes.

11 Q Do you know, other than through this lawyer -- strike  
12 that.

13 Do you know, other than through this e-mail communication  
14 from Joe's dad, saying something about there is no question  
15 you're on drugs and your bipolar condition is serious enough  
16 for you to be in lock-up? Anything about Mr. Joe Francis  
17 involving the drugs or a bipolar condition?

18 A I'm aware of there being issues in the past, yes.

19 Q Okay. And were you concerned by the statement that Ray  
20 Francis makes to Joe in this e-mail: "We are in shock that  
21 you were trying to attack those people and make false  
22 accusations to those who stood by you when you were  
23 condemned and abandoned."

24 Do you know what that's referring to?

25 A I assume it's referring to the fact that his parents and

1 I were the ones who visited him in jail. Tried to provide  
2 some support to him.

3 Q Inviting your attention FGW00085.

4 A Yes.

5 Q Do you recall receiving this e-mail from Howard Fisher?

6 A Yes.

7 Q And did you understand -- inviting your attention not  
8 just to FGW00085 but to the, I guess, nine pages that follow  
9 appear to be a draft of a complaint against you and your law  
10 firm?

11 A Yes.

12 Q Did you receive this at or about the date on it, March 21  
13 of this year, threatening to sue you unless you resigned?

14 A Yes.

15 Q You still refuse to resign?

16 A Yes.

17 Q Inviting your attention to FGW00095. Do you have that  
18 before you?

19 A 95?

20 Q 95.

21 A Yes.

22 Q The date after, at least by date anyway, the e-mail was  
23 sent that we just reviewed, now we're on March 22nd, you  
24 have e-mailed Mr. Fisher: "I'm growing weary of your and  
25 Mr. Francis' relentless assault upon me and my family. They

1 are debilitating and precluding me from conducting my  
2 day-to-day business. Now you are threatening a lawsuit  
3 which you know is designed to cause me and my firm to spend  
4 money and create problems for me and my firm. What exactly  
5 do you propose that I do to avoid the filing of this lawsuit  
6 or any other lawsuit by Mr. Francis any of his entities?"

7 A Yes.

8 Q What was your purpose in sending this e-mail to  
9 Mr. Fisher?

10 A I wanted Mr. Fisher to step forward and go on record as  
11 saying he was filing the lawsuit not for the purpose of  
12 addressing the claims in the lawsuit, but to get me to take  
13 action with regard to the Trust.

14 Q And the response you got is just above what I read from  
15 Mr. Fisher, is it not?

16 A It is.

17 Q And it states: "Dear Brian, thank you for your e-mail.  
18 We would appreciate you facilitating an understanding of the  
19 transition from the original trustee and implementing the  
20 points in my previous e-mail."

21 The points in the previous e-mail refer to your assisting  
22 and replacing the trustee and the protector with somebody  
23 that Mr. Francis would approve of?

24 A Actually, it was replacing the trustee and both  
25 protectors.

1 Q Okay. And you were given to understand that --

2 THE COURT: I'm sorry. Both protectors?

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: Meaning?

5 THE WITNESS: Pittsford Limited and myself.

6 THE COURT: Pittsford Limited was no longer a  
7 protector, are they?

8 THE WITNESS: Your Honor, the way -- what happened  
9 was Pittsford went out of good standing.

10 THE COURT: Right.

11 THE WITNESS: I was appointed protector. Then  
12 Pittsford was later put back into good standing. And under  
13 the terms of the Trust you can have one or more protectors.  
14 So from the point in time that Pittsford was put back in  
15 good standing, we have always viewed that as being two  
16 protectors.

17 THE COURT: When was that?

18 THE WITNESS: The date? I'm thinking it was  
19 around -- Judge, I don't remember. It was later in the  
20 process.

21 THE COURT: Go ahead, Counsel.

22 MR. WILLIAM COHAN: Thank you.

23 BY MR. WILLIAM COHAN:

24 Q Inviting your attention to FGW00105. And this is an  
25 e-mail from Raymond J. Francis, whom you've already

1 identified as Joe's dad, to Joe that you got a copy of by  
2 way of an attachment from Joe himself, sent to you on or  
3 about March 24th of this year. Do you see that?

4 A Yes, I do.

5 Q Again Ray says to his son Joe: "If you continue to  
6 accuse your mother and I of stealing, I will ask the Court  
7 for a restraining order. You're messing with the wrong  
8 folks. I will stop -- you are a major bipolar and you need  
9 help badly. Raymond J. Francis. (You also need to change  
10 your name immediately. You are a disgrace to the Francis  
11 family.)"

12 Did you speak with Ray and Maria Francis, his parents, at  
13 or about this time, March 24th of this year?

14 A I speak with them frequently.

15 Q Are they personal friends of yours?

16 A Yes.

17 Q Okay. The response that Joe sent to you and to his  
18 father to this e-mail are: "So why are you directing Brian  
19 not to follow my wishes?"

20 Do you see that on the page?

21 A Yes.

22 Q Do you know where Mr. Joe Francis got the idea that his  
23 father was directing you in any way, shape or form?

24 A Other than as I said. I made a comment to one of his  
25 counsel, Joe's counsel I should say, that not all the

1 beneficiaries want a change and that Ray has encouraged me  
2 not to do this. Not to resign as protector.

3 Q Okay. But regardless of Ray's wishes in the matter, were  
4 you willing to resign?

5 A Well, at some point. But not when it puts the Trust at  
6 risk.

7 Q Okay. We'll get to point in a minute.

8 Inviting your attention FGW00109. This is within a day  
9 or two of the last e-mail that we were just addressing.  
10 They're in chronological order. Inviting your attention to  
11 the statement from Ray Francis to his son Joe: "Please  
12 understand for the last time I am not directing Brian or  
13 anyone else. You've alienated your family and everyone I  
14 know. From this point on none of my computers will accept  
15 your stupid messages. Please check yourself into a rehab  
16 center immediately. Money is your God. You had better be  
17 careful. You're in dangerous waters."

18 Do you know whether Joseph Francis had ever previously  
19 spent time in a rehab center?

20 A I'm not familiar with him being in rehab center. No.

21 Q Did you discuss Joseph Francis' response to his father  
22 which was right up above that: "Now we all know that you're  
23 guilty. This is so far beyond, you can't even answer why"?

24 A Well, we've had numerous discussions about where he's  
25 coming up with these theories that he's coming up with. And

1 we don't know.

2 Q Inviting your attention to FGW00131.

3 A Yes.

4 Q Do you recognize FGW00131 that begins: "Brian, you are  
5 served." Joe Francis and the pages following it. FGW00132,  
6 133, just those two pages?

7 A Yes.

8 Q Did you actually get served and sued by Joe Francis using  
9 this services of Howard Fisher?

10 A Yes, as did my firm.

11 Q And what is the current status of that lawsuit?

12 A A motion to dismiss is pending for July the 7th. And  
13 Howard Fisher has filed a motion to withdraw as counsel for  
14 Mr. Francis.

15 Q Do you recall the reasons why Mr. Fisher alleged that he  
16 was withdrawing?

17 A He claimed that he could not communicate with his client.

18 Q So Mr. Fisher says he can't communicate with Joe Francis?

19 A Correct.

20 Q Okay. Inviting your attention to FGW00139.

21 A Yes.

22 Q Do you recall receiving this? This is April 9 of this  
23 year: "Brian, this is to confirm that all the beneficiaries  
24 of the Francis Trust have fired you as the protector."

25 At this point in time is it correct that no one except

1 Joe Francis among the beneficiaries, namely neither of his  
2 parents, were firing you or trying to cause you to quit?

3 A That is correct.

4 Q "We also believe -- we also believe that you are not the  
5 protector and are illegally trying to steal the Trust and  
6 its funds. I'm requesting a full accounting now for the ten  
7 time. You have destroyed our family forever, you worthless  
8 piece of shit. I'm coming for you, Brian."

9 A Yes.

10 Q And this is on April the 9th.

11 And then above that you've got another e-mail from Joe on  
12 or about same day, same time: "Brian, I'm coming for you.  
13 Be afraid of me."

14 At this point in time in April of 2011 were you becoming  
15 afraid of Joseph Francis?

16 A I was sleeping with a 9 millimeter.

17 Q Inviting your attention to FGW00143. Strike that.

18 Let's move to FGW00145. The last entry which is at the  
19 top of the page of April the 9th: "Ali, call me when your  
20 father is in jail. You can see that I gave him a chance. I  
21 am not fucking around. Joe Francis."

22 Did you discuss this with your daughter?

23 A Yes, I did.

24 Q Did she express any alarm?

25 A All of my family expressed alarm. I kept them advised.

1 Q Inviting your attention to FGW00147. This is about the  
2 same time. It says: "James, your father will go to prison  
3 unless you call me."

4 Did you discuss this with your son James?

5 A I tried to make light of it with James. He's underage.

6 Q Okay.

7 A But yes. In to answer your question, I did.

8 Q Inviting your attention to FGW00153. Do you recall  
9 receiving this e-mail on April the 13th that says to you:  
10 "Did your daughter get beaten and raped yet? That's the  
11 word --" and you have to go to the next page to see -- "on  
12 street?"

13 A It was actually a text message to my phone.

14 Q It was a text message sent to your phone?

15 A I forwarded it to the e-mail so I could print it out.

16 Q Okay. I see on pages FGW00155 and 156 that it's been  
17 printed out from your phone?

18 Did you get a restraining order against Joe Francis as a  
19 result of these messages?

20 A Yes.

21 MR. WILLIAM COHAN: Your Honor, may I have just a  
22 moment?

23 THE COURT: Yes.

24 MR. WILLIAM COHAN: I have nothing further of this  
25 witness.

1 THE COURT: Thank you. Cross?

2 CROSS-EXAMINATION

3 BY MR. THOMAS:

4 Q Mr. Rayment, you are today counsel for the Francis Trust.  
5 Is that correct?

6 A That's correct.

7 Q And have you been counsel for the Francis Trust since it  
8 was settled?

9 A Yes.

10 Q And who chose you as counsel for the Francis Trust?

11 A Mr. Chaffe.

12 Q At whose suggestion?

13 A There's really not been a suggestion made. I think the  
14 first issue that came up where counsel was required was for  
15 the purchase of the lots in Mexico. And the idea was taken  
16 to Mr. Chaffe. He agreed to it and he appointed me to  
17 assist the Trust in doing so.

18 Q So you were not counsel for the Trust at the time that it  
19 was settled?

20 A No. Mr. Owen Foley was the attorney who settled the  
21 Trust. I don't have a license to practice in the Turks and  
22 Caicos.

23 Q Okay. You were previously counsel for -- or provided  
24 legal services to Mantra Films, you said?

25 A That's correct.

1 Q And were you counsel for Sands Media?  
2 A Correct.  
3 Q Summerland Holdings?  
4 A Only with regard to the Mexican lot transactions. That's  
5 the only relationship there.  
6 Q Counsel for Casa Blanca?  
7 A Yes.  
8 Q Counsel for Rothwell?  
9 A Yes.  
10 Q Counsel for Island Films?  
11 A Yes.  
12 Q You were not counsel for Hallmark Trust, correct?  
13 A That's correct.  
14 Q Were you ever counsel for Mr. Chaffe?  
15 A No. No.  
16 Q Okay. I believe you stated Mr. Francis in creating  
17 Mantra Films?  
18 A That is correct.  
19 Q Incorporating, I should say.  
20 Did you assist him also in incorporating Sands Media?  
21 A Yes.  
22 Q When was that?  
23 A 2000, 2001, 2002. Sometime early.  
24 Q And that was after the Francis Trust was settled?  
25 A Correct.

1 Q Did you take the idea of creating the Francis Trust to  
2 Joe Francis, or did he bring it to you?

3 A I think that would get into attorney-client  
4 communication. I'm not sure I can answer that question.

5 Q Who are the beneficiaries of that trust?

6 A I think Ray Francis, Maria Francis, Joe Francis, Oklahoma  
7 Film Holdings Corporation. And any children of Joe Francis,  
8 should there be any.

9 Q And the Oklahoma film corporation, was that set up by  
10 you?

11 A It was.

12 Q And was it owned by Joe Francis?

13 A It is.

14 Q Is it a nonprofit?

15 A I don't believe so. It's never had any business or  
16 activity at all. I think it's gone out of good standing at  
17 this point and has been for quite some time.

18 Q What were the reasons for establishing the Francis Trust  
19 in the Turks and Caicos Islands?

20 A You're talking about the reason for setting it up there?

21 Q Yes.

22 A Because that's the only place that I knew of where there  
23 was an attorney who set up trusts offshore.

24 Q So it specifically needed to be set up offshore?

25 A Well, it didn't need to be. But the idea was to set it

1 up as an asset protection trust. And having it offshore was  
2 beneficial for that purpose.

3 Q And whose idea was that?

4 A Mine.

5 Q Did Mr. Francis concur in setting it up for asset  
6 protection purposes offshore?

7 A I think we're getting into attorney-client communication  
8 there.

9 Q Why would it be any different if the same trust were set  
10 up in United States?

11 A Because it's harder for creditors to get to assets in  
12 another jurisdiction.

13 Q If it were a -- never mind.

14 Did you discuss with Mr. Francis before the Trust was set  
15 up any potential tax benefits of having an offshore trust?

16 A Again anything I -- well, no, I did not. But I'll leave  
17 it at that.

18 Q Did you consider the potential tax benefits of a TCI  
19 trust before it was set up?

20 A No.

21 Q Was Hallmark selected as the trustee based upon the  
22 recommendation of Mr. Foley?

23 A I believe Mr. Foley pretty much selected them. I  
24 certainly didn't know anybody down there to do that work.

25 Q Was Mr. Francis there at the time that you worked with

1 Mr. Foley to set up this trust?

2 A Yes.

3 Q Did he approve the selection of Hallmark?

4 A I assume he did. He signed the Trust.

5 Q How was the Trust funded?

6 A Funded? There were funds that went into the Trust that  
7 were from some Rothwell contracts. The second --

8 Q How much that was?

9 A I'm going to say around \$1 million of revenue.

10 The other two sources of funding that I'm aware of we've  
11 already spoken about here today is from the Asia Pacific and  
12 then from the Mantra and Sands transfers.

13 Q Whose idea was it to have Pittsford Limited be the  
14 protector of the Trust?

15 A I don't know if it was Owen's idea or if it came from the  
16 discussions with Colin and Owen. I was not involved in that  
17 decision.

18 Q Did Mr. Foley discuss with you the need or the nature of  
19 having a protector for the Trust?

20 A He described it to me. I wasn't familiar with the  
21 concept at the time.

22 Q So who set up Pittsford for the purpose of being the  
23 protector of the Trust?

24 A I don't know that it was set up for that purpose. I just  
25 know it was selected to be protected.

1 Q By whom?

2 A It was -- again, I don't know if it was Owen Foley or  
3 Colin that did it. I wasn't in the middle of the  
4 decision-making process on that issue.

5 Q Do you know who owned and/or controlled or operated  
6 Pittsford?

7 A Today or at the time?

8 Q At the time.

9 A No.

10 Q Today?

11 A Today I understand that it's controlled by Nicola and  
12 Colin.

13 Q Who were at the time the trustees of the Trust?

14 A Correct.

15 Q When Hallmark was selected as the trustee did you discuss  
16 with Joseph Francis whether Hallmark would honor his request  
17 regarding the operation of the Trust?

18 A Well, I don't know how far to get into discussions with  
19 him about the Trust without it being attorney-client  
20 privilege. But let me put it this way. He was aware that  
21 the Trust terms do not permit him to control Mr. Chaffe's  
22 activity with regard to the Trust.

23 Q Was there a letter of wishes given to the trustee?

24 A I believe there was, yes, sir.

25 Q Who gave those to the trustee?

1 A Those came from Mr. Francis. And I believe they were  
2 sent through me to Owen Foley.

3 Q Who prepared the letter of wishes?

4 A I was -- they were sent out by Mr. Francis. Whether Owen  
5 did or I transcribed them and sent them to him, I don't  
6 recall.

7 Q Was that done at the time the Trust was set up?

8 A Yes.

9 Q Did you ever discuss with Mr. Francis whether Chaffe  
10 would honor his wishes?

11 A Well, we had discussions certainly about the Mexican  
12 property where his wishes were honored. Beyond that I'm not  
13 aware of any other requests that were made.

14 THE COURT: Counsel, there is a court meeting at  
15 4:00 today that I have got to attend. So I'm going to end a  
16 little early. So let's end at this time. We'll come on  
17 back in tomorrow. If you can be here -- try to be here at a  
18 quarter to 9:00. We'll start no later than 9:00. But if  
19 you're all here early, maybe we can get started a little  
20 earlier.

21 You wanted to know times, Counsel? 148 minutes have been  
22 used by plaintiff, and 80 minutes been used by the defense.

23 We'll see you back here tomorrow morning at a little bit  
24 before 9:00.

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C E R T I F I C A T E

I, Nichole Rhynard, CCR, CRR, RMR, Court Reporter for the United States District Court in the Central District Court at Los Angeles, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 20th day of July 2011.

/S/ Nichole Rhynard  
Nichole Rhynard, CSR, CRR, RMR  
Official Court Reporter

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10 UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION  
 13

14 ROTHWELL, LTD., a Cayman Islands Corporation, 15 Plaintiff, 16 v. 17 UNITED STATES OF AMERICA, 18 Defendant. 19 20 21	) Case No. CV 10-479-RGK(FFMx) ) <u>OBJECTIONS OF UNITED STATES</u> ) <u>OF AMERICA TO PLAINTIFF'S</u> ) <u>REQUESTS FOR JUDICIAL NOTICE</u> ) <u>Trial:</u> ) Date: June 14, 2011 ) Time: 9:00 a.m. ) Ctrm: 850 ) Roybal U.S. Courthouse ) 255 East Temple St. ) Los Angeles, CA 90012
--	---

22 Defendant United States of America submits the following objections to  
23 plaintiff's requests for judicial notice.

24 Plaintiff's request for judicial notice of expert opinions --

25 While the defendant does not object to the Court taking judicial notice of  
 26 foreign statutory law, such as statutes enacted in Mexico and in the Turks & Caicos  
 27 Islands, or any other elements of foreign law that are not subject to reasonable  
 28 dispute in that they are generally known or can be readily determined by reference

1 to sources whose accuracy cannot reasonably be questioned, defendant does object  
2 to plaintiff's request for judicial notice of the "expert" opinions of Messrs. Foley,  
3 Connell, and Durney, on the ground that Federal Rule of Evidence permits the  
4 taking of judicial notice only of a fact—

5 not subject to reasonable dispute in that it is either (1) generally  
6 known within the territorial jurisdiction of the trial court or (2) capable  
7 of accurate and ready determination by resort to sources whose  
8 accuracy cannot reasonably be questioned.

9 Rule 201(b), Federal Rules of Evidence. Clearly opinions are not such facts for  
10 which judicial notice is intended under Rule 201.

11 Plaintiff's request for judicial notice re Mexican property law and the expert  
12 report on such —

13 As noted above, defendant objects to the taking of judicial notice of Mr.  
14 Connell's expert opinions on the ground that such opinions are not facts of which  
15 judicial notice can be taken under Rule 201. The defendant does not object to the  
16 taking of judicial notice of those matters of Mexican law that are otherwise  
17 contained in Mr. Connell's report, but defendant asserts that such matters are  
18 irrelevant to any issue to be decided in this case. It is defendant's position that  
19 since the levied funds that are the subject of the complaint were located in  
20 California at the time of the levy, and were levied on the basis that such funds were  
21 being held by plaintiff as a nominee for the taxpayer Joseph Francis, the applicable  
22 law for determining the issue at hand is California property law. The relevance of  
23 the Mexican property to this issue is only that its acquisition and use by Joseph  
24 Francis demonstrates his control and enjoyment of assets held in plaintiff's name.

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1 Plaintiff's request for judicial notice re the validity and independence of the  
2 Francis Trust under applicable Turks & Caicos Islands' law –

3 Defendant objects to the taking of judicial notice of Mr. Foley's expert  
4 opinions on the ground that such opinions are not facts of which judicial notice can  
5 be taken under Rule 201. While defendant does not object to the taking of judicial  
6 notice of the statutory law of the Turks & Caicos Islands, as set forth in exhibits  
7 161, 162, 163, 164, and 165, taking judicial notice of such statutory law should not  
8 be necessary because there is no objection to the admission of exhibits 161 through  
9 165 into evidence in this case.

10 With regard to the "expert" opinions of Mr. Foley regarding Turks & Caicos  
11 law, defendant has previously stated its objections to the receipt into evidence of  
12 those opinions, because the Court is capable of researching and interpreting Turks  
13 & Caicos Islands' law itself, and because Mr. Foley is not appearing in order to  
14 allow his opinions to be further explained and tested through cross examination by  
15 the defendant. The parties have agreed for Mr. Foley to testify through his  
16 deposition transcript, which has been marked by the parties and will be submitted  
17 to the Court. However, as the Court will see from the marked transcript, the  
18 defendant is agreeing to the admission of Mr. Foley's deposition transcript only for  
19 the purpose of his testimony as a percipient witness, because he is the person who  
20 drafted the trust document that was used for the creation of the Francis Trust.

21 The defendant also objects to the taking of judicial notice of Mr. Foley's  
22 expert opinions on the ground that they are irrelevant. The fact that the trust may  
23 have been established under the formalities of Turks & Caicos Islands' law does  
24 not mean that the trust was then operated in accordance with such formalities.  
25 Further, since the funds levied on by the IRS were never assets of the trust, but  
26 were rather funds transferred from Mantra and Sands directly to plaintiff, and  
27

1 plaintiff is a Cayman Islands entity, not a Turks & Caicos Islands entity, Turks &  
2 Caicos Islands law could not have any relevance to the issues in this case. As  
3 noted above, the property interest of Joseph Francis in the levied funds is  
4 controlled by California law.

5 Plaintiff's request for judicial notice re the controlled foreign corporation  
6 rules set forth in the Internal Revenue Code and the expert report of Michael C.  
7 Durney –

8 First, defendant asserts that taking judicial notice of the laws of the United  
9 States is unnecessary. It is the duty of this Court to apply the laws of the United  
10 States to every case before it, so the taking of judicial notice of such laws is wholly  
11 redundant.

12 As noted above, defendant objects to the taking of judicial notice of the  
13 expert opinions of Mr. Durney on the ground that such opinions are not subject to  
14 judicial notice under Rule 201. The defendant further objects to the taking of  
15 judicial notice of the expert report of Mr. Durney for the reasons that (1) Mr.  
16 Durney does not possess sufficient qualifications to be recognized as an expert on  
17 the matters about which he seeks to opine, and (2) the matters about which Mr.  
18 Durney seeks to opine are not relevant to the issue before the Court.

19 Plaintiff has failed to show how Durney qualifies as an expert by his  
20 knowledge, skill, experience, training, or education. In order for Durney to testify  
21 as an expert, he must be qualified to provide expert testimony about U.S. tax laws  
22 regarding controlled foreign corporations and foreign trusts. A review of Durney's  
23 resume shows that he is not an expert in these matters. According to Durney, in the  
24 past 4 years he has testified as an "expert" in 5 matters "concerning compliance  
25 with and violations of U.S. tax laws": 1) two matters relating to federal tax  
26 violations of Dunkin' Donuts and Cold Stone Creamery franchises, 2) two matters  
27

1 involving legal malpractice claims in civil tax cases, and 3) the proceeding brought  
2 by Joseph R. Francis contesting the IRS jeopardy determination previously decided  
3 by this Court (CV 09-9449-RGK). According to Durney, he has authored articles  
4 principally on tax compliance matters, co-authored a book on criminal tax  
5 procedure, and written a journal article on the Foreign Bank Accounting Report.  
6 Considering Durney's lack of expertise in controlled foreign corporations and  
7 foreign trusts, coupled with plaintiff's failure to show how Durney's testimony  
8 would assist the Court in this matter, Durney's "expert" report should not be  
9 admitted into evidence in this case.

10 Durney's report is particularly troubling for two reasons. First, he fails to  
11 give a complete analysis of the application of the controlled foreign corporation  
12 rules to the facts in this case. For example, he admits that under the controlled  
13 foreign corporation rules the interest income earned on plaintiff's bank account that  
14 was levied by the IRS should have been reported by Joseph Francis on his  
15 individual income tax returns. However, he provides no analysis of other types of  
16 income received by plaintiff during 2002 and 2003. For example, even if it were  
17 accepted that funds paid by Sands and Mantra to Rothwell, directly and indirectly  
18 through Chaffe's Schedule Company, were for consulting services, professional  
19 services, and insurance premiums, under the controlled foreign corporation rules,  
20 including the ownership attribution rules cited by Durney and the related person  
21 provision found in 26 U.S.C. § 954(d)(3), under the controlled foreign corporation  
22 rules, specifically §§ 951, 952, 953, and 954(e), all of the income received by  
23 Rothwell from Sands and Mantra would be required to be reported by Francis on  
24 his individual income tax returns. Even if Mr. Durney was qualified as an expert in  
25 this area, if he fails to appear and testify the defendant will be denied its  
26 opportunity to challenge and test his opinions through cross examination before the  
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Court.

The second reason that Durney's report is troubling is that he baldly states, without foundation and without any analysis of nominee ownership under California law, that "the [IRS's] taking of the Rothwell Morgan Stanley account pursuant to this Levy in order to satisfy the asserted tax liabilities of Mr. Francis had no legal basis." Durney's Report, ¶ 15, p. 6, lines 15-17. As the Ninth Circuit has explained, "an expert witness cannot give an opinion as to her legal conclusions, i.e., an opinion as to an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004); See also, United States v. Scholl, 166 F.3d 964, 973 (9th Cir. 1999); United States v. W.R. Grace, 455 F.Supp 2d 1156, 1166 (D. Montana August 24, 2006).

Further, as noted, since Durney's report only analyzes one small aspect of controlled foreign corporation law, without analyzing all pertinent law applicable to controlled foreign corporations and California law regarding nominee ownership, it is irrelevant to the issues to be decided by the Court in this case.

For the reasons set forth above, taking judicial notice of Durney's report, without requiring that he appear for trial and testify orally before the Court, and be cross examined by defendant, would be inconsistent with Rule 201 and would unfairly prejudicial to defendant. It should not be allowed.

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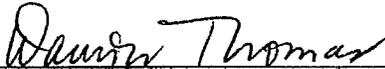
1 Plaintiff's request for judicial notice re the corporate status of Mantra Films,  
2 Inc., and Sands Media, Inc., and of state law pertaining thereto --

3 The defendant objects to the taking of judicial notice of such matters on the  
4 sole ground that they are irrelevant to any issue to be decided in this case.

5  
6  
7 Respectfully submitted,

8 ANDRÉ BIROTTE JR.  
9 United States Attorney  
10 SANDRA R. BROWN  
11 Assistant United States Attorney  
12 Chief, Tax Division

13 DATED: June 13, 2011

14   
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6 ROTHWELL, LTD.

7  
8 UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION

10 ROTHWELL, Ltd., a Cayman Islands  
11 Corporation,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA,

15 Defendant.

) CASE NO. CV-10-479-RGK (FFMx)

) **REQUEST FOR JUDICIAL NOTICE**

) BY PLAINTIFF ROTHWELL, LTD. RE:

) VALIDITY AND INDEPENDENCE OF THE

) FRANCIS TRUST UNDER APPLICABLE

) TURKS & CAICOS ISLANDS' LAW

) TRIAL: Tuesday, June 14, 2011

) TIME: 9:00 A.M.

) CTRM: Room 850, United States Courthouse

) 255 E. Temple Street

) Los Angeles, CA

) [Hon. R. Gary Klausner]

18  
19 Plaintiff Rothwell, Ltd., by and through counsel undersigned, pursuant to Federal Rule of  
20 Evidence 201, hereby respectfully requests that this Court take judicial notice of: (1) the percipient  
21 witness testimony and legal opinions with respect to the provisions of the trust at issue instanter of  
22 Owen Foley, Esq., an attorney licensed as a solicitor in Ireland and licensed by the Supreme Court  
23 of the Turks & Caicos Islands ("TCI") and practicing law in TCI, who specializes in international  
24 trusts and TCI trust measures ( Trial Exhibit #150 Foley's *curriculum vitae* (Bates #OF20007)), in  
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1 his deposition testimony (Trial Exhibit #149)<sup>1</sup>; (2) the legal opinions and conclusions in Mr. Foley's  
2 report (Trial Exhibit #151 (Bates # OF20008-09)) which applies TCI laws to the facts and issues in  
3 the above-captioned matter; and, (3) applicable trust and business laws of the Turks & Caicos Islands  
4 in TCI Ordinances (Trial Exhibits #161 (Trust Ordinance (TC00480-515)); #162 ( Company  
5 Management Ordinance (TC00100-132)); #163 (Business Licensing Ordinance (TC00543-587));  
6 #164 (Companies Ordinance (TC00232-419); and #165 (Confidential Relationships Ordinance  
7 (TC00516-523)) identified by Mr. Foley, all of which are attached hereto.

### 8 DISCUSSION

9 Under Fed.R.Evid. Rule 201(d), judicial notice is mandatory when requested by a party who  
10 supplies the court with necessary information. *O'Toole v. Northrop Grumman Corp.*, 400 F.3d 1218  
11 (10<sup>th</sup> Cir. 2007). Rule 44.1, F.R.Civ.P., gives wide latitude to a district court in determining issues  
12 of foreign law. *See* Rule 44.1, which provides in pertinent part:

13 In determining foreign law, the court may consider *any relevant material or source,*  
14 *including testimony, whether or not* submitted by a party or *admissible* under the Federal  
15 Rules of Evidence. The court's determination must be treated as a ruling on a question of  
16 law. [Emphasis added].

16 As the Ninth Circuit observed: "[a]lthough pursuant to Rule 44.1, courts may ascertain  
17 foreign law through numerous means, expert testimony accompanied by extracts from foreign legal  
18 materials has been and will likely continue to be the basic mode of proving foreign law. *Universe*  
19 *Sales Co., Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9<sup>th</sup> Cir. 1999) (holding that district court  
20 erred in not considering the declaration of an expert on Japanese law, even though it was unrebutted  
21 by the other party). Furthermore,

22 An expert witness [testifying about foreign law] is not required to meet any special  
23 qualifications. Indeed he need not even be admitted to practice in the country whose law is  
24 in issue. 9 C. Wright & A. Miller, *Federal Practice & Procedure* §2444 at 406 (1971).

24 *In re Grand Jury Proceedings, Marsoner v. U.S.*, 40 F.3d 959, 964 (9<sup>th</sup> Cir. 1994)(holding district  
25 court erred by failing to consider the implications of Austrian law).

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26  
27 <sup>1</sup>The video of Mr. Foley's deposition will be provided to the Court at the beginning of  
28 trial.

1 Although matters of law are generally inappropriate subjects for expert testimony, the Ninth  
2 Circuit recognizes that there may be “instances in rare, highly complex and technical matters where  
3 a trial judge utilizing limited and controlled mechanisms, under the matter of trial management,  
4 permits some testimony seemingly at variance with the general rule.” *Flores v. Arizona*, 516 F.3d  
5 1140, 1166 (9<sup>th</sup> Cir. 2008), *citing Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 101 (1<sup>st</sup> Cir. 1997).  
6 In *Flores*, the Ninth Circuit found that expert testimony may be helpful especially in a bench trial  
7 “where there was no danger that a jury might give too much credence to a legal expert.” Moreover,  
8 the Ninth Circuit has held that “in considering the admissibility of testimony based on some ‘other  
9 specialized knowledge,’ Rule 702 generally is construed liberally.” *U.S. v. Hankey*, 203 F.3d 1160,  
10 1168 (9<sup>th</sup> Cir. ), *cert. denied*, 530 U.S. 1268 (2000). Furthermore, the Ninth Circuit and other circuits  
11 have affirmed trial court decisions to allow experts to refer to terminology from applicable law in  
12 expressing their opinions. *Nationwide v. Cass Information Systems, Inc.*, 523 F.3d 1051 (9<sup>th</sup> Cir.  
13 2008).

14 Because resolving questions of law is the distinct and exclusive province of this Court,  
15 Plaintiff respectfully submits the following exhibits for judicial notice on applicable foreign law in  
16 the jurisdiction of Turks & Caicos Islands: Mr. Foley’s percipient witness testimony and legal  
17 opinion testimony construing the Francis Trust provisions and related TCI corporations’ powers and  
18 limitations under applicable TCI law during his deposition (Exhibit # 149); and, Mr. Foley’s legal  
19 opinion and report (OF20008-9)(Exhibit # 151) on the conditions under which a trust in TCI might  
20 be treated as a sham based on excessive influence or control by the settlor; TCI Trust Ordinance  
21 (TC00480-515) (Exhibit # 161); TCI Company Management Ordinance (TC00100-132)(Exhibit  
22 #162); TCI Business Licensing Ordinance (TC00543-587)(Exhibit #163); TCI Companies Ordinance  
23 (TC00232-419)(Exhibit #164); and, TCI Confidential Relationships Ordinance (TC00516-  
24 623)(Exhibit #165) to assist this Court in determining the laws of TCI and in applying those laws  
25 to the facts in this case.

26 ///

1 **A. Mr. Foley's Deposition (Exhibit #149) and Expert Report (Exhibit #151)**

2 The Court should take judicial notice of Foley's percipient witness testimony concerning the  
3 TCI legal foundation for the creation and provisions of the Francis Trust. Mr. Foley's explanations  
4 of the trust provisions as construed by TCI laws are also proper subjects for judicial notice because  
5 he is a qualified expert witness on the purposes and effects of the trust provisions of the Francis  
6 Trust, which were drafted by him pursuant to and in accordance with TCI law, and his explanations  
7 are correct. Mr. Foley's testimony and expertise on these matters are unrebutted and he was also  
8 subjected to cross-examination by the Government during his deposition. Mr. Foley's expert  
9 credentials are undisputed facts in the Joint Statement of Undisputed And Disputed Facts, Docket  
10 Entry (DE) 44, see ¶¶ 1 and 2. His deposition testimony also provides foundation for many exhibits  
11 that the parties have stipulated are admissible, including the trust deed (Trial Exhibit #101)(FT00001  
12 to FT00029).

13 Specifically, Plaintiff Rothwell, Ltd. requests that the Court take judicial notice of the legal  
14 opinions and conclusions of Mr. Foley based on TCI law as expressed in his deposition on  
15 November 18, 2010, (Exhibit #149) at the following pages: 38:18 - 41:15, 41:21 - 43:10, 44:25 -  
16 45:7, 46:2 - 6, 46:7-17, 46:18 -51:14, 51:15 - 52:18, 53:3 - 61:18, 64:12 - 65:1, 65:8 - 67:16, 72:10 -  
17 74:25, 78:12 -21, 79:9 - 82:23, 86:25 - 88:17, 92:7 - 96:14, 99:8 - 102:12, 105:10 - 16, 108:9 - 112:3,  
18 116:3 - 20, 117:7 - 118:4, 126:6 - 130:21, 131:2 - 19, 146:10 - 148:6, and 148:18 - 153:4. These  
19 citations to the judicially noticeable legal opinions and conclusions of Mr. Foley are further  
20 supported by his expert report (Exhibit #151), which also contains legal opinions and conclusions  
21 that are judicially noticeable and consistent with his cited testimony. Much of this is already in the  
22 undisputed facts in the Joint Statement of Undisputed and Disputed Facts. *See e.g.*, DE 44 at ¶¶ 4  
23 -13.

24 Mr. Foley's legal opinions and conclusions during his deposition were subjected to cross-  
25 examination by the Government. It was a properly noticed deposition and the documents, including  
26 relevant TCI ordinances, discussed during the deposition were provided to the Government in  
27

1 accordance with the rules of discovery -- months in advance of the TCI depositions of Messrs.  
2 Chaffe, Foley and Trowbridge held on November 18, 19 and 20, 2010, respectively. The  
3 government cross-examined Mr. Foley during his deposition. *See e.g.*, Exhibit #149 at 98:12,  
4 105:9, 148:18, 153:13, 167:24, and 175:8 - 13. In fact, the Government cross-examined Mr. Foley  
5 until it had nothing else to ask: “**MR. THOMAS: We’ve got nothing,**” (*id.* Trial Exhibit #149 at  
6 167:24), and, “**MR. THOMAS: We have asked all the questions that we, uh, wish to ask of this**  
7 **witness,**” *id.* at 175:12 (emphasis added).

8 Furthermore, the Government suggested that Plaintiff Rothwell, Ltd. request this Court take  
9 judicial notice of the TCI Ordinances (Trial Exhibits ##161 - 165) during Mr. Foley’s deposition  
10 and stated it wouldn’t object to the Court doing so:

11 MR. COHAN: Okay. I am inclined to abandon this exercise in favor of Mr. Thomas  
12 earlier suggestion that we could ask the court to take judicial notice, if the issue  
should arise.

13 MR. THOMAS: **And we will - - we will not object.**

14 *Id.*, Trial Exhibit #149 at 174: 3 - 8 (emphasis added).

15 **B. TCI Ordinances (Exhibits # 161 - 165)**

16 It is undisputed that the Trust’s provisions are construed by the laws of the Turks & Caicos  
17 Islands. *See* DE 44 at ¶ 5. Mr. Foley identified the applicable provisions of the TCI Ordinances  
18 during his deposition. The TCI Trust Ordinance (TC00480-TC00515)(Exhibit # 161) is identified  
19 and authenticated by Mr. Foley during his deposition (Exhibit #149) at 167:3 - 22. Section 61 of the  
20 TCI Trust Ordinance and its effect on the trust is explained by Mr. Foley early in his deposition  
21 (Exhibit #149), for example at 54-55, 59-60, and 64-65. The TCI Company Management Ordinance  
22 (TC00100-132)(Exhibit #162) is identified and authenticated during Mr. Foley’s deposition (Exhibit  
23 #149) at 169:12 - 171:9. The TCI Business Licensing Ordinance (TC00543-587)(Exhibit #163) is  
24 identified and authenticated during Mr. Foley’s deposition (Exhibit #149) at 172:7 - 174:8. The TCI  
25 Confidential Relationships Ordinance (TC00516-623)(Exhibit #165) is identified and authenticated  
26 during Mr. Foley’s deposition (Exhibit #149) at 174:13 - 175:7. The foundation for the TCI

1 Companies Ordinance (TC00232-419)(Exhibit #164) is the same and it is similarly judicially  
2 noticeable; it was discussed during Mr. Foley’s deposition (Exhibit #149) at 129:10-23.

3 **CONCLUSION**

4 Accordingly, the Court should take judicial notice of the percipient witness testimony and  
5 legal opinion and conclusions of Mr. Foley in his deposition (Exhibit #149) and report (Exhibit  
6 #150) as well as the applicable laws of TCI (Exhibits #161-165).

7 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of June, 2011.

8 WILLIAM A. COHAN, P.C.

9 By: *s/ William A. Cohan*  
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16 Attorney for Plaintiff Rothwell, Ltd.

17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on this 10<sup>th</sup> day of June, 2011, I did cause the foregoing Request for  
19 Judicial Notice by Plaintiff Rothwell, Ltd. Re: Validity and Independence of The Francis Trust  
20 Under Applicable Turks & Caicos Islands’ Law to be served via the ECF system on the  
21 following:

22 AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov  
23 AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

24 By: *s/ Alicia Cisneroz*  
25 Alicia Cisneroz, Legal Assistant

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROTHWELL, LTD., A CAYMAN ISLANDS )  
CORPORATION, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )

Case No. 10-CV-00479  
RGK (FMM)

TRANSCRIBED VIDEOTAPED DEPOSITION OF  
OWEN FOLEY  
TURKS & CAICOS ISLANDS  
NOVEMBER 18, 2010

BARRÓN & ASSOCIATES  
Litigation Services  
(619) 228-1342  
e-mail: reporter99@hotmail.com

TRANSCRIBED BY: LORENA BARRÓN, CSR. NO. 12058

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROTHWELL, LTD., A CAYMAN ISLANDS )  
CORPORATION, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 10-CV-00479  
RGK (FMM)

Videotaped deposition of OWEN FOLEY, taken on  
behalf of Plaintiff, at the law offices of Misick &  
Stanbrook, in Turks & Caicos Islands, commencing at 9:35  
a.m, Thursday, November 18, 2010.

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APPEARANCES:

FOR PLAINTIFF:

LAW OFFICES OF WILLIAM A. COHAN, P.C.  
By WILLIAM A. COHAN, ESQ.  
P.O. Box 3448  
Rancho Santa Fe, California 92067  
(858) 832-1632

FOR DEFENDANT:

ASSISTANT U.S. ATTORNEYS FROM CENTRAL DISTRICT OF CALIFORNIA  
By DARWIN R. THOMAS, ESQ.  
VALERIE L. MAKAREWICZ, ESQ.  
Rm. 7211, Federal Building  
300 North Los Angeles Street  
Los Angeles, California 90012  
(213) 894-2740

ALSO PRESENT:

Sharon Standley, Paralegal assistant  
Brian Rayment, Esq.  
Tim Cowdin, Videographer

## 1 I N D E X

2 WITNESS: OWEN FOLEY

3 EXAMINATION: PAGE

4 MR. COHAN 5, 90, 115, 139, 149, 155, 167, 170

5 MR. THOMAS 89, 105, 136, 148, 153, 165, 170

6 EXHIBITS:

7 NUMBER DESCRIPTION PAGE

8 OF20007 Owen Foley's curriculum vitae 24

9 FT000029 3/2/10 Deed betwee Hallmark 25

10 Bank &amp; Trust and Colin Chaffe

11 OF20008 - 09 Owen Foley's 11/17/10 47

12 Opinion re: "Sham Trust,  
13 Influence of the Settlor, etc."

14 OF34-OF256 Stack of duments 138

15 OF20001-04 6/14/2000 Royal West Indies 156

16 Resort Letter to O. Foley w/attachments

17 OF20005-06 6/16/2000 Royal West Indies 159

18 Resort Letter to O. Foley

19 TC480-TC515 Chapter 124 Trusts Ordinance 166

20 TC00100-TC132 The Company Management 169

21 (Licensing) Ordinance 1999

22 TC00543-587 Chapter 130 Business 172

23 Licensing Ordinance

24 TC00516-523 Chapter 125 Confidential 174

25 Relationships Ordinance

1 OWEN FOLEY,  
2 having first been duly sworn, was  
3 examined and testified as follows:  
4

5 EXAMINATION

6 BY MR. COHAN:

7 Q Good morning, Mr. Foley.

8 A Good morning.

9 Q Uh, I want to state for the record that we are  
10 here on the Turks & Caicos Islands. And that it is  
11 approximately 9:35 a.m. on November the 18th, 2010. Um,  
12 Assistant U.S. Attorney Valerie Makarewicz is seated  
13 across the table. Next to her, Assistant U.S. Attorney  
14 Darwin Thomas, both from the U.S. Attorney's office,  
15 from the Central District of California. Uh, to my  
16 right is Brian Rayment, the protector of the trust, uh,  
17 known as the Francis Trust, um, who is an attorney  
18 licensed to practice in Oklahoma in the United States.

19 I'm William Cohan, and I'll be propounding the  
20 questions on direct examination. And to my left is  
21 seated Sharon Standley, who's a paralegal and assistant  
22 with my office, William A. Cohan, Professional  
23 Corporation in California.

24 So with that preface, Mr. Foley, I'm going to  
25 ask you a bunch of questions about your professional and

1 educational background and about your involvement in the  
2 creation of the Francis Trust and some legal principles  
3 pertaining to that trust and trusts more generally in  
4 the Turks & Caicos Islands.

5 And with that, uh, let me ask you first of  
6 all, where you were born and approximately when?

7 MR. THOMAS: Before we begin, could I put an  
8 objection on the record?

9 MR. COHAN: Please.

10 MR. THOMAS: Okay. We have just been handed a  
11 copy of an e-mail, I guess, containing a memorandum, uh,  
12 prepared, I believe by Mr. Foley, entitled Sham Trust  
13 Influence of the Settlor, et cetera, and a copy of the  
14 C.V.

15 And from what you've just stated, apparently you  
16 intend to ask Mr. Foley some questions regarding Turks &  
17 Caicos law and so on and so forth, that he could only be  
18 testifying to in the capacity of an expert; however, we  
19 have not received any designation, uh, required by the  
20 rules of civil procedure of experts, uh, or a, um, report  
21 from Mr. Foley prior to this time.

22 So we will be objecting to the evidence that he  
23 wishes to offer in the capacity as an expert.

24 MR. COHAN: Very well. Your objection is  
25 noted for the record. And the statements that you made

1 were accurate. We have not provided you with any expert  
2 report or disclosure prior to that. So obviously you  
3 can pursue that as you deem appropriate.

4 Uh, may I proceed?

5 MR. THOMAS: Certainly.

6 MR. COHAN: Okay.

7 BY MR. COHAN:

8 Q Now, Mr. Foley, I think the question that I  
9 began with was where and when you were born.

10 A I was born in Galway, in the Republic of  
11 Ireland in 1958.

12 Q Okay. And you undertook education while in  
13 Ireland?

14 A Uh, yes. Uh, I was educated at University  
15 College of Dublin, where I obtained a degree of bachelor  
16 of civil law in 1978. Subsequently educated at the  
17 honorable King's Inn in Dublin. And after that, at the  
18 Law School of the Incorporated Law Society of Ireland in  
19 Dublin, where I was admitted as a solicitor of the High  
20 Court of Ireland at -- in 1982.

21 Q So at the age of 24 then, you were admitted to  
22 the Bar of -- what was the name of the court again?

23 A The High Court of Ireland.

24 Q The High Court of Ireland.

25 Is that the highest court in Ireland?

1 A Yes.

2 Q Is that, if you know, essentially analogous to  
3 the United States Supreme Court in terms of --

4 A Uh, it's the highest court. For instance,  
5 there is a supreme court to which appeals can be made,  
6 but that's the highest court, for instance.

7 Q Okay. And what is the highest court to which  
8 appeals can be made?

9 A The supreme court.

10 Q And that's the supreme court of?

11 A Of Ireland.

12 Q Okay. And have you ever been admitted to the  
13 Supreme Court of Ireland?

14 A There is no process for admissions for the  
15 Supreme Court of Ireland. It's -- but when you're  
16 admitted as a -- as a -- Ireland is a dual -- a dual  
17 professional legal admittance system. People qualify as  
18 either barristers who do work at (inaudible), or as  
19 solicitors who are more commercial slash transactional  
20 professionals. And, uh, I was a solicitor. And  
21 solicitors are -- when admitted, are admitted to the  
22 High Court of Ireland.

23 Q Okay. And so you are not, nor have you ever  
24 been a barrister; is that correct?

25 A I have, uh -- I have never been admitted as a

1 barrister. I have passed all of the qualifications to  
2 become a barrister immediately prior to my taking the  
3 call to the Irish Bar. I decided that my interest lay  
4 in being commercial/transactional lawyer that than an  
5 advocate, so I pursued the course of being in the Law  
6 Society of Ireland. And so it's different to be called  
7 to the Bar in Ireland.

8 Q Okay. Now, after your admission in 1982 to  
9 the High Court, what did you do by way of either  
10 employment as an attorney, or continuing with your  
11 education?

12 A Um, from 1982 until 1984, I worked for a  
13 general practice law firm in the Irish Midlands.

14 Uh, in 1984 I went to Australia for a year.  
15 In Australia I worked briefly for -- well, they're the  
16 largest firm in Australia and their current office is in  
17 western Australia. Subsequent to that, I worked for  
18 another major law firm in Melbourne, in the State of  
19 Victoria in Australia. And in 1985 I was admitted to  
20 practice in the State of Victoria in Australia.

21 Q So you were admitted to the Bar of what court  
22 in Australia?

23 A Uh, the Supreme Court of Victoria. And that's  
24 how they designate it. It doesn't mean you're entitled  
25 to practice before all the courts.

1 Q Right. So the Supreme Court of Victoria, and  
2 forgive my ignorance of Australias law and geography.

3 Is Victoria essentially a state or a province?

4 A It's a state, Australia is.

5 Q Okay.

6 A It's the state of -- the largest city that is  
7 Melbourne. It's like another city of Australia.

8 Q Okay. And so you were there practicing law in  
9 1984, 1985; is that right?

10 A Yes. Well, I was in Perth in '84 and  
11 Melbourne in '85.

12 Q Okay. And you were doing essentially  
13 transactional work; is that right?

14 A Uh, no. In both of those places, I -- I  
15 didn't do much transactional work. I did -- worked in  
16 what they call, the common law departments, civil  
17 litigation departments (inaudible).

18 (Extremely loud background noise.)

19 MR. COHAN: Are you picking up the sound?

20 I mean, that was a loud truck that went by.

21 THE VIDEOGRAPHER: As far as I can tell.

22 MR. COHAN: Okay. All right.

23 BY MR. COHAN:

24 Q Um, so you did get some experience in civil  
25 litigation, which -- forgive again my ignorance, but

1 would that be more typically the province of a  
2 barrister?

3 A Yes. The government, they don't -- in  
4 Australia they don't have a specific profession, like  
5 for instance, I was used to in Ireland. So attorneys  
6 can gravitate to whatever type of work they wanted to  
7 do, but as it happened, when I went there, that's where  
8 they had -- in both places, that's where they had  
9 opportunities, and that's where I worked.

10 My time in Australia was not -- uh, it was not  
11 especially career driven. I was interested in taking  
12 time out to -- to see the world. And so I was surprised  
13 when I got there, to find that -- and I don't know I was  
14 looking for a job, I remember in the restaurant or  
15 something. Yet, somebody said to me, why are you doing  
16 this, you're a lawyer? And, uh, it just didn't occur to  
17 me that I could get work in Australia as a lawyer,  
18 because of -- I was young, and thought they had a  
19 different qualification system. So to my great surprise  
20 and delight, I found that, uh, people were absolutely  
21 trying out for lawyers in Australia at the time. And,  
22 so, notably getting job, jobs with very high, high  
23 profile law firms there.

24 Q So you're saying you actually preferred  
25 practicing law than waiting on tables?

1 A Yes. Surprisingly.

2 Q Very well. There's no accounting for taste.  
3 So say I. Uh, if I may, then, after this stint in  
4 Australia, what did you do next by way of continuing  
5 your education or employment?

6 A And after Australia, I spent six months  
7 backpacking around Asia, and then returned to Dublin,  
8 where I took a job with, uh, a small law firm, in the  
9 city of Dublin. Uh, there on the kind of I wanted to go  
10 back to Australia, did mainly civil litigation work.

11 Q So you returned to Dublin?

12 A Yes.

13 Q And for how long did you remain at Dublin  
14 engaged in what you've described as --

15 A I remained in Dublin from, I think, November  
16 of 1985 until April of 1988.

17 Q Okay. And were you continuously employed in  
18 that capacity during that interval of November --

19 A Yes.

20 Q Okay. Um, so what did you do then in 1988,  
21 uh, that differed from what you had been doing?

22 A Well, then I was offered a -- I -- I'm --  
23 I'm -- I had a friend who I was working with for a law  
24 firm here. And the law firm here was not this law firm.  
25 The law firm here was expanding at the time. It was

1 looking for somebody to take on an associate. And they  
2 were interviewing people in Dublin making -- they found  
3 that their interviews weren't going very well, they  
4 didn't find anybody suitable. So my friend said, well,  
5 you should speak to Owen Foley. He's been around the  
6 world. He won't be put off by the fact that he's coming  
7 somewhere exotic.

8 And so they called me out of the blue and  
9 asked me to speak to them. This is in November of 1987.

10 Uh, and I -- I spoke to them. At the time I  
11 had been planning to go back to Australia to work for  
12 the firm I worked for in Perth. And these people spoke  
13 to me and I felt, well, Turks & Caicos sounds pretty  
14 interesting. And the work seemed to be quite different  
15 from anything I've been doing before then.

16 So I thought that I -- I -- I agreed to come  
17 out here on a two-year contract to work for them, and at  
18 the time and then to go to Australia after that two-year  
19 contract expired.

20 Q But, you're still here.

21 A I'm still here, yes. Not with the same firm,  
22 but still here.

23 Q I understand. I did want to go through the  
24 chronology in this fashion. So you came here then,  
25 "here," being to the Turks & Caicos Islands --

1 A Yes.

2 Q -- and began working as an attorney. Um, you,  
3 you characterize the work as different work. So can you  
4 describe for us what type of work you mean?

5 A Yeah. I came to -- I -- I came to work for a  
6 firm called Dempsey, O'Neill, which no longer exists.  
7 It was an adjunct to the firm called Dempsey and Company  
8 in Grand Turk. Their office here on Providenciales have  
9 different partners. It was called Dempsey O'Neill. And  
10 the firm -- the office here in Providenciales -- the  
11 work I was doing, there wasn't really -- any litigation  
12 here, or at least it was very modest litigation, it  
13 wasn't at that stage (inaudible) pursuing a career in  
14 litigation. And that firm had a practice which could  
15 have been, I suppose, divided in -- down the middle.  
16 Half of it was related to offshore financial matters.  
17 And the other half was acting for developers or people  
18 who were engaged in property-type transactions here of  
19 that nature.

20 Q Okay.

21 A So, uh, and this is the work I did for them.  
22 I -- I would say would spill out into those, on those  
23 two sides. I acted for some developers. I acted for  
24 private clients who were requiring properties here or  
25 were selling properties here for that amount, half my

15

1 time was spent, uh, working with people who were -- who  
2 didn't live here at all. And who had at Turks & Caicos  
3 Islands entities be their companies trusts or matter or  
4 structures of that nature. Uh, Turks & Caicos Islands  
5 then was and remains a jurisdiction, which doesn't have  
6 direct taxation.

7 And so that was attractive to people  
8 internationally in ways that they said that the Cayman  
9 Islands and the British Virgin Islands were attractive  
10 to people. It allows them to establish international  
11 structures reached or either tax -- tax efficient or,  
12 uh, avoid overous -- uh, regulation or (inaudible) in  
13 mainland jurisdictions.

14 Q Okay. So first of all, Dempsey is spelled  
15 D-e-m-p-s-e-y?

16 A Yes.

17 Q O'Neill?

18 A O apostrophe N-e-i-l-l.

19 Q N-e-i-l-l. I got that one wrong. Okay. Uh,  
20 so you began working in 1988. Uh, doing roughly half  
21 the work of offshore financial work and half developer  
22 work. What I take from that is that the bulk of all of  
23 it, would be transactional rather than litigation?

24 A Yes. There was no litigation, no litigation  
25 involved.

1 Q Yeah. You did say the words very little. So  
2 you didn't do that. For how long did you continue in  
3 that capacity beginning in 1988?

4 A Uh, I worked with Dempsey O'Neill from 1988  
5 until 1994, when that partnership dissolved. And  
6 Mr. O'Neill established his own law firm here, separate  
7 and distinct from Mr. Dempsey.

8 At that stage, a colleague of mine, Gordon  
9 Kerr, was in the firm, Dempsey O'Neill here in  
10 Providenciales. And I, uh, took over the running of  
11 Mr. Dempsey's Providenciales practice. And, uh, we ran  
12 that business from 1994 to 1998.

13 Q Okay. Let me catch up. You -- you speak  
14 rapidly.

15 A Sorry.

16 Q You were -- that's okay. I write slowly.  
17 Don't think it faster. Uh, Gordon Kerr and yourself,  
18 took over Dempsey's practice, as I understood you, uh,  
19 and operated the two of you, you and Mr. Kerr,  
20 basically, uh, from 1994 to 1998; is that right?

21 A Yes.

22 Q Okay. And then that's -- is that Finbar  
23 Dempsey?

24 A Yes.

25 Q That's F-i-n-n-b-a-r?

1 A One "n." F-i-n-b-a-r.

2 Q So that was 1994 to 1998. I'm not sure, but I  
3 thought you said, "Mr. Kerr was here," meaning, perhaps  
4 you meant here in this law firm, Misick & Stanbrook?

5 A Mr. Kerr is still a partner of mine. He's a  
6 partner like here in this law firm now.

7 Q That's what I thought --

8 A Yes.

9 Q -- you said.

10 A He -- he -- he worked at Dempsey -- at the  
11 Dempsey organization as well.

12 Q Okay. So when you and Mr. Kerr were working  
13 at the Dempsey firm that was left after Dempsey and  
14 O'Neill split in '94, were you and/or Mr. Kerr partners  
15 in that firm?

16 A No. We were not partners. The arrangement  
17 that we had with Mr. Dempsey was that, uh, we would run  
18 the business and that we would share the profits. At --  
19 and that we would formalize the partnership shortly  
20 after that.

21 And Mr. Dempsey proved reluctant to formalize  
22 the partnership, even though we were sharing profits and  
23 behaving in that respect as if we were partners. And,  
24 uh, say that on that account, differences arose between  
25 us, probably in 1996, '97, in that time period. And in

1 1998, I'm going through to 1998, in 1998 it became  
2 apparent that the only basis in which Mr. Dempsey was  
3 prepared to formalize a partnership with us was on  
4 commercial and terms which were unacceptable to us, both  
5 to Mr. Kerr and myself.

6 And, uh, so eventually matters came to a head,  
7 I think on October 31st of 1998 when Mr. Dempsey made us  
8 a take-it-or-leave-it partnership offer, which we  
9 declined. He fired us. And the following day we became  
10 partners in this firm.

11 Q Okay. I guess October 31st is the day you  
12 recall.

13 A Yes.

14 Q Okay. Um -- so -- then from, I guess,  
15 November 1st, I'm guessing, it was kind of an educated  
16 guess. Um, and since then, you and Mr. Kerr have been  
17 law partners?

18 A Yes.

19 Q Okay. And, uh, does that mean -- well, strike  
20 that. I won't lead.

21 What happened next? I think I asked such a  
22 vague question, what happened next? But I think you  
23 know what I mean in context. I mean, in terms of your  
24 professional --

25 A Well, we -- we -- at that -- at that time,

1 this firm had three other partners, Ariel Misick, Clive  
2 Stanbrook and Conrad Griffiths.

3 Q Can I stop you there for one second?

4 A Yes.

5 Q Ariel, A-r-i-e-l?

6 A Yes. Misick, M-i-s-i-c-k.

7 Q M-i-s -- two "s's"?

8 A No. One "s."

9 Q I-c-k. Uh, who were the other partners again?

10 A Clive Stanbrook.

11 Q Clive Stanbrook. So we've got the name  
12 partners. And --

13 A Conrad Griffiths.

14 Q Conrad?

15 A Griffiths.

16 Q Okay. I -- I was thinking that you might have  
17 been speaking Russian and said "Comrad." You said  
18 Conrad with an "n." Griffiths, G-r-i-f-f-i-t-h-s?

19 A Yes.

20 Q This is for the benefit of the -- the -- the  
21 court reporter who is going to be typing all this out.  
22 And I'm gonna be asked -- how to -- how do you spell  
23 these things. So I figured, I better ask you --

24 A Sure.

25 Q -- so we don't have to do an e-mail. Okay.

1 So Conrad Griffiths. So those three partners had  
2 already been operating the law firm known as Misick &  
3 Stanbrook when you --

4 A That's correct, yes.

5 Q -- when you and Mr. Kerr joined; is that  
6 right?

7 A That's correct.

8 Q Sorry. Let -- let me, if you will, let me  
9 finish my question.

10 Even though you know what I'm gonna ask, it's  
11 hard for the court reporter to transcribe when we speak  
12 simultaneously. Um, so bear with me just a minute.

13 So did you and Mr. Kerr become partners of  
14 this firm, Misick & Stanbrook, immediately after  
15 November 1?

16 A Yes.

17 Q Okay. And so you have been ever since?

18 A Yes.

19 Q All right. So for -- let's see. Twelve  
20 years. And you're in your 13th year then, you've been  
21 here as a partner?

22 A Yes.

23 Q Okay. Now, when you came to this firm in  
24 early November of 1998 and to the present, what kind of  
25 legal work have you been doing in that 12-year interval,

1 if you can summarize it?

2 A Well, from -- from the latter days of the  
3 Dempsey O'Neill business, from the early 1990s, I had  
4 been developing and interested in and practicing in the  
5 area of international trusts.

6 And as I said, Turks & Caicos Islands is a  
7 zero tax jurisdiction. Also, it had in 1990 passed a  
8 trust ordinance in 1990, which was a modern piece of  
9 trust legislation, which made this attractive  
10 jurisdiction for international investors to -- for  
11 international investors to establish trusts.

12 And so from early 90's on, I had been  
13 developing that side of our practice. I was involved.  
14 That carried on through -- through the -- the days after  
15 the Dempsey O'Neill split. In the mid-1990s I spoke a  
16 number of occasions of international well transfer  
17 conferences on Turks & Caicos Islands, trust measures,  
18 and I acted for a number of people in establishing  
19 international Turks & Caicos Islands trusts. And I  
20 distributed articles of various magazine -- of various  
21 professional publications and so on, on that topic. And  
22 that continued after 1998, when I joined Misick &  
23 Stanbrook.

24 They didn't have anybody here at the time who  
25 had any particular expertise in the area of trust and

1 they were attracted to that fact, that that's something  
2 that I brought to the table.

3 And so that continued with Misick & Stanbrook,  
4 and I just continued. Until now, I would not say -- um,  
5 yeah, it's continued until now.

6 Q Okay. You were about to say what you would  
7 not say. So I'm being curious, want to know, what was  
8 it that were about to say?

9 A Well, I would say that -- that, um -- as a  
10 jurisdiction for the establishment of trusts, the Turks  
11 & Caicos Islands is less popular now than it was in the  
12 90s and the early part of the last decade.

13 And not because any of the Turks & Caicos  
14 Islands has changed anything, but rather because, uh,  
15 other jurisdictions have passed new legislation, which  
16 has proved interesting and attractive to international  
17 advisors in the trusts field.

18 And the -- during the same period, this  
19 country was experiencing large, uh, development boom in  
20 the construction and tourism areas. Successive  
21 governments here, uh, felt that there was -- the company  
22 was doing so well. I mean, that business -- that there  
23 really is no great need for them to expand. And the  
24 financial business that the country did a decision which  
25 now seems wrong headed. But -- and so despite, you

1 know --

2 Q Yes, I've noticed an awful lot of not totally  
3 complete construction around the island.

4 Is, uh, is that what you're referring to?

5 A Yes. Yes. We've got a construction boom,  
6 followed by a construction bust.

7 Q Uh, yes, those booms are always followed by  
8 bust. But please continue --

9 A So I would say, the point I was going to make  
10 was that -- it was two-fold. One was that at the Turks  
11 & Caicos Islands, I would say the last decade became  
12 less attractive for international advisors to recommend  
13 their clients, jurisdiction for international trusts.  
14 Not because the Turks & Caicos Islands disimproved in  
15 any way, but rather because our competitors passed new  
16 and more alluring legislation. They select the Cayman  
17 Islands, British Virgin Islands and so on.

18 And from our own standpoint, of course we --  
19 we have been in this firm grew significantly, in the  
20 last decade and certainly into the construction bust.  
21 And that there -- during that period, was an enormous  
22 amount of construction development work, which tended to  
23 shove -- shove other work to the margin. So I was not  
24 as assiduous in the last five or six years in pursuing  
25 trust work, as I had been before then.

1           And this is a business where you -- for that type  
2 of business you need to be out there on the international  
3 circuit going to conferences and doing all that type of  
4 thing to keep your face there to get that kind of work.

5           Q     In other words, marketing the firm as being a  
6 leader in creating trusts, that sort of thing.

7           A     Yes.

8           Q     All right. Um, well, even though you've  
9 covered it, since I asked you to provide me with a  
10 curriculum vitae, uh, and you provided one that's, I  
11 guess, apparently, rather modest. But, uh, I feel like  
12 I might as well mark it and give it to you. I provided  
13 it to counsel, but we don't have a Bates number on it.

14                   So I'm allowed to be provided with a Bates  
15 number.

16           MR. COHAN: We, uh -- will mark this  
17 curriculum vitae, uh, as your -- let's see. Not your --  
18 but as OF -- not very creatively standing for Owen Foley  
19 20007.

20                           (Exhibit OF20007 was marked.)

21 BY MR. COHAN:

22           Q     And I ask you, sir, do you recognize that  
23 document?

24           A     Yes, I do.

25           Q     And what is that document, Mr. Foley?

1 A It's a pre-resume of my professional career.

2 Q Uh, it doesn't say much, other than, quote, he  
3 has been a regular contributor to international  
4 publications on Turks & Caicos Islands corporate and  
5 trust law and is a member of the Society Trust & Estate  
6 Practitioners.

7 But could you, uh, at some convenient time in  
8 the near future, provide us with, uh, a list of the, uh,  
9 publications that you have produced that's referred to  
10 here?

11 A Certainly.

12 Q Okay. Thank you. Um, and that's something  
13 that I'm gonna offer as evidence.

14 Now, the next thing that I'm gonna require  
15 about, and really here for us, is what we have marked --  
16 and I believe has been provided counsel for the  
17 government, as FT -- as in Francis Trust, four zeros  
18 followed by a 1 through FT29.

19 (Exhibits FT00001 THROUGH FT000029 were marked.)

20 BY MR. COHAN:

21 Q And let me give this to you, sir. And give  
22 the government a moment to get their copy. And then if  
23 you will, Mr. Foley, take a few moments to review this,  
24 and then I want to ask you quite a few questions about  
25 it.

1 MR. COHAN: Tim, how are we doing on the, uh,  
2 ambient noise?

3 THE VIDEOGRAPHER: There's no way to check  
4 without turning the cameras off and playing the video  
5 back. I can certainly do that, if you'd like.

6 MR. COHAN: Yeah. Let's do that now, if you  
7 would, please. I just want to make sure that we're not  
8 engaging in exercise in utility here.

9 Let's go off the record while people are looking  
10 at this, and make sure that this is audible.

11 (End of recording.)

12 BY MR. COHAN:

13 Q All right. Okay. Now, we're back on the  
14 record. We went off the record for, I'm not sure  
15 exactly how long, but I think the camera will show the  
16 clock that we have there, how long. A few minutes.

17 Um, just to check the sound levels because we  
18 do have some ambient noise and we wanted to make sure  
19 that the court and the court reporter were able to hear  
20 what we're all saying here while we're on the record,  
21 and we've mostly been on the record.

22 So, if I might, Mr. Foley, have you had a  
23 chance to review the 29 pages which constitute FT1  
24 through FT29?

25 A Yes, I've glanced at it.

1 Q Okay. Do you recognize this document or  
2 portions of it?

3 A Well, I recognize the, the trust deed, which  
4 is the first 21 pages.

5 Q All right.

6 A The subsequent pages were not prepared by me.

7 Q All right. Well, I may ask you some questions  
8 about them. I'm not sure, then again, maybe I won't.  
9 But at least the first 21 pages I do wish to inquire  
10 about. So you said you recognize this document.

11 Do you recall when you first saw this document  
12 or the original of which these copies were made? And  
13 I'm referring to FT1 through FT21.

14 A Uh, I first saw this -- I mean, I drafted this  
15 document.

16 Q Very well. I didn't know that. And so now  
17 you've answered a question I haven't even asked yet.  
18 Which was, did you draft this document? You did.

19 A Yes.

20 Q When, sir, do you believe you drafted this  
21 document, to the best of your recollection?

22 A I believe in April and May of 1999.

23 Q And at whose behest did you draft this  
24 document, if you recall?

25 A At the behest of Joseph Francis.

1 Q And was Mr. Francis accompanied or assisted by  
2 anyone whom you recall?

3 A Yes. Mr. Francis was accompanied by Brian  
4 Rayment.

5 Q And do you recognize Brian Rayment?

6 A Yes, I do. He's sitting beside me on my left.

7 Q Very well. Thank you.

8 Did you have any prior relationship with  
9 Mr. Rayment? Meaning, prior to your meeting  
10 Mr. Francis?

11 A Uh, yes, I did. I had known Mr. Rayment for  
12 two or three years before that.

13 Q Do you -- do you recall -- go ahead, I'm  
14 sorry. Was your answer complete?

15 A No. I was trying to recall why I knew Brian  
16 before that, Mr. Rayment before then. But I --

17 Q Good. Because that was gonna be my next  
18 question, if you recall the context in which you had met  
19 Mr. Rayment?

20 A Mr. Rayment was introduced to me initially by  
21 a gentleman called Ken Jones from Tulsa.

22 Q And was Ken Jones from Tulsa, a business  
23 acquaintance, a client, do you recall?

24 A Uh, he was a client.

25 Q Okay. Do you -- I'm not sure if I, uh,

1 heard -- let me ask.

2 How long had you known Ken Jones from Tulsa,  
3 Oklahoma prior to his -- Mr. Jones introducing you to  
4 Mr. Rayment, to the best of your knowledge?

5 A Well, if I assume that Mr. Jones introduced  
6 Mr. Rayment to me in or about 1996, I would by then have  
7 known Mr. Jones for about six years. I believe that I  
8 first met him in 1990.

9 Q Okay. Are you allowed to disclose the nature?  
10 Not any communications, which would be privileged, but  
11 the nature of the work that you did for Mr. Jones?

12 A No, I'm not authorized to disclose that.

13 Q All right. Then I won't ask.

14 In any event, you've already disclosed that he  
15 was a client of yours. And at least you had known  
16 Mr. Jones for approximately six years when Mr. Jones  
17 introduced you to Mr. Rayment, correct?

18 A That's correct.

19 Q All right. And then you apparently then, if I  
20 have the chronology straight, and correct me if I'm  
21 wrong -- let me ask it a different way.

22 Is it correct that you had then met  
23 Mr. Rayment, something like three years prior to  
24 Mr. Rayment introducing you to Mr. Joe Francis?

25 A To the best that I can recall, that's correct.

1 I can't remember the exact date which I was introduced  
2 to Mr. Rayment, but that's approximately the case.

3 Q And did you have any dealings that you recall  
4 with Mr. Rayment during that approximately three-year  
5 period from 1996 to mid-1999, when Mr. Rayment  
6 introduced you to Mr. Joe Francis?

7 A I recall meeting Mr. Rayment on a number of  
8 occasions. I believe that Mr. Jones -- I -- I can't  
9 recall whether I met or dealt with him independently of  
10 Mr. Jones ever.

11 Q Okay. Do you recall whether Mr. Rayment was  
12 introduced to you by Mr. Jones as an attorney  
13 representing Mr. Jones, or entities in which Mr. Jones  
14 had any interest?

15 A I can't recall.

16 Q Okay. Well, let me then ask you to look at  
17 the, uh, the document, FT1 through 21. It bears a date  
18 on it. At the top it says, "Dated May 24, 1999."

19 The stamp, uh, April 8th, 2010, I believe was  
20 placed on this by my office when we received it.

21 Um, but if you have a different recollection,  
22 by all means tell us.

23 A No, I do not.

24 Q Okay. So do you believe that this document  
25 was completed on or about May 24th, 1999?

1 A Yes, I do.

2 Q Okay. Uh, inviting your attention to, uh,  
3 Page FT -- I'll not refer to the multiple zeros,  
4 henceforth FT2. Uh, this is the -- Mr. Joe Francis  
5 identified in, uh, No. 1, uh, on the first page as the  
6 Settlor?

7 A That's correct, yes.

8 Q And the second party named under the --  
9 between section of this, what's called Irrevocable  
10 Settlement, uh, is Hallmark Trust Limited, correct?

11 A That's correct, yes.

12 Q Do you know how, uh, a determination was made  
13 that Hallmark Trust Limited would be the trustee  
14 pursuant to the provisions of this irrevocable  
15 settlement?

16 A Uh, yes, I do.

17 Q Could you please tell us?

18 A Hallmark Trust Limited was a trust company  
19 which -- with which we, from time to time, done some  
20 business.

21 Q Excuse me, one second. When you say "we," do  
22 you mean --

23 A I mean this firm, Misick & Stanbrook.

24 Q Very well, thank you.

25 A And I had done business with Hallmark Trust

1 Limited when I was at Dempsey and company.

2 Q So that means that you had been doing business  
3 with Hallmark for at least, uh, that would -- well, that  
4 would only go back to 1998, I guess is when you --

5 A Well, no, while I was doing business with them  
6 at Dempsey and company. So it was -- I was probably --  
7 we -- we had probably done work with them before about  
8 four or five years at that stage.

9 Q Okay. And who were, uh, the principals of  
10 Hallmark Trust Limited, to the best of your recollection  
11 when, when this transaction, May 24th, 1999 took place?

12 A My recollection is that the principals were  
13 Colin Chaffe and Nicola Jordan.

14 Q Are you acquainted with Colin Chaffe?

15 A Yes, I am.

16 Q And did your acquaintance with Mr. Chaffe,  
17 begin, uh -- well, strike that.

18 When did your acquaintance begin with  
19 Mr. Chaffe, to the best of your knowledge?

20 A Sometime in the mid-1990s, I believe.

21 Q Do you recall the circumstances under which it  
22 began?

23 A I don't.

24 Q Okay. In any event, is it correct that, uh,  
25 acting as an attorney for clients, whom I will not ask

1 you to name, uh, you engaged Hallmark Trust Limited  
2 Services to act as trustee?

3 A Either to act as -- yes. Either to act as  
4 trustee or to provide, uh, to provide other corporate --  
5 to provide corporate services to companies established  
6 by us for clients.

7 Q Okay. And can you briefly summarize what you  
8 are referring to under the rubric of corporate services?

9 A Uh, yes. Uh, we have -- this firm has a  
10 corporate management, affiliate called Caribbean Island  
11 Services Limited, which incorporates companies for  
12 clients, provides registered office for those companies  
13 and so on. However, uh, we -- the Caribbean Island  
14 Services Limited does not typically provide a board for  
15 those companies, unless the company itself does nothing  
16 more than hold real estate locally.

17 Q When you say "a board," I believe what I'm  
18 asking you -- does that mean a board of directors?

19 A I mean a board of directors. I mean,  
20 directors and a secretary.

21 Q Okay. Can you explain that -- not so much the  
22 process, as the whole purport of providing a board of  
23 directors. And -- and the context in which that would  
24 be done and the purpose for which it's done.

25 And I realize the question is compound, so

1 I'll object to my own question. But, if you -- I'm just  
2 being facetious.

3 Can you explain that, that process, not my  
4 objection?

5 A Every company that's founded in the Turks &  
6 Caicos Islands, must have at least one director and must  
7 have a corporate secretary.

8 And from time to time, companies were  
9 established for clients, where, as a matter of policy,  
10 because the company concerned was going to do business  
11 going to do active business, not just own a piece of TCI  
12 real estate. Uh, where we are our corporate management  
13 affiliate would not, as a matter of our policy, provide  
14 a board for that company.

15 Q Sounds like conversely if all the company was  
16 willing to do was own property, then your firm would  
17 provide that? Or --

18 A Yes.

19 Q -- or excuse me, the Caribbean Management  
20 Services would perform those limited services?

21 A Yes.

22 Q All right. I'm gonna (inaudible). Please  
23 continue.

24 A Yes. Uh, so from time to time when a client  
25 was going to -- was establishing a structure or an

1 entity of a company, which was going to do more active  
2 business, and where they did not want to be on the board  
3 of that company themselves, did not want to be a  
4 director or did not want to be a secretary, then, uh, we  
5 would either have to turn away that business, which  
6 didn't suit us obviously, or we would find a third  
7 party, who would provide those services. Hallmark Trust  
8 Limited from time to time provided those services.

9 Q Okay. And so it was for that purpose if I  
10 under -- well, strike that.

11 Was it for that purpose then, that you  
12 personally invited Hallmark Trust Limited to participate  
13 in this irrevocable settlement?

14 A Uh, no. In this occasion, we -- Hallmark  
15 Trust Limited has -- has a license to act as a  
16 professional trustee. So if you establish a trust here,  
17 then obviously the trust -- must have the necessity of a  
18 trustee.

19 We are not a trust company. We are a law  
20 firm. Our corporate management affiliate is a licensed  
21 company manager. It is not a trust company. We do not  
22 have an in-house trust company.

23 And so where a client needed a professional  
24 trustee, then Hallmark Trust Limited was one of a number  
25 of local trust companies to whom we would refer that

1 business.

2 Q So is it correct that you made a referral of  
3 Mr. Francis and Mr. Rayment to Hallmark Trust Limited,  
4 in connection with the creation of FT1 through 21,  
5 Francis Trust?

6 A That is correct.

7 Q Okay. Um, then having made that referral  
8 of -- what happened next? I -- I really want -- I  
9 wanted to get the chronology of events that led to the  
10 creation of this document as completely as you can tell  
11 us, without invading privileged communications.

12 Just describe the process of what happened, I  
13 think is what I'm asking.

14 A The process was that I met with Mr. Francis  
15 and Mr. Rayment and described to them the nature of the  
16 Turks & Caicos Islands trust regime, essential details  
17 of our trust law.

18 They described for me -- I'm sorry. They  
19 instructed me as to what they wanted. I, based on those  
20 instructions, drafted a trust deed.

21 Q That would be FT1 through 21?

22 A Yes. And it probably went through a number of  
23 incarnations.

24 Q Okay.

25 A It was sent out and considered. And it may

1 not have gone through them. I can't recall. It's --  
2 it's -- it's a long time ago. But that typically was  
3 what happens. It goes through, people ask questions,  
4 they don't understand what some of the clauses mean,  
5 they say, "Why is that there?" et cetera. And, uh,  
6 eventually it -- it -- it evolved into it's -- it's  
7 final -- it was -- it was -- it reached its final  
8 iteration.

9 And in -- during the course of this process, I  
10 would have advised them that -- at the outset I said to  
11 them, we are not a trust company. We are a law firm.  
12 We cannot be your trustees. We do not have any  
13 affiliate who would act as a trustee, because we had --  
14 do not have any affiliate that is licensed to act as a  
15 trustee.

16 And my recollection is, and I may have  
17 mentioned it, a couple of different trust companies.  
18 One of which was Hallmark. And I asked Hallmark what  
19 their fees would be. And then shared that information,  
20 and that was apparently acceptable. And Hallmark was  
21 designated as the trustee of the trust.

22 Q So is it correct then that you didn't  
23 designate, but rather you -- your best recollection is  
24 that you, uh, identified Hallmark among -- at least a  
25 couple of other potential professional trust companies

1 that were licensed, and left it to the client to make a  
2 decision as to which one the client would select?

3 A My recollection is that there were just two  
4 trust companies that I suggested. That this was the one  
5 that they elected to go with.

6 Q Okay. So at that point in time, you followed  
7 the directions that the clients provided in creating  
8 this document?

9 A Yes.

10 Q Okay. And you don't recall whether and to  
11 what degree there were additional drafts. But in any  
12 event, you do recall that FT1 through 21 was the  
13 approved version, because it's been executed by the  
14 parties?

15 A Yes, that's correct.

16 Q Okay. Let me ask you some more questions  
17 about this document, if I may.

18 First of all, at the very top of FT2, it says:  
19 "This irrevocable settlement is made in triplicate this  
20 24th day of May, One thousand nine hundred and ninety  
21 nine."

22 This is language -- specifically words  
23 "Irrevocable Settlement," is not totally familiar to me,  
24 but I'm not a trust lawyer. So I'm asking you if you  
25 understand irrevocable settlement to be a contract

1 between parties?

2 A Uh, a trust isn't a contract, conventional  
3 sense, it's a relationship -- it establishes a  
4 relationship between certain parties.

5 Q Okay.

6 A And that relationship involves one party, the  
7 trustee, receiving and holding assets to which it  
8 acquires legal, but not beneficial title, and which  
9 assets it holds in trust for other parties, the  
10 beneficiaries. So essentially you have three parties.

11 You have a person who in -- in the jargon of  
12 our trust law and the jargon of trust law in, in --  
13 under the British system generally, who is the person  
14 who contributes the assets to the trust, who is the  
15 Settlor.

16 Then you have the trustee and then you have  
17 the beneficiaries. In this instance, Joseph Francis was  
18 the Settlor.

19 Q Okay. And -- and it describe them as such, in  
20 Hallmark Trust on FT2. Um -- so, going through this  
21 clause, immediately below under "Whereas," and I'm still  
22 on FT2. So there's a transfer of property or transfers  
23 of property contemplated by this document?

24 A Yes.

25 Q And once the property is transferred, then I

1 believe you testified that the trustee holds merely  
2 legal title and holds that legal title for the benefit  
3 of the beneficiaries, designated by this trust  
4 instrument?

5 A That's correct, yes.

6 Q Okay. And this use of the word,  
7 "Irrevocable." And it's a simple English word, but I  
8 want to make sure that my understanding of it is the  
9 same as yours. Meaning, that once this is executed,  
10 this document or any irrevocable settlement under the  
11 law of this jurisdiction, the properties transferred,  
12 the transferor, also known as the Settlor, cannot revoke  
13 or reverse the transaction, and the property is no  
14 longer available to the Settlor, unless the Settlor is a  
15 beneficiary under the terms of the instrument.

16 MR. THOMAS: Objection. The question is  
17 leading. Also calls for a legal conclusion by the  
18 witness, which he's not qualified to give in this, uh,  
19 litigation. Hasn't been qualified as an expert.

20 Further, it appears that you have some bias on  
21 the matter, since he was involved as a percipient matter of  
22 creating a trust.

23 MR. COHAN: Your objections are all noted.  
24 And none of them has any validity. But that's --

25 MR. THOMAS: Not even the leading part?

1 MR. COHAN: The leading part, you're right.  
2 That -- that -- that was valid. Uh, so based -- let me  
3 go back.

4 BY MR. COHAN:

5 Q I -- I asked you a leading question, but I was  
6 really trying to just restate what I thought you had  
7 testified to moments earlier.

8 And I want to make sure that the record we  
9 make is as clear as possible. So let me ask you in a  
10 non-leading fashion, if I'm capable of that.

11 When a Settlor, such as Mr. Francis, pursuant  
12 in terms of this document, transfers property pursuant  
13 to the terms of this document, can the Settlor revoke  
14 the -- the -- the transfer?

15 A No, he cannot.

16 Q Okay. Now, let me ask you some questions  
17 about whether you're an expert. Uh, you've already  
18 testified as to your education and your experience.  
19 You've also provided with us, a curriculum vitae, which  
20 indicated that you had published in the field of trusts.

21 Uh, do you consider yourself to be an expert  
22 in trust law, in the jurisdiction in the Turks & Caicos  
23 Islands?

24 A Yes, I do.

25 Q And what is the basis for your belief that you

1 are an expert in the law of -- in the Turks & Caicos  
2 Islands as far as it pertains to the creation of trusts  
3 governed by the law of the Turks & Caicos Islands?

4 A Uh, I have participated in the establishment  
5 of many trusts since 1993, probably 1992 onwards. I  
6 have advised trustees and Settlers, both locally and  
7 internationally on this topic over the years since then.

8 I was the contributor of the chapter on the  
9 Turks & Caicos Islands trust to, uh, publication of both  
10 chancellor international guide to offshore trusts  
11 trident international guide to offshore trust published  
12 by London publisher by Chancellor of Publications in the  
13 mid-1990s. Uh, I have spoken internationally, uh, on  
14 Turks & Caicos Islands trusts at conferences in London  
15 in 1995, '96. And I was instrumental in, uh, and, part  
16 of the committee, which looked at revision of various  
17 aspects of the TCI trust ordinance in the mid-1990s,  
18 which led to the passage of an ordinance called the  
19 voluntary dispositions ordinance, which for various  
20 reasons was never -- bill passed, it was never actually  
21 brought into force.

22 (Background noise.)

23 And -- and -- I don't know what else to say.  
24 I contributed to the articles every week to address the  
25 publications in the Turks & Caicos Islands, just as I

1 have done so. I've -- I've -- I've published on the  
2 topic in the past.

3 And I have -- I have in the past advised  
4 people internationally and continue to advise them on --  
5 on these issues. And I knew this -- the legal community  
6 here is a small one, and I am fairly familiar with other  
7 members of the legal community here, and the type of  
8 work they do. And I think it's fair to say, I don't  
9 know of anybody else who does any more trust work than I  
10 do.

11 Q Very well. I have more questions in this  
12 area. Uh, you testified earlier that you have been  
13 doing trust work in this jurisdiction, uh, during the  
14 last 22 years --

15 A Yes.

16 Q -- if I understood your testimony.

17 MR. THOMAS: I thought he said from 1992?

18 THE WITNESS: Sorry. I said --

19 MR. THOMAS: That would be about 18.

20 MR. COHAN: Thank you. You're right. I was  
21 thinking 1988. But that's, I believe when you said you  
22 initially came here. In any event, if it's only 18  
23 years, I'll -- I certainly don't want to go beyond 18  
24 years.

25 Uh, do you know other practitioners in this

1 jurisdiction who are better qualified than yourself to  
2 opine on the lawfulness and the provisions of trusts, such  
3 as FT1 through 21?

4 MR. THOMAS: Objection. Relevance.

5 MR. COHAN: Noted for the record.

6 BY MR. COHAN:

7 Q Mr. -- Mr. Foley, you should know that because  
8 this matter is gonna be presented to a court in the  
9 United States in the Central District of California,  
10 that counsel for the government is obligated to make  
11 objections to questions which he feels are  
12 objectionable. And those objections obviously can't be  
13 ruled by the judge until the judge is presented with the  
14 material.

15 So counsel has to make his objections and then  
16 you have to answer it. And I have an opportunity after  
17 he makes the objections to rephrase the questions, uh,  
18 to conform to whatever counsel suggested is the defect.

19 However, irrelevance objections is one that,  
20 uh, I don't really need to respond to. The judge will  
21 be the determining force of whether the question is  
22 relevant or not. I am telling you that the relevance of  
23 it is created by the objection that counsel himself made  
24 to your qualifications. So I'll repeat the question.  
25 The question is, do you know anyone who practices law or

1 is otherwise qualified to opine on the laws of the Turks  
2 & Caicos Islands pertaining to trusts, and particularly  
3 FT1 through 21, who is better qualified than you are, to  
4 opine on matters of trust law in the Turks & Caicos  
5 Islands?

6 A No. I know people who are comparably  
7 qualified, but none better, I would think.

8 Q Very well. Now, I want to -- and I am going  
9 to continue to ask you questions on the basis that you  
10 are an expert, as such under the laws of the United  
11 States, you are qualified to give opinions on the law.

12 And that's the basis upon which I will ask you  
13 those questions. More foundational, um, I take it that  
14 you charge money for providing legal opinions to  
15 clients?

16 A Yes, I do.

17 Q And so you -- well, I won't ask it.

18 Do you believe that you are qualified to be  
19 paid as a professional?

20 A Yes, I do.

21 Q Very well. And are you licensed to practice  
22 law in this jurisdiction?

23 A Yes, I am.

24 Q Is that entitle you, as a matter of local law,  
25 to be paid to provide professional --

1 A Yes, it does.

2 Q Has anyone ever challenged your qualifications  
3 to perform the work that you have testified you have  
4 performed for the last 18 years?

5 MR. THOMAS: Objection. Relevance.

6 THE WITNESS: No. Nobody has objected.

7 BY MR. COHAN:

8 Q Has any trust that you've ever created,  
9 pursuant to the laws of the Turks & Caicos Islands, ever  
10 been held to be invalid as a trust for any purpose  
11 whatsoever?

12 A Not to my knowledge.

13 Q All right. Is it possible, under the laws of  
14 the Turks & Caicos Islands, for a trust to be held  
15 invalid if challenged by a party to the trust or a third  
16 party?

17 A Yes, it is.

18 Q Well, since we've gotten here a little earlier  
19 than I thought, I'm gonna hand you a copy of a  
20 memorandum that you prepared for me, uh -- actually, not  
21 specifically at my request, but because I asked you a  
22 question about the conditions under which a trust  
23 created in this jurisdiction might be treated as a sham  
24 based on excessive influence or control by the Settlor.  
25 And I think you had --

1 Do you have a copy of that or do I have them  
2 all?

3 A No, you have it.

4 Q All right. I have them all. The next one in  
5 order, I think we've marked was OF20007. So this would  
6 be --

7 MS. STANDLEY: Eight.

8 MR. COHAN: Eight.

9 MR. THOMAS: How many zeros were there,  
10 Sharon?

11 MR. COHAN: I think there were three.

12 MS. STANDLEY: There are three.

13 MR. COHAN: Even though my name isn't Sharon.  
14 Sorry. Um, 0009.

15 (Exhibits OF20008 and OF20009 were marked.)

16 BY MR. COHAN:

17 Q So let me hand you what's been marked for  
18 purposes of identification as OF2000 -- excuse me, 20008  
19 and 20009. And ask you if you recognize that document?

20 A Yes, I recognize this document.

21 Q And can you tell me when this document was  
22 prepared?

23 A Yesterday, November 17th.

24 Q Okay. And why did you prepare it?

25 A Uh, I prepared it arising as of the question

1 you asked of me. You didn't ask me to prepare this, but  
2 you asked a question relevant to this issue.

3 Q As you pointed out, I didn't ask you to  
4 prepare it, did I?

5 A No, you did not.

6 Q And so why did you prepare it, even though I  
7 didn't ask you?

8 A Uh --

9 Q This is not a criticism. It's just a  
10 question.

11 A I prepared it because your question, uh,  
12 high -- highlighted an issue. And, uh, it seemed to me  
13 that it was possible that it was an issue of which I  
14 could be asked a question. And so I thought it would be  
15 prudent to look at the issue and to make a summary of my  
16 conclusions of it certainly.

17 Q Very well. We appreciate that you did. And  
18 now, if I might invite your attention to this document,  
19 um, you did answer my question when I propounded the  
20 question to you, uh, the day before yesterday,  
21 specifically the 7 -- excuse me, the 16th of November,  
22 uh, when I met with you briefly and asked you this  
23 question. But -- would it be fair to say that this  
24 written response was quite a bit more detailed than what  
25 you stated to me on that --

1 A Yes, that's correct.

2 Q All right. So I just want to go through this  
3 quickly. When you prepared FT1 through 21, uh, were you  
4 aware of anything that had transpired which would  
5 invalidate the trust that was purportedly created as the  
6 Francis Trust and incorporated FT1 through 21?

7 A No, I was not.

8 Q Okay. Now, in OF2008 and 2009, you set forth,  
9 uh, several statements about the circumstances under  
10 which a trust would be deemed a sham, pursuant to the  
11 laws of this jurisdiction. Meaning, the Turks & Caicos  
12 Islands.

13 Let me ask you if you did some research to  
14 prepare this two-page document?

15 A Yes, I did.

16 Q And what research did you do, sir?

17 A I, uh --

18 Q I do see footnotes. But, um --

19 A Yes. I researched, uh, a number of -- of, um,  
20 textbooks on the law of trust in the library.

21 Q All right. And does this document constitute  
22 your legal opinion on the issue of the circumstances  
23 under which a trust created in this jurisdiction,  
24 including the trust before you now as FT1 through 21,  
25 would be determined to be a sham?

1           A     Uh, yes, it does, because it's a precis  
2     (phonetic).  If no one was giving a legal opinion, you  
3     typically, you know, say you're making -- that there  
4     might be qualifications.  But I -- I'm unaware of any  
5     reason to qualify this.

6           Q     I understand.  This was not -- this document,  
7     OF20008 and 20009, was not sought by anyone, um, was it?

8           A     No, it was not.

9           Q     All right.  It was your volunteering a more  
10    complete answer to the question I propounded the  
11    previous day?

12          A     That's correct.

13          Q     And is it your testimony that if you had been  
14    called upon to actually write an opinion, it might have  
15    been longer and more detailed than this, what you refer  
16    to as a precis?

17          A     Uh, yes, it might have been.

18          Q     Very well.  Um, were you, at the time of  
19    creation of the trust, aware of any circumstance or any  
20    facts that would invalidate the trust, pursuant to the  
21    terms of -- identified in this two-page document, which  
22    we just identified as 2008 and 2009?

23          A     No, I was not.

24                 MR. THOMAS:  2008 and 2009?  Or is it 2008  
25    and 20009?

1 MR. COHAN: The latter is correct. I stand  
2 corrected, Counsel.

3 MR. THOMAS: Okay. Thank you.

4 MR. COHAN: Thank you.

5 I was hoping to dispense with the zeros, but  
6 given the fact that we have numbered so many documents, I  
7 guess I can't. And I thank you for correcting me.

8 BY MR. COHAN:

9 Q Uh, have any events, subsequent to the  
10 creation of FT1 through 21, the Francis Trust taken  
11 place, um, which would invalidate that trust pursuant to  
12 the terms of 20008 or 20009, of which you have become  
13 aware?

14 A Uh, no.

15 Q All right. Now, let me, if I may, return to  
16 the Francis Trust and ask you some more questions.  
17 Looking at -- and if I may invite your attention to Page  
18 FT2, dispensing with the zeros this time.

19 Um, beneficiaries are referred to, uh, under  
20 definitions and interpretations, are they not?

21 A They are, yes.

22 Q And can you tell us, uh, whether this document  
23 identifies the beneficiaries?

24 A Yes, it does.

25 Q And can you tell us where?

1 A It identifies the beneficiaries in the Third  
2 Schedule to the document.

3 Q And the Third Schedule to the document is on  
4 which page, sir?

5 A FT00020.

6 Q All right. And can you read who those are?

7 A Uh, yes. The beneficiaries are listed as:

8 "Joseph Raymond Francis of 8899 Beverly  
9 Boulevard, Suite 810, Beverly Hills, California 90048,  
10 born April 1st, 1973.

11 Raymond J. Francis, of 145 Emerald Bay Drive,  
12 Laguna Beach, California, born June 2nd, 1940.

13 Maria E. Francis of 145 Emerald Bay Drive,  
14 Laguna Beach, California, born September 14th, 1943.

15 Any children of the Settlor and their remoter  
16 issue born within the Trust Period. Oklahoma Film  
17 Holding Corporation, 7666 East 61st Street, Suite 240,  
18 Tulsa, Oklahoma 74133."

19 Q Now -- thank you. There is both --  
20 immediately below what you just read, something  
21 identified in bold type is the Fourth Schedule. Or do  
22 you pronounce it shedual (phonetic)?

23 A Uh, when I was growing up, I would have  
24 pronounced it shedual. But I have lived in this  
25 hemisphere very long enough to pronounce it Schedule.

1 Q Very well. And I won't ask you about tomahto  
2 (phonetic) and tomato. Uh, or I'll try not to.

3 Uh, inviting your attention to that Fourth  
4 Schedule, "Excluded Persons."

5 Can you tell us what is the purport of this  
6 subsection, the Fourth Schedule here?

7 A Uh, well --

8 Q What are they excluded from, if I may offer  
9 it?

10 A They are excluded from taking any benefit of  
11 the trust.

12 Q Okay. So what they're excluding from is being  
13 a beneficiary under this instrument?

14 A Yes. That's correct.

15 Q All right. Do you know why that provision was  
16 inserted in this document?

17 A Uh, because trusts here are frequently  
18 established to -- uh, would -- would -- in the hope of  
19 providing a Settlor protection from future creditors,  
20 generally known as asset protection, creditor  
21 protection. And so the purpose of the excluded persons  
22 schedule is specified persons who cannot take benefit,  
23 cannot be beneficiaries. And so if, for instance, this  
24 one of the beneficiaries became insolvent or his assets  
25 were under threat of sequestration, he cannot be -- he

1 cannot be a beneficiary. He cannot take benefit under  
2 the trust and similarly somebody who is a treasurer of  
3 the beneficiary would not be entitled to receive  
4 benefits under the trust.

5 Q Is the law of this jurisdiction that a  
6 creditor is entitled to no more from the trust -- a  
7 creditor of a beneficiary, is entitled to no more than a  
8 beneficiary is entitled to.

9 Did you understand my question?

10 A No, I didn't understand.

11 Q Let me rephrase it. My understanding of the  
12 laws in the United States, is that a creditor of any  
13 person, including a beneficiary of a trust, can take  
14 anything that the beneficiary can take, or is entitled  
15 to compel, but can take no more than the beneficiary  
16 debtor can take.

17 Is that the law of this jurisdiction?

18 A That is the law of this -- this jurisdiction,  
19 with -- with a qualification.

20 Q Which is, I hesitate to ask but --

21 A Well, the qualification is that -- and that's  
22 perhaps not a qualification, more an amplification.  
23 And, that is that, that, uh -- under the terms of our  
24 trust ordinance, under Section 61 of our trust  
25 ordinance, if a Settlor transfers assets to a Turks &

1 Caicos Islands Trust and he was not insolvent, within  
2 the meaning of that statute at the time at which he made  
3 the transfer, then that transfer, to the trust would not  
4 be set aside at the instance of the creditor.

5 Q Right.

6 A So -- and so in that respect, the creditor  
7 would have -- it seems to me less rights than he would  
8 have in the U.S. and the circumstances you mentioned.

9 Q Very well. That brings up another point. Uh,  
10 and I'm glad you did amplify. If a Settlor engages in  
11 something called a fraudulent conveyance, is it -- are  
12 you familiar with that term, "fraudulent conveyance"?

13 A Yes, I am.

14 Q Okay. And what is your understanding of the  
15 term fraudulent conveyance?

16 A Fraudulent conveyance, to my understanding, is  
17 a transfer of assets which is intended to hinder, delay,  
18 or defraud your creditors.

19 Q All right. So given your --

20 MR. THOMAS: Can I ask just one --

21 MR. COHAN: Go ahead. Any time. I -- I want  
22 the record to be clear. At any time, Counsel, when you  
23 want to interrupt and ask a question, you're free to do  
24 so.

25 So go ahead.

1 MR. THOMAS: I've changed my mind. Thank you,  
2 though.

3 MR. COHAN: Okay. Very well. But -- but I  
4 did want to make that a, a matter --

5 MR. THOMAS: Certainly.

6 MR. COHAN: -- of record. We did that  
7 yesterday. I see no reason to be different today. To  
8 be as economical of time and convenience when something  
9 is on your mind, so you don't have to make notes of it  
10 later.

11 BY MR. COHAN:

12 Q Okay. I was asking about fraudulent  
13 conveyance. I want to make sure that we're clear on  
14 this record. I believe your -- immediately preceding  
15 testimony, that you called both the qualification and  
16 then decided it was more of an amplification. Is that  
17 notwithstanding the prohibition on a creditor or the  
18 beneficiary taking more from a trust, than the  
19 beneficiary could take, if the beneficiary was indebted  
20 to the creditor. There's an exception to that, which  
21 would be, if the Settlor, who was also a beneficiary,  
22 transferred assets into this type of trust that's shown  
23 by FT1 through 21 in fraud of creditors, meaning, that  
24 it rendered the Settlor insolvent or otherwise put  
25 assets out of reach of bona fide creditors at or

1 immediately prior to the time of the transfer into the  
2 trust, that the trust would not prevent creditors from  
3 reaching those assets.

4 Is that a correct statement?

5 A I think that -- that's a correct analysis  
6 subject to the -- the -- the -- there's a solvency test.  
7 Settlor meets the solvency test.

8 Q Okay.

9 A If on the date of the particular transfer he  
10 passes the solvency test, then the transfer will not be  
11 set aside at the instance of a creditor.

12 Q Were you aware of any issues with respect to  
13 Mr. Francis's solvency at or about the date of May the  
14 24th, 1999 that, uh, raised the issue in your mind, if  
15 you can recall?

16 A No, I was not.

17 Q Okay. Has anything subsequent to that time  
18 been brought to your attention to change your opinion in  
19 that regard?

20 A Um, no. I mean, I'm not currently familiar  
21 with Mr. Francis's state of solvency. I don't know  
22 anything of his financial affairs. So the only time  
23 with which this could have arisen for me, would be at  
24 the time that we established the trust.

25 I don't know anything of his -- his -- his

1 affairs, since I believe he's a man in the public eye.  
2 I read things in the media about him. But I'm not aware  
3 of his -- have any personal knowledge of his personal  
4 situation, his financial status, I couldn't say whether  
5 he's solvent or not.

6 Q Okay. You are aware of the fact that I am  
7 here and government counsel from the United States are  
8 here in connection with the lawsuit?

9 A I am. I am, yes.

10 Q And are you aware of whether Mr. Francis is a  
11 party to -- to this lawsuit?

12 A He -- he is not.

13 Q Right. I just asked you if you're aware of  
14 whether he were. You are correct, he is not. But I  
15 just wanted to ask you, without asking a leading  
16 question, which sometimes I do ask leading questions.  
17 But it's always inadvertent, unless it's an adverse  
18 party or I just feel like it.

19 Um, I'm not -- not paying attention. I don't  
20 mean to suggest answers to you, sir. I'm in no position  
21 to do that. Um, so the solvency test which you just  
22 said earlier a moment ago, what is that solvency test?  
23 And we're referring now to the point in time immediately  
24 preceding the establishment of the trust, such as the  
25 Francis Trust, which is FT1 through 21, and the solvency

1 test that would have been applied to Mr. Francis  
2 immediately prior to May 24th, 1999.

3 A Yeah. That he -- at the time of the transfer  
4 of assets to the trust to meet that solvency test, the  
5 Settlor must have assets available to meet his  
6 liabilities as they -- as they fall due.

7 Q Assets available to meet his liabilities --

8 A I'm quoting that from memory.

9 Q You're quoting that from memory --

10 A So I went -- it might be -- if -- if, there's  
11 a copy, of the trust ordinance I can direct it.

12 Q We'll get to it. We'll get to it. We do have  
13 such a copy, and we will bring it to your attention in  
14 due course here.

15 Now, I want to -- you -- you mentioned a few  
16 moments ago that you did some work, uh, with respect to  
17 asset protection trusts; is that right?

18 A Yes, that's correct.

19 Q Would you characterize this Francis Trust, FT1  
20 through 21, as an asset protection trust?

21 A Yes, I would.

22 Q Okay. And what provision or provisions of  
23 this document, the Francis Trust, makes it a, quote,  
24 asset protection trust? Generally, first and then  
25 specifically if you can identify this provision in the

1 document?

2 A Well, generally speaking, the trust has been  
3 established pursuant to the laws of these islands, where  
4 we have statutory asset protection provision, namely  
5 Section 61 of the trust ordinance.

6 Q Say that again. I'm sorry. I didn't hear the  
7 ordinance.

8 A This trust was established pursuant to the  
9 laws of the Turks & Caicos Islands, where we have a  
10 statutory asset protection provision, namely, Section 61  
11 of the trust ordinance.

12 Q Thank you.

13 A And I've just described that to you.

14 Q Right.

15 A And the type of trust that has been  
16 established here, to go on with your question, the type  
17 of trust that has been established here, is a  
18 discretionary trust. The nature of that trust is that  
19 assets are settled on the trustee who is given very  
20 broad powers and discretions as to which of the  
21 beneficiaries he may benefit. When he may benefit, and  
22 indeed whether at all to benefit them.

23 In those circumstances, no particular  
24 trustee -- I'm sorry, I beg your pardon.

25 No particular beneficiary can put his hand up

1 at any time and say, I have a vested interest in these  
2 assets. None of the beneficiaries has a vested interest  
3 in the assets. All -- each beneficiary has -- is hope  
4 of receiving benefit. And until the trustee exercises  
5 his discretion in favor of that beneficiary, that  
6 beneficiary has no, as I say, vested interest.

7 Q All right.

8 A In those circumstances, because the  
9 beneficiary doesn't have a vested interest, then it  
10 seems to me that a creditor could not, even if he had a  
11 judgment, could not attach that interest of that  
12 beneficiary, because the beneficiary does not have a  
13 vested interest.

14 Q Ergo -- what you're saying, this is what I was  
15 trying to articulate earlier, the creditor is in no  
16 better position to make a claim than the beneficiary who  
17 owes the debt?

18 A Yes, that's correct.

19 Q All right. Thank you. Now, can you identify  
20 the provisions in this document that reflect the  
21 limitations on the interest, i.e., that is not vested  
22 about which you just testified a few moments ago?

23 And let's go through as many of these  
24 provisions as you need to, to clarify this. And I know  
25 that's sort of a burdensome question, but it's -- it's

1 just easier for me to ask you to find what's pertinent,  
2 than for me to try and guess.

3 A Okay. On clause 4 on Page F20004, specifies  
4 the terms in which the trustees --

5 Q I'm sorry. You misspoke. You said F2.

6 A Oh, I beg your pardon. FT. FT.

7 MR. THOMAS: Can I clarify something on that?

8 MR. COHAN: Please.

9 MR. THOMAS: I think my, uh, confusion arose  
10 initially because you designated the first new item  
11 here, uh, the CV as OF20007.

12 MR. COHAN: Right.

13 MR. THOMAS: Am I to understand that the 2 is  
14 part of the OF designation?

15 MR. COHAN: Yes.

16 MR. THOMAS: And the numbers are -- I --  
17 that's come to me now. So I understand. OF2 is for  
18 this set of documents.

19 MR. COHAN: Right. See, we -- we did --

20 MR. THOMAS: When you said the 20007 for the  
21 initial document, I thought you were designating it as  
22 OF20007. But now I understand it. So we -- we won't  
23 worry about the intervening zeros.

24 MR. COHAN: Okay. Well, the problem is with  
25 the 2.

1 MR. THOMAS: I understand. I totally  
2 understand what's happened here.

3 MR. COHAN: All right.

4 MR. THOMAS: And I didn't mean to make an  
5 issue where there shouldn't have been --

6 MR. COHAN: Okay. We have a --

7 MS. STANDLEY: We tried to make it  
8 self-explanatory. When we saw it, we know it was a  
9 different --

10 MR. COHAN: We have a request for a break.  
11 And I think it's a really good idea, because for one  
12 thing, I need, uh -- I had some coffee that has another  
13 destination in mind.

14 And then this witness could review this while  
15 we're not all sitting here and we can resume in say, ten  
16 minutes?

17 MR. THOMAS: That would be fine.

18 MR. COHAN: Would that all right? Thank you.

19 THE VIDEOGRAPHER: Should I shut this off?

20 MR. COHAN: Please. Um, I mean, unless --  
21 now, before you do that, we had the idea that it would  
22 be more comforting to everyone if we just kept the  
23 record running, so there wouldn't be any dispute if  
24 something be missing or whatever. Uh, I'll leave it up  
25 to government counsel.

1 MR. THOMAS: We -- we don't anticipate such  
2 disputes.

3 MR. COHAN: Okay. Go ahead and turn it off.

4 THE VIDEOGRAPHER: Okay.

5 (End of recording.)

6 BY MR. COHAN:

7 Q Okay. Back on the record. And I'm sure you  
8 know, Mr. Foley, that you're still under oath. And  
9 we're resuming your deposition after taking a brief  
10 break, during which I hope you've had a chance and taken  
11 the opportunity to review your -- I won't call it turgid  
12 prose, um, your FT1 through 21. Uh, and I think the  
13 pending question was, and even if it wasn't, it is now,  
14 the provisions of FT1 through 21, the Francis Trust that  
15 make it an asset trust -- excuse me, an asset protection  
16 trust. And, uh, I think that further refinement was to  
17 limit the potential claim of any beneficiary. And you  
18 started to identify some of those provisions.

19 A Uh, I -- I think I should say at the onset  
20 that it seems to me that on reflection that really any  
21 trust you establish here, any trust that is not a trust,  
22 whether it's a fixed interest, is -- it may not be  
23 set -- it may not be established for reasons of asset  
24 protection, but it could be described as an asset  
25 protection trust, because it has the benefit of the

1 statutory protection that I mentioned to you.

2 Q Section 61?

3 A Section 61, yes. And the trust -- this  
4 particular trust -- and let me know if I'm moving too  
5 fast for you.

6 Q Almost certainly you are, but I'll do my best  
7 not to fall too far behind. Please proceed.

8 A This particular trust, as I said earlier is --  
9 established as a discretionary trust. Trustees afforded  
10 broad powers and discretions as to whom to benefit, whom  
11 are the beneficiaries to benefit and when and if to  
12 benefit them. In that respect, I draw your attention to  
13 clause 4.

14 Q And what page is that on?

15 A FT00004.

16 Q Four. Okay. And where is --

17 A I'm not sure if you want me to read this out.

18 Q You don't need to read the entire thing. If  
19 you'll just point us to the paragraph that you're  
20 referring to or the subparagraph.

21 A Okay. In clause 4(a) it refers to the, uh --  
22 uh, the trustees holding the trust fund and the income  
23 thereof, and --

24 Q All right. That's near the bottom of the page  
25 under the bold letters, "Trusts of Income and Capital"?

1 A Yes.

2 Q All right.

3 A There. And you'll see the -- that, um -- I  
4 don't want to read the whole thing out, but it says, the  
5 trust fund -- "Upon trust during the Trust Period to pay  
6 appropriate or apply the whole or such part of the  
7 income of the Trust Fund as the Trustees may in their  
8 absolute discretion think fit to or for the maintenance  
9 or otherwise for the benefit of all or such one or more  
10 exclusive of the other or others of the Beneficiaries in  
11 such shares and in proportions of more than one and  
12 generally in such manner as the Trustees shall in their  
13 absolute discretion think fit."

14 Q That is the language that you are referring to  
15 as providing -- well, strike that.

16 Is that the language, at least some of it,  
17 that you were referring to when you said that, this  
18 discretionary trust, uh, provides that it is  
19 discretionary entirely, whether, when, and which  
20 beneficiaries receive anything from the trust?

21 A That's correct. That -- that is one of -- of  
22 the -- of the sections which -- which deals with that.  
23 If we go on to the next paragraph in the same clause.  
24 "B" this relates to, uh, the holding of any income  
25 appropriated to the beneficiary, uh -- and again,

1 it's -- I don't want to read all of this out, but you'll  
2 see again that, how -- how are the obligations there  
3 is -- is -- as the trustees may in their absolute  
4 discretion to determine. Again, the clause, the line 5  
5 and --

6 Q Are we on FT, leaving out the zeros, ending in  
7 5?

8 A Yes.

9 Q We're at the top of the page?

10 A At the top of the page. And this is the  
11 paragraph beginning at "To hold any income appropriate  
12 to a beneficiary."

13 And it says to pay or apply the same to or for  
14 the benefit of such Beneficiary," et cetera, et cetera.  
15 "As the Trustees may in their absolute discretion  
16 determine" --

17 Q Isn't that a bit redundant of the preceding  
18 subparagraph? I hesitate to suggest that, but in  
19 reading this, I thought I saw an awful lot of, what  
20 seems to me to be the same thing. And perhaps it was  
21 just because of certain potential contingent events,  
22 this was written in this fashion. I'm afraid to ask you  
23 what you're talking about.

24 A I -- I think -- I think in -- in -- it's in  
25 the nature of the trust business, like it is in many

1 areas of the law, but people tend, because of events  
2 which may have transpired in the past to -- to repeat  
3 things in as many ways as possible. I mean, I don't  
4 think any lawyers could be accused -- would ever be  
5 charged with being too brief. So there's a tendency to,  
6 to, uh -- this isn't repeating exactly what was said  
7 before, it's referring to something slightly different.  
8 And -- but it is -- it is -- there is a tendency in  
9 these documents or for instance it's in the will, to --  
10 to -- to repeat things. You know, lawyers tend  
11 typically to say things in triplicate.

12 Q Okay. And is it fair to say that when you  
13 prepared this document, uh, you were using, uh, some  
14 exemplars, rather than creating this entire FT1 through  
15 21, uh, from memory or --

16 A No. I -- I think certainly we never do it  
17 from memory. There's -- there are -- and a lot of these  
18 clauses are clauses which have not been drafted by me or  
19 this firm. In the first instance, there are  
20 internationally established precedents under the --  
21 under the British system, which have stood the test of  
22 court analysis. And so documents and forms evolve in  
23 that -- in that way.

24 Q And so you selected a number of the provisions  
25 that appear in FT1 through 21 from those sources?

1 A Yes. Substantially, yes.

2 Q Okay. Let -- now, you just raised another  
3 thing -- and forgive me for this very brief digression,  
4 but we've talked about your practicing law here.

5 And are you admitted to the Bar of the court  
6 of the Turks & Caicos Island? Or what qualifies you to  
7 practice law here?

8 A I'm admitted to the Bar of the Supreme Court.  
9 I'm admitted to practice before the Supreme Court in the  
10 Turks & Caicos Islands.

11 Q All right. And is that, uh, encompassed  
12 within any larger, uh, legal system, such that there are  
13 appeals or other proceedings that go up to a higher  
14 court anywhere in the world?

15 A Yes. The, uh -- appeal from the supreme court  
16 of these islands, lies to the court of appeal for the  
17 Turks & Caicos Islands, which consist of a panel of  
18 three judges, senior judges from the region. Uh, the  
19 current members -- I think one is the Chief Justice of  
20 Bermuda. I think one is a judge from Cayman Island,  
21 appeared before -- the present changes from time to  
22 time. I got to remember where the third one is from.  
23 And the right of appeal lies from that court to the  
24 privy council in London. The privy council in London,  
25 is the same as the highest court of appeal in England,

1 which is the House of Lords. Except that when it sits  
2 on matters which do not arise in -- as I understand it  
3 England or Wales, it's deemed to be the privy council.  
4 It's the same personnel, but there is -- I think for  
5 English constitutional reasons it's called the privy  
6 council.

7 Q Now, is this -- is this an appeal as of right?  
8 Or -- or is this a discretionary appeal such as, for  
9 example, uh, a Writ of Certiorari in the United States  
10 Supreme Court. If -- if you know?

11 A I -- I have no knowledge of Writs of  
12 Certiorari to the U.S. Supreme Court. But it -- it is  
13 not an appeal as of right. Privy council will not take  
14 on the cases because people simply had the money to push  
15 it all the way there. And you have to be granted leave  
16 to appeal from the court of appeal in the Turks & Caicos  
17 Islands to the privy council and -- and typically they  
18 would have to be good grounds for the appeal or the  
19 appeal would have to raise a matter of significant and  
20 public interest or whatever. There are various  
21 qualifications of -- as to when that can arise.

22 Q Right.

23 A But that is the ultimate court of appeals,  
24 yes.

25 Q Okay. In the United States, whereas a party

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1 in the courtroom were practicing, where this case is  
2 being litigated, has a right of appeal from the United  
3 States District Court to, in our case, United States  
4 Court of Appeals from the 9th Circuit, the -- there is  
5 no right, other than to seek review from an adverse  
6 decision to the United States Supreme Court, which is  
7 the highest court in the United States, but it's  
8 discretionary. In other words, you can petition, but  
9 your chances are, I think on average, less than one in  
10 100, that the supreme court will review. And so that's  
11 the, the analogue I was seeking clarification about.  
12 And I think you've done that.

13 Okay. Back to this document in -- I want to  
14 exhaust your recollection, if not your patience, with  
15 the review of this document to insure that we've  
16 identified the pertinent provisions on the basis of  
17 which this is properly qualified as an asset protection  
18 trust. Meaning, that creditors can take from this trust  
19 no more than --

20 (Interruption at the door.)

21 MR. COHAN: Thank you.

22 The record should reflect that we're getting  
23 water here.

24 BY MR. COHAN:

25 Q That the, uh -- that the creditor of a

1 beneficiary under this particular trust, can take no  
2 more than a beneficiary, and the beneficiary has no  
3 vested right until and unless the trustee, makes a  
4 distribution to that beneficiary. So --

5 A Was there a question?

6 Q No. I'm lost myself with that one. I got  
7 distracted needing some water. Thank you.

8 MR. COHAN: Thank you very much.

9 BY MR. COHAN:

10 Q I'm wanting to invite your attention to any  
11 provisions here, other than those we've already  
12 identified just moments ago, that qualify this  
13 particular trust instrument as an asset protection  
14 trust, described as I hypothetically tried to  
15 characterize it.

16 A Excuse me. Continuing from where we were, we  
17 had clause 4(b) on Page FT0005.

18 Is that like that, right? 00005, I beg your  
19 pardon.

20 Q That's right.

21 A Moving on to clause C, in -- in -- immediately  
22 below that, this deals with, with the right of the  
23 trust, of the trustees to accumulate income of the trust  
24 fund. And that gives them that right again in their --  
25 in their -- to accumulate such as that as they may in

1 their absolute discretion think fix, so they can carry  
2 on and accumulate -- accumulating and never make a  
3 distribution.

4 Q Okay. This refers -- that's too vague.  
5 Paragraph, uh, 4(c) that appears on FT -- I'll dispense  
6 the zeros. It ends with 5. Begins with:

7 "Not withstanding the trusts aforesaid during  
8 the Accumulation Period."

9 Uh, my question is, for what period of time  
10 does this trust exist, until it is obligated to make  
11 distribution, if there is any such limitation  
12 temporally.

13 A This trust -- the duration of this trust is --  
14 is for the trust period, which is a defined term. And  
15 if we go to FT3, to use your abbreviated description,  
16 you can see a definition of "the Trust Period" subclause  
17 (m)."

18 Q Right.

19 A In the middle of the page. And the trust  
20 period showing the period from the dates hereof, i.e.  
21 24th May 1999 and ending on the earliest of the  
22 following dates.

23 One, "The day on which shall expire the  
24 maximum period allowed by the Proper Law of this  
25 settlement."

1           And two, "Such earlier dates as the Trustee  
2 may at their discretion appoint by deed after the  
3 execution of the Settlement in accordance with the  
4 procedure as stated therein."

5           Well, the day, if I can turn to the first arm  
6 of that, the day on which shall expire the maximum  
7 period allowed by the proper law of this settlement, the  
8 proper law of the settlement is the law at the Turks &  
9 Caicos Islands currently.

10          Q     And that's designated in subparagraph (g) on  
11 FT3?

12          A     Subparagraph (g) says "the proper law of the  
13 settlement shall mean the law referred to in clause 2."  
14 And if you go to clause 2 on FT4, 2(a) "The proper law  
15 of this settlement shall be that of the Turks & Caicos  
16 Islands."

17          Q     Right. Okay. And what period is provided by  
18 the proper law of the Turks & Caicos Islands?

19          A     It's an indefinite period. The rule of  
20 perpetuities does not apply to the Turks & Caicos  
21 Islands trust.

22          Q     Okay.

23          A     So this goes on indefinitely or until the  
24 trustees exercise their power, uh, to -- under "m" sub 2  
25 on F3 to bring it to an end.

1 (End of recording.)

2 BY MR. COHAN:

3 Q Now, this -- again, forgive this digression,  
4 but I asked you whether this were -- this document, FT1  
5 through 21 was a contract, and I believe your testimony  
6 was that, no, it wasn't a contract, it stands for a  
7 relationship. And forgive me for taking uh, uh, a  
8 position here, but -- are you saying that this document  
9 is not a contract because it creates relationships?

10 A No, I'm not --

11 Q I'm not understanding or saying it is a  
12 contract, but I'm not saying it doesn't create  
13 relationships.

14 A I don't know that I've heard a trust described  
15 as a contract before, because for instance, one of the  
16 people who required to enforce would be the  
17 beneficiaries. The beneficiaries haven't give any  
18 consideration to anybody for anything. So I don't want  
19 to get into a digression of the law of contract. But --

20 Q Well, I just wanted clarification on why you  
21 said it was not a contract. So I just asked a question  
22 I really intended to ask.

23 What were the reasons why you responded that  
24 this created relationships, this -- this Francis Trust  
25 created a relationship, but it's not a contract? What

1 were your reasons for saying no, it's not a contract?

2 A Well, it seems to me that the contract, and  
3 the necessities of the parties to the contract and must  
4 have consideration between those parties. So the one  
5 can enforce it as against the other. In this  
6 arrangement, a beneficiary could enforce the trust.

7 Not -- I mean, this particular trust, the beneficiaries  
8 simply have a hope of succession as we've already  
9 decided, as we already discussed. But let's suppose  
10 that -- and it's easier if we're talking about a fixed  
11 trust where a beneficiary has a vested interest.

12 Q All right.

13 A That beneficiary has the power to enforce that  
14 trust, if the trustee acts in breach of trust, he can  
15 pursue him. As the trustee he can say, hang on a  
16 second, I've got a vested interest here you're supposed  
17 to do certain things on a certain date in a certain  
18 manner. But that beneficiary may not be a party to that  
19 contract at all. To that -- to that trust at -- at all,  
20 he hasn't provided any consideration to anybody.

21 Q Okay.

22 A So I don't know -- I mean, I honestly can't  
23 comment on the U.S. law of trust, but it seems to me  
24 that does not apply in contract under our system where,  
25 you know, if I contracted you to sell you something, a

1 third party can't enforce that.

2 He may have some other legal right, but in  
3 this case, we're talking about that -- it's a  
4 relationship under the law of trust. I don't -- I mean,  
5 it's -- you raise an interesting academic point. I've  
6 just never heard a trust described as a contract before.

7 Q All right. Were you -- I think I understand  
8 now why you -- you testified that you don't believe it's  
9 a contract. And I believe you said that it's because  
10 the beneficiaries don't have any enforceable rights,  
11 because they don't have a vested right, so they can't  
12 enforce any terms of the contract. But how about --

13 A No. I think you -- you've mischaracterized  
14 what I said.

15 Q Okay. Please clarify.

16 A What I said was in relation to a contract. It  
17 seems to me that the essential element of the contract  
18 is -- there is consideration passing between the  
19 parties.

20 Q Well, there's consideration between, uh,  
21 Mr. Francis and the trustees who are parties to this  
22 contract, is there not?

23 A Yes. I mean, Mr. -- Mr. -- there's  
24 consideration passing from the Settlor to them  
25 certainly.

1 Q Right.

2 A But the beneficiaries, haven't -- haven't  
3 contributed anything to anybody to have rights of  
4 enforcement.

5 (Background noise.)

6 MR. THOMAS: What -- what consideration had  
7 passed from the Settlor to the, uh, the trustee?

8 THE WITNESS: Settlor settled assets on, on  
9 the trust, and allowed consideratin to the trustees.

10 MR. THOMAS: Not a consideration of the  
11 trustee.

12 MR. COHAN: Well, the trustees are entitled to  
13 be paid for their services.

14 THE WITNESS: They are being paid for the  
15 services, they're not being paid by the Settlor.  
16 They're being paid out of the trust fund.

17 BY MR. COHAN:

18 Q Right. But the Settlor is the source of the  
19 funds in the trust.

20 A But the funds in the trust don't belong to the  
21 Settlor once they're in the trust.

22 Q All right. That's further clarification to me  
23 for the reason why you gave the answer. And I -- and I  
24 don't want to digress beyond, but I think we need to,  
25 for purposes of establishing the bona fides of this

1 instrument, the Francis Trust under the laws of the  
2 Turks & Caicos Islands.

3 Now, you were reviewing this document to, uh,  
4 determine the portions of it that made it an asset  
5 protection trust. And then you pointed out that, um --  
6 because of Section 61 of the statute, um, all trusts in  
7 this jurisdiction are in a sense asset protection  
8 trusts.

9 Then you testified about the period or the  
10 duration of the trust arrangement, and you said that it  
11 was perpetual, and that it was not limited by the  
12 American rule against perpetuities?

13 A Right.

14 Q Okay. I wanted to ask you about --

15 A I haven't -- we haven't finished -- I mean,  
16 I -- I understood that you wanted me to go through --

17 Q And I do. Please, go ahead.

18 A -- and identify all these clauses.

19 Q Please.

20 A Continuing from where we left off on Page FT5,  
21 we go to (d). "(d) Is what happens at the expiration of  
22 the trust period," and it says that the trustees should  
23 move the trust -- the trust fund as to both capital and  
24 income for all or such one or more exclusive of the  
25 other or others of the beneficiaries in such shares and

1 proportions, if more than one, and generally in such  
2 manner as the trustees shall prior to, or on the date of  
3 such expiration in their absolute discretion determine  
4 and in default of and subject to such determination upon  
5 trust for such of the beneficiaries as shall be living  
6 and if more than one in equal shares absolutely.

7           So again, once we come to the end of the trust  
8 period if trustees decide to end this trust, then  
9 typically before they would do so, they would have to  
10 exercise their discretion in the manner set out in this  
11 paragraph.

12           If I am one of the beneficiaries, I have no  
13 guaranteed right that they are going to exercise that  
14 discretion in my favor, and therefore, I may receive  
15 nothing.

16           And in clause -- if we could move down  
17 further -- further down that page to 5(b). And it says  
18 the trustees may pay or apply the whole or any parts or  
19 part of the capital of the trust fund to or for the  
20 benefit of all or any one or more exclusive of the other  
21 or others of the beneficiaries and in such respective  
22 amounts if more than one, and generally in such manner  
23 as the trustees shall in their like discretion think  
24 fit.

25           "Like discretion," in there refers to the

1 reference to discretion in the previous paragraph, which  
2 I believe was their absolute discretion. Same as it  
3 appears throughout the document. So again, this is  
4 further evidence that everything is at the discretion of  
5 the trustees.

6           If I could go on to Page FT8, clause 11  
7 trustees, clause says, "Power to ignore interests."  
8 "Trustees in exercising any of the powers hereby  
9 conferred in favor of any particular person are hereby  
10 expressly authorized to ignore entirely the interest of  
11 any other person interested or who may become interested  
12 under this deed."

13           And then if we go on further to --

14           Q       Would this mean then if, for example,  
15 Mr. Francis has issue, and I think there's a provision  
16 whereby issue of the Settlor are identified as potential  
17 beneficiaries?

18           A       Right.

19           Q       So that the trustees can, if they wish, upon  
20 the birth of issue to Mr. Francis, make a distribution  
21 but had no duty whatsoever --

22           A       They had no duty. And likewise, they could  
23 make a distribution to one of the issue and not to the  
24 others. And the one who wasn't favored could stick his  
25 hand up and say, "Hey, this isn't fair."

1 Q Right. Because it's irrelevant whether it's  
2 fair.

3 A Right. They're entitled to ignore his  
4 position.

5 Q All right.

6 A And if you go down to Page -- sorry, to clause  
7 13(a) on the same page, the heading, "Exercise the  
8 powers." "The trustees shall exercise the powers and  
9 discretions vested in them as they shall think most  
10 expedient for the benefit of all or any of the persons  
11 actually or prospectively interested under this  
12 settlement and may exercise or refrain from exercising  
13 any power or discretion for the benefit of any one or  
14 more of them without being obliged to consider the  
15 interests of the others or other." In which again, ties  
16 into what we had said earlier.

17 So I think that -- and their -- the reference  
18 to discretion, the reference is to the discretion of the  
19 trustees abound in this document. But that's -- those  
20 seem to me are, are significant, and examples of what  
21 I'm talking about. So the trustees have very very broad  
22 powers and discretions, as to whom they benefit and when  
23 they benefit.

24 Q All right. If I may then move on to a --  
25 somewhat related topic. And that is, inviting your

1 attention, if I may, to FT9. "Powers of appointment of  
2 new or additional trustees."

3 A Yes.

4 Q Because you -- you testified earlier that the  
5 rule against perpetuities doesn't apply. And, uh, there  
6 was no limit on the length of time that the trust could  
7 exist without making a distribution. And because  
8 obviously people die, uh, at some point.

9 What happens if there is no distribution  
10 during the lifetime of any living trustee, and, uh,  
11 there has been no distribution at the death of trustee?  
12 That's why I invite your attention to this section, of  
13 the trust for you to clarify what happens under those  
14 circumstances.

15 Now, when this was entered into, um, FT1  
16 through 21, Hallmark Trust Limited was the trustee,  
17 corporations unlike natural persons, at least in the  
18 United States, have perpetual existence unless they're  
19 dissolved. So -- and that's one question.

20 Is it correct that in this jurisdiction, that  
21 corporations exist perpetually?

22 A Yes, it is.

23 Q All right. So there was implicitly at least  
24 an understanding with Hallmark Trust Limited, at least  
25 in theory, would exist forever. At least beyond any

1 human lifetime?

2 A Yes.

3 Q All right. But in the event that Hallmark  
4 Trust declined to act at some point, these -- these  
5 subsections here, beginning with 17(a), uh, appear to me  
6 to provide for replacing trustees.

7 A That's correct.

8 Q And can you summarize what the process is  
9 that's reflected in section 17, and all the  
10 subparagraphs that appear under 17(a) through (i), from  
11 FT9 over on to FT10. The -- the process for replacing  
12 or changing trustees?

13 A You'll have to let me read it for a second.

14 Q Please. I must confess that when I read this  
15 the first time, after I read portions of it, I stopped  
16 and wondered what I had just read without recalling it  
17 at all.

18 I'm wanting to get to the protector, and the  
19 role of the protector, but I guess we're not there yet.

20 (Pause in proceedings.)

21 THE WITNESS: Okay. Clause 17(a), due to the  
22 circumstance where a trustee is dissolved and unable to  
23 continue, and cause the rights -- the right parties  
24 specified in the Seventh Schedule to replace that  
25 trustee, in order of priority of the Seventh Schedule

1 specified in the first person and then right to the  
2 protector, and the second is the trustees for the time  
3 being.

4 Because at that state, a trustee is still a  
5 trustee. 17(b) is largely similar to 17(a). It seems to  
6 refer primarily to -- to a -- it doesn't refer to  
7 dissolution of the trustee. It just relates to the trustee  
8 wishing to withdraw.

9 BY MR. COHAN:

10 Q Okay.

11 A Otherwise, it sets out the same procedure.  
12 17(c), it says, that the person having the power to  
13 appoint new trustees has the power to appoint one or  
14 more persons or corporations, to be an additional  
15 trustee or trustees hereof.

16 So that doesn't relate to the -- retirement of  
17 the existing trustee. It just says that that -- the  
18 person specified to the Seventh Schedule, can appoint  
19 additional trustees. And then the rest of it is --  
20 well, (d) relates to, um, through the handover --

21 Q Right.

22 A And, uh, basically says that, that the costs  
23 incurred by their retiring trustee, investing the trust  
24 fund and the new trustee, are effectively for the  
25 account of the trust fund. Trustee doesn't have to pay

1 that cost himself. 17(e) deals with the remuneration of  
2 the new trustee.

3 And so that would be dealt with between that  
4 new trustee and the persons making such appointment.  
5 17(f) indicates that on change of the trusteeship, a  
6 memorandum is to be endorsed and annexed to the deeds  
7 stating the name of the new -- of the trustee for the  
8 time being. And that's primarily for the benefit of  
9 third parties who are dealing with the trust.

10 17(g) says that any appointment of new or  
11 additional trustees take effect in the -- to take effect  
12 forthwith or on such date as is specified in the  
13 instrument of appointment.

14 17(h) relates to trustees and corporation.  
15 Corporations which in this case, Hallmark Trust is, it  
16 says that it acts -- it's to act by its proper officers.

17 And then 17(i) deals with the circumstances  
18 where there is more than one trustee and says that those  
19 circumstances -- the instance that power should be  
20 valid -- if it should -- if the, uh -- if the deed or  
21 instruction concern is executed by a majority, a number  
22 of the trustees for the time being? Again, I don't  
23 believe that has risen here, because the trustee has  
24 always been one or more -- one or more person.

25 Q Okay. Let -- let me ask you. If there is any

1 limitation on the remuneration that a trustee may  
2 appropriate to himself or itself for performing trust  
3 services, and I guess another way of asking it, uh, you  
4 is, can the trustee simply appropriate whatever amount  
5 of the trust assets he or she or it wishes at any time  
6 for services performed? I mean, logically I would  
7 assume not, but I don't know. I'm asking --

8 A No.

9 Q All right. Assuming -- I did assume that was  
10 so. What limitation or limitations exist on the  
11 compensation, a trustee can make to him or her or  
12 itself, um, for whatever services are performed, trust  
13 or other services?

14 A I think we have them called dealing here with  
15 the new remuneration of the trustee. Rather than my  
16 opining without seeing that, turn to that. That's  
17 clause 20. Give me a moment.

18 Q Okay. Yes. FT11, I believe is where you --

19 A That's correct, yes. FT11, yes.

20 Q All right.

21 (Pause in proceedings.)

22 A Clause 20(a) -- bear with me a moment.

23 Q Please.

24 A So 20(b) deals with the remuneration of the  
25 trustee. Any trustee for the time being, who shall be a

1 company authorized to undertake trust business, shall be  
2 entitled in addition to reimbursement of its proper  
3 expenses and remuneration for its services in  
4 accordance -- shall be entitled in addition to  
5 reimbursement of its proper expenses and to remuneration  
6 for its services in accordance with such company's  
7 published terms and conditions for trust business in  
8 force from time to time.

9 Q So, implicitly, this presupposes that the  
10 trust company publishes terms and conditions for trust  
11 business.

12 Do you know whether Hallmark Trust did so?

13 A No. I -- I -- I -- I -- I do know that in the  
14 outset I asked what their terms and conditions were.  
15 And, uh, there was a -- my recollection was they had a  
16 basic annual charge. And after that, it depended on the  
17 extent of activity of the trust.

18 Q The trust of, uh, could, under certain  
19 circumstances, employ the services of an attorney who  
20 assisted, for example, in transferring the  
21 responsibility, the trusteeship from one trustee to  
22 another?

23 A Yes.

24 MR. THOMAS: Could I?

25 MR. COHAN: Go ahead.

1 EXAMINATION

2 BY MR. THOMAS:

3 Q I -- I -- Mr. Foley, I don't understand 20(b)  
4 of this -- reading. It appears, if I read this  
5 correctly, "Any trustee from time to time" -- uh, cut me  
6 off before I started -- "shall be entitled in addition  
7 to reimbursement of its proper expenses and remuneration  
8 for its services in accordance with such company's  
9 published terms and conditions for the trust business in  
10 force from time to time."

11 That appears to be a sentence fragment.

12 A Yeah, I think there's something missing there.

13 Q Okay. Thanks. It's confusing.

14 MR. COHAN: I think if you strike the word,  
15 "who" from the first line.

16 MR. THOMAS: I was --

17 MR. COHAN: It's -- it makes sense.

18 MR. THOMAS: Okay.

19 THE WITNESS: I -- I think that the "shall" is  
20 missing before "authorized." It should be, "Any trustee  
21 for the time being shall be a company" -- "shall be  
22 authorized" -- sorry. I beg your pardon. That's wrong.  
23 "Shall be entitled" -- I think -- sorry. I beg your  
24 pardon. I think in the second line "and" should be  
25 "to." So it shall be entitled to in addition to

1 reimbursement of its proper expenses to remuneration.

2 MR. THOMAS: "To remuneration for its services  
3 in accordance" -- okay. I would understand that.

4 MR. COHAN: Okay. Striking the word "and."

5 MR. THOMAS: We're not -- we're not -- we're  
6 not revising the terms of the trust.

7 MR. COHAN: No. We're just trying to  
8 understand these provisions as well as we can.

9 MR. THOMAS: But in any event, Mr. Foley,  
10 trustee is under a fiduciary duty --

11 THE WITNESS: Yes. Correct.

12 MR. THOMAS: -- to the extent the trustee gets  
13 remuneration for its own services, expenses, et cetera.  
14 It is subject to a fiduciary duty and thus limited to  
15 being unable to loot the trust.

16 THE WITNESS: That is correct.

17 MR. THOMAS: Okay. Thank you.

18 MR. COHAN: Right. But beyond that general  
19 limitation, I appreciate Counsel's question, because I  
20 was gonna ask about fiduciary duty.

21

22 FURTHER EXAMINATION

23 BY MR. COHAN:

24 Q Uh, the -- this fiduciary duty also -- well,  
25 let me ask it in a non-leading fashion.

1 Is it the case that the fiduciary duty also  
2 limits the trustees discretion in paying for services of  
3 a third party, such as attorneys providing services to  
4 the trust?

5 A Well, I think fiduciary duty is always an  
6 overriding duty.

7 Q Thank you. That was a better way I could have  
8 asked the question. But, so as an overriding duty, is  
9 it the case that the trustee should not pay more than  
10 fair market value for any services, professional or  
11 otherwise, provided to the trust.

12 A Yes. I think that's reasonable.

13 Q All right. We have a situation. We'll speak  
14 hypothetically. What if a trustee, uh, demands and  
15 takes 30,000 U.S. dollars for transferring the  
16 trusteeship from that trustee to another trustee?

17 Uh, how would, uh, court evaluate the  
18 propriety, or whether that was a breach of fiduciary  
19 duty by charging that amount of money for transferring  
20 trusteeship from itself to a successor trustee?

21 A I don't know.

22 Q All right. This is an issue that hasn't  
23 arisen previously in your practice?

24 A No.

25 Q Are there, um, proceedings that one could

1 invoke in court, uh, if one were the protector, for  
2 example, to question the lawfulness of such a  
3 distribution, as self dealing or otherwise a breach of  
4 fiduciary duty?

5 A Yes, I would think so. Or there might be --  
6 I'm not qualified to tell you.

7 Q All right. Let me invite your attention  
8 further down the same page that we're on, uh, to the  
9 next, uh, subject of inquiry. On FT11, Paragraph 21,  
10 "The Protector." The protector is referred to on --  
11 let's see. Let me find what it is in the definition  
12 section.

13 A H. FT3(h).

14 Q Thank you. And on FT3 subparagraph (h) of  
15 Paragraph 1, the definition and interpretation that  
16 identifies, quote, the protector, end quote, shall mean  
17 the person or persons as listed in the Fifth Schedule  
18 and successor protectors shall be appointed in  
19 accordance with the procedure as stated therein.

20 Before we go to the Fifth Schedule, I want to  
21 invite your attention to this Paragraph 21 under the  
22 bold letters, uh, identifying the protector on FT11 and  
23 ask you, what function protector serves in this  
24 particular document and more generally in the law of  
25 this jurisdiction?

1           A     Uh, the protector is a person typically  
2 somebody known to the Settlor or the beneficiaries or  
3 both, who is, uh, someone in whom they have faith and  
4 trust, at whose consent, the trustee requires before it  
5 carries out certain specified functions, powers and  
6 discretions pursuant to the trust document.

7                     Uh, the role of the protector is primarily  
8 found in discretionary trusts, because if you have a  
9 trust of this nature, where the trustees are afforded  
10 enormous powers and discretions in relation to those  
11 powers, and there is a natural concern on the part of  
12 the Settlor that, uh, he is divesting himself with all  
13 this money, to somebody who is giving all these powers  
14 and discretion who may do as he or she thinks fit with  
15 them. Clearly there's a divesting of control over  
16 assets when you put them into trust. But if -- if you  
17 have a fixed trust, and the trustee has certain fixed  
18 obligations and these fixed people to benefit in this  
19 type of trust, you're saying it's just a class of  
20 trustees you can benefit whom -- whom you want, when you  
21 want.

22                     And so the practice has grown up of all having  
23 a protector, a third party whose consent is required  
24 before certain powers -- carry the powers or exercise of  
25 discretions, exercise. And that's the function of the

1 protector.

2 Q Well, I've seen in this particular document,  
3 on Page FT11, it says, "The protector in his sole  
4 discretion and without giving reasons, shall have power  
5 to dismiss any trustee by giving 14 days notice in  
6 writing to such trustee and to appoint in writing a  
7 replacement wherever resident."

8 A Yes.

9 Q Okay. Even I can understand that. Uh, at  
10 least I think I can. So the protector is, is in a sense  
11 given total discretion, unless I'm missing something to  
12 fire or get rid of the trustee.

13 A Yes.

14 Q If he is dissatisfied with the trustees'  
15 performance and needs no reasons whatsoever to do that.

16 A That's correct.

17 Q Okay. Now, this refers to the Sixth Schedule.  
18 And I'm -- I think that's --

19 MR. THOMAS: Which one?

20 MR. COHAN: I'm sorry. 21(a). It says,  
21 quote, where there is a protector for the time being,  
22 any decision of the trustees in relation to the exercise  
23 of their powers listed in the Sixth Schedule shall be  
24 null and void unless the trustees shall first obtain the  
25 consent of the protector.

1 MR. THOMAS: I'm sorry. Uh, Bill, which  
2 provision is that? The only reason I ask is because  
3 there is -- oh, I got it. Okay. Sorry.

4 MR. COHAN: All right.

5 MR. THOMAS: My -- my colleague here is  
6 helping me.

7 MR. COHAN: All right. That's what she should  
8 be doing. Um, okay. I just -- I'm only going faster  
9 than we can go. And I'm, you know, and I'm moving  
10 fairly slowly because I'm learning as we go here.

11 BY MR. COHAN:

12 Q So inviting your attention, Mr. Foley, to the  
13 Sixth Schedule, which is on FT21, I believe. And  
14 particularly to the parenthesis that enclosed the words  
15 "Actions of trustees requiring the protector's consent."

16 Before we get into those, I want to make sure  
17 that it's clear, your testimony was that the protector  
18 needs no grounds to discharge and replace the trustee  
19 with another trustee; is that correct?

20 A That's correct.

21 Q All right. And then the further check on the  
22 absolute discretion on the trustee, is provided into  
23 Sixth Schedule, according to Paragraph 21(a) on FT11  
24 where it says quote, where there is a protector for the  
25 time being any decision of the trustees in relation to

1 the exercises of their powers listed in the Sixth  
2 Schedule shall be null and void unless the trustees  
3 shall first obtain the consent of the protector.

4 Is it correct that this Sixth Schedule says  
5 essentially, unless the protector consents to the  
6 trustee engaging in the activities identified in the  
7 paragraphs in the Sixth Schedule, the trustee may not do  
8 so. And any such actions without the protector's  
9 consent are null and void?

10 A Yes.

11 Q Okay. And so that refers to the discretionary  
12 powers of the trustees under the clauses listed in the  
13 Sixth Schedule, right?

14 A That's correct.

15 Q Okay. And so let's turn to those. The first  
16 one, which is 1(m) subparagraph small Roman numeral two.  
17 This refers, as I see it, but I'm asking you, does this  
18 refer to the trust period?

19 A Yes, it does.

20 Q So that whereas -- if I understand this, is it  
21 correct that the trustees may change the trust period  
22 that you testified earlier as being perpetual, but only  
23 with the consent of the protector?

24 A That's correct.

25 Q All right. And then the next such power of

1 the trustees limited by the protector is 2(c). And that  
2 appears on Page FT4. It says "The trustee shall have  
3 power, paren, subject to the application (if any) of the  
4 rule against perpetuities," which brings us to this  
5 question of the application of the rule against  
6 perpetuities about which you testified earlier.

7 Do you see where I'm pointing?

8 A Yes.

9 Q Okay. Does this mean that the rule against  
10 perpetuities does or does not limit the duration of this  
11 trust? And I know that you earlier testified that it  
12 did not, but that raises the question in my mind about  
13 this provision.

14 A It does not. The reason that references  
15 there, is because it's contemplated elsewhere in this  
16 trust, that the trust might, in certain circumstances,  
17 move jurisdiction.

18 Q Okay.

19 A So if it moves jurisdiction, it may well go to  
20 a jurisdiction, where the rule against perpetuities does  
21 apply.

22 Q In which case?

23 A In which case then --

24 Q The rule of perpetuities would apply.

25 A Would apply, yes.

1 Q All right. I wanted to make sure I had read  
2 that correctly. Thank you.

3 Now, the next --

4 MR. THOMAS: Excuse me.

5 MR. COHAN: Go ahead.

6 MR. THOMAS: Just for my own edification,  
7 because I know earlier Bill had referred to it as the  
8 American rule against perpetuities. And then I realized  
9 it actually involved, I believe, from the English common  
10 law.

11 THE WITNESS: That is correct.

12 MR. THOMAS: How is it that Turks & Caicos --  
13 was done by legislation?

14 THE WITNESS: Yes, it was done by  
15 legislation -- it's in the trust ordinance.

16 MR. THOMAS: Okay. Thank you.

17 MR. COHAN: Is that it for now?

18 MR. THOMAS: Yes. He knew the rest of my  
19 question.

20 MR. COHAN: He keeps knowing the rest of mine  
21 too, and I'm trying to gently say, let me finish the  
22 question before you answer it, even though you know the  
23 question.

24 Okay. We didn't go through the rules of  
25 depositions with you on the record, which I typically do.

1 Um, and I'm not going to now.

2 BY MR. COHAN:

3 Q Uh, let me invite your attention back to the  
4 Sixth Schedule, uh, on FT21. And the next, um,  
5 limitation on the trustees' discretion, according to the  
6 Sixth Schedule is in 4(a), to which I invite your  
7 attention now. My interpretation -- strike that.

8 Is it correct that distributions are subject  
9 to approval of the protector if they exceed \$10,000  
10 U.S.? That's how I read it, but I'm asking the question  
11 is that so?

12 A That is correct.

13 Q All right. And then the next, um, limitation  
14 provided by the Sixth Schedule refers to 4(d), which is  
15 on FT5. Referring to the expiration of the trust  
16 period. So that apparently no distribution in excess of  
17 \$10,000 can be made to any beneficiary, without the  
18 consent of the protector. If I read this correctly.  
19 And that's my question.

20 Is that the way you wrote it and the way you  
21 read it? It's about \$10,000.

22 A We're looking at where now?

23 Q We're looking at -- first the Sixth Schedule  
24 that talks about the limitations imposed upon the  
25 discretion of the trustees, such that the protector must

1 agree. Uh, and 4(d) on FT5 that refers to "At the  
2 expiration of the trust period" -- I'm quoting the first  
3 words in Paragraph 4, subparagraph (d). "At the  
4 expiration of the trust period as to both capital and  
5 income of the trust fund for all or such one or more  
6 consider the other or others of the beneficiaries in  
7 such shares and proportions, if more than one and  
8 generally in such manner as the trustees shall, prior to  
9 or on the date of such expiration in their absolute  
10 discretion determine, and in default of and subject to  
11 such determination upon trust for such of the  
12 beneficiaries as shall be living and if more than one in  
13 equal shares absolutely."

14 I read those provisions together, mean that --  
15 (End of recording.)

16 BY MR. COHAN:

17 Q Distribution to a beneficiary by the trustees  
18 in excess of \$10,000 is null and void unless done with  
19 the concurrence of the protector.

20 Is that what it's meant to say?

21 A Let me -- yeah.

22 Q If not, please explain for me.

23 A First of all, that 4(a) --

24 Q FT4, at the bottom of FT4?

25 A Yes.

1 Q Okay. Yes, sir.

2 A That relates to payment of income of the trust  
3 fund.

4 Q Right.

5 A So I think the limitations of Sixth Schedule,  
6 is that the trustee cannot pay any income of the trust  
7 funds to a beneficiary without getting the protector's  
8 consent.

9 Q Okay. That's how I understood it.

10 A Okay. It's not -- it's not a \$10,000 -- the  
11 \$10,000 is separate.

12 Q Well, it's just that that is reportedly  
13 incorporated in the Sixth Schedule, so then that would  
14 be redundant.

15 A I agree that it very may be -- it may be  
16 redundant, except this would suggest -- it's not  
17 redundant to the extent that if the trustee says I want  
18 to pay or buy or appropriate \$2,327 to one of the  
19 beneficiaries, it wouldn't be caught by the \$10,000  
20 limitation, but it is caught by the 4(a).

21 Q All right.

22 A Similarly, 4(d) that relates to what happens  
23 at the end, as you say, at the end of -- at the  
24 expiration of the trust period when it's coming to an  
25 end.

1           You are correct, that is -- first of all,  
2           that -- they can -- the -- the power there being  
3           exercised there it seems to me is the one, first of all,  
4           to -- yes, they can't make any distribution pursuant to  
5           4(d) above \$10,000 without the consent of the protector.

6           Q     Okay. And then 4(e), a charitable  
7           distribution likewise limited?

8           A     Yes.

9           Q     It can be made by the trustee in her, his or  
10          its absolute discretion in amounts less than \$10,000?

11          A     Actually, I don't think it can, because there  
12          isn't any charitable beneficiary.

13          Q     Ah, but I thought there was?

14          A     I thought -- in looking at this, it said that  
15          the -- the list of beneficiaries ends in Oklahoma Film  
16          Holding Corporation.

17          Q     I thought -- okay. Where -- where is that  
18          again? I got lost.

19          A     That's in the Third Schedule.

20          Q     Third Schedule that you said it's on Page 20.

21          A     Yes.

22          Q     Well, you're right.

23          A     I think there may have been a previous job to  
24          specify something like the International Provision of  
25          the Red Cross.

1 Q All right.

2 A But that did not make it to the final draft.

3 Q Okay. Thank you. Thank you. So that's it.  
4 All right. And then, uh, 4(e). That's the one I was  
5 just inviting your attention to.

6 A Yes.

7 Q As you pointed out, contrary to my mistake,  
8 uh, there are no, uh, charities identified. So the, uh,  
9 trustees are prohibited from making any such  
10 distribution by this -- by this instrument. Uh, so the  
11 next is 5, powers of appointment in advancement. But  
12 rather than going through all of these, they do more or  
13 less speak for themselves.

14 And what I wanted was to get clear on the  
15 principle that we're talking about. Principle,  
16 p-r-i-n-c-i-p-l-e, not p-a-l. We're not talking about  
17 money, we're talking about a principle of law. And what  
18 I mean is, in the Sixth Schedule, it also says the  
19 powers of the trustees identified in clauses F5 8, 9,  
20 10, 11, and 15. Any dispositions pursuant to any of  
21 those powers are null and void, if the amount of the  
22 distribution exceeds U.S. \$10,000, unless the protector  
23 concurs.

24 My question is, is that correct, that --

25 A No.

1 Q -- that interpretation?

2 A My interpretation is that the trustee cannot  
3 exercise any of those powers or discretions without the  
4 prior consent of the protector, regardless of the  
5 amount. Because it's not always to do with the amount,  
6 it's exercising the discretion to do something. It may  
7 be exercising a discretion to bring the trust period to  
8 an end. That doesn't relate to an amount of money.

9 Q Right. So this \$10,000 limitation, is an  
10 additional limitation?

11 A Yes.

12 Q Okay. Thank you. Okay. I think I want to  
13 turn to -- before I go to some other document, let me  
14 make sure I don't have any more questions about the  
15 remaining pages.

16 (Pause in proceedings.)

17 MR. COHAN: I don't think I have anymore  
18 questions on this document. But before we leave it, if  
19 you want to, you can certainly ask questions, Mr. Thomas  
20 or Ms. Makarewicz.

21 MR. THOMAS: Pardon me?

22 MR. COHAN: I was saying that before we move  
23 on from this document, you might want to question, but  
24 obviously you can do so later when I'm done.

25 MR. THOMAS: Oh, um, we're moving on from the

1 trust document?

2 MR. COHAN: Yes. And from the eight pages  
3 that are attached to it.

4 MR. THOMAS: Okay. I do have, uh, some  
5 questions about the trust document.

6 MR. COHAN: Please go ahead, if you wish.

7

8 FURTHER EXAMINATION

9 BY MR. THOMAS:

10 Q Um, Mr. Foley, in the Fifth Schedule, the  
11 protector is identified as Pittsford Limited.

12 A That's correct.

13 Q How was that entity chosen as the protector?

14 A I'm not sure that I can answer that without  
15 disclosing either privileged information or confidential  
16 information.

17 Q Can you tell us anything about Pittsford  
18 Limited then? What is it -- is this an entity that acts  
19 as protector for a lot of trusts that are --

20 A Not so far as I'm aware of, no.

21 Q So, where was Pittsford -- was Pittsford  
22 Limited selected by -- well, first, did you discuss the  
23 preparation of this trust with Mr. Francis and  
24 Mr. Rayment?

25 A Yes, I did.

1 Q Um, was Pittsford Limited selected by them at  
2 their -- did they bring Pittsford Limited to you? Or  
3 did you suggest or offer or direct them or advise them  
4 that Pittsford Limited was available for this?

5 MR. COHAN: I'll object to the second part of  
6 the question, because it invades the privilege.

7 MR. THOMAS: Well, the privilege isn't yours.  
8 (Speaking at the same time.)

9 MR. COHAN: I am claiming on behalf of the  
10 client.

11 MR. THOMAS: Which client is this? Rothwell?

12 MR. COHAN: Yes.

13 MR. THOMAS: And you do have a legal  
14 relationship with Rothwell Limited?

15 MR. COHAN: No. I was going to say the  
16 Francis Trust. I also represent the Francis Trust.

17 MS. MAKAREWICZ: They're not a party.

18 MR. COHAN: I know they're not a party. I  
19 represent them, notwithstanding the fact that they're  
20 not a party.

21 MR. THOMAS: Okay. And so you're claiming  
22 that --

23 MS. MAKAREWICZ: Have him answer the first  
24 part of the question.

25 MR. THOMAS: Pardon me?

1 MS. MAKAREWICZ: Have him answer the first  
2 half of the question.

3 MR. COHAN: Yeah. It was a compound question  
4 as well.

5 MR. THOMAS: What was the first half of the  
6 question?

7 MS. MAKAREWICZ: Can you disclose how  
8 Pittsford Limited got chosen as protector?

9 BY MR. THOMAS:

10 Q Can you tell us how Pittsford Limited was  
11 chosen as the first protector?

12 A Uh, I don't believe that I can, because I  
13 believe that that would be disclosing confidential  
14 information.

15 Q Okay. Who -- which -- confidential  
16 information covered by attorney-client privilege or your  
17 obligations under --

18 A Both that. And also we have confidential  
19 relationships ordinance here in the Turks & Caicos  
20 Islands which is.

21 Q Which is broader than --

22 A Yes. Which is broader than -- which would  
23 require my obtaining consent of the client.

24 Q Okay. Who was your client?

25 A In the establishment of the trust?

1 Q Yes.

2 A Mr. Francis.

3 Q Was Mr. Rayment your client?

4 A No.

5 Q Okay. Did Mr. Rayment tell you anything about

6 um, the, um, selection of the Pittsford Limited as the,

7 uh, protector?

8 A No.

9 Q Do you know if a subsequent protector was

10 appointed?

11 A Do I know of my own knowledge?

12 Q Well --

13 A No. I don't know. I don't -- no direct

14 knowledge of that.

15 Q Do you have any indirect knowledge of that?

16 A I have hearsay knowledge.

17 Q Okay. What is that?

18 A Well, I've been told that -- that -- that --

19 that there is another protector.

20 Q Who told you that?

21 A Mr. Rayment told me.

22 Q And did he tell you who that was?

23 A Yes.

24 Q And who was it?

25 A Mr. Rayment.

1 Q And did he tell you when he became the  
2 protector?

3 A He didn't give me a date, a precise date.

4 Q Did he tell you, uh, why he became the  
5 protector?

6 A I suppose I'm trying -- going here into areas  
7 where I can -- I can -- I need to think for a moment to  
8 see whether what I can disclose to you or what I can't  
9 disclose to you, because you're asking me questions that  
10 are concerning that I might be breaching my own  
11 obligations.

12 Q Okay. Was Mr. Rayment acting as an agent for  
13 Joe Francis in this -- in this transaction?

14 A Yes.

15 MR. COHAN: I'm reserving -- I'm not objecting  
16 on the privileged grounds, but I don't wish my failure  
17 to object as -- I don't want it to be interpreted as a  
18 waiver, because it's not a waiver.

19 MR. THOMAS: All right. Will you waive the  
20 privilege with respect to the trust, so that he can  
21 answer these questions?

22 MR. COHAN: Only question by question. I  
23 won't waive it wholesale. I'm wanting to get as much  
24 information as you can, without invading privilege, and  
25 there are ways you can ask that. Clearly, the witness

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1 has said he did not offer Pittsford. So you can draw  
2 the inference, obviously, that it came from somewhere  
3 other than this witness. Therefore, it must have come  
4 from --

5 MS. MAKAREWICZ: What is Pittsford?

6 BY MR. THOMAS:

7 Q Do you know what Pittsford Limited is?

8 A Yes. It's a British Virgin Islands Company.

9 Q Were you familiar with Pittsford Limited  
10 before you created this trust for Mr. Francis?

11 A No.

12 Q No. Okay. Do you know how long Pittsford  
13 Limited acted as the protector of the trust?

14 A Uh, it's my understanding that it's still the  
15 protector of the trust.

16 Q I thought -- oh, can there be more than one  
17 protector --

18 A Yes.

19 Q -- at a time?

20 A Yes.

21 Q So Pittsford Limited could then appoint  
22 somebody else as the protector for a specified period  
23 or --

24 A Let me check the -- the document, if you don't  
25 mind. Provisions in relation to that respect.

1 Yes. Fifth Schedule, "The protector at the  
2 time being may appoint one or more persons to be the  
3 protector for such period as the protector shall  
4 specify."

5 MR. COHAN: Immediately below that, I invite  
6 your attention, the fact the trustees can likewise do  
7 that.

8 THE WITNESS: Yes, of course. Yes.

9 BY MR. THOMAS:

10 Q Well, wait a second. My interpretation of  
11 this is apparently different from yours, because clause  
12 2 says, "The protector for the time being may appoint  
13 one or more persons to be the protector for such period  
14 as the protector shall specify."

15 That suggests to me that there's only one  
16 protector. And that that protector may designate  
17 somebody else for a specified period of time to be the  
18 protector. Am I incorrect on that?

19 A Let me look at clause -- on -- on FT3,  
20 definition of protector. I'm pretty confident it could  
21 be person or persons. So I'm confident there might be  
22 more than one protector.

23 Q Okay. That's your understanding?

24 A Yes.

25 Q Do you know of any other persons or entities

1 that have been appointed to be a protector of this  
2 trust, other than Pittsford Limited and Mr. Rayment?

3 A No, I do not.

4 Q Did you have discussions regarding the  
5 appointment of a protector, other than Pittsford Limited  
6 with Mr. Francis and Mr. Rayment, during the time that  
7 this document was being drafted?

8 MR. COHAN: On this question I will not invoke  
9 the objection of privilege. And I -- but it's up to  
10 this witness whether he can answer the question.

11 MR. THOMAS: It's the privilege that the --  
12 which -- you represent the trust?

13 MR. COHAN: I do.

14 MR. THOMAS: It's the trust privilege that  
15 you're claiming?

16 MR. COHAN: I am.

17 BY MR. THOMAS:

18 Q Did the trust have a legal relationship with  
19 you, Mr. Foley?

20 A Upon and subsequent to its establishment, yes.

21 Q Okay. So prior to its establishment, could  
22 you tell us what the discussions were that you had with  
23 Mr. Francis and Mr. Rayment about the protector?

24 A Unfortunately, without Mr. Francis's consent,  
25 I'm legally proscribed from telling you that.

1 Q Do you need Mr. Rayment's consent?

2 A I need Mr. Francis's consent.

3 Q Okay.

4 A See, he is the client. Mr. Rayment was his  
5 agent. He came here as his lawyer.

6 MR. THOMAS: Okay. I have no further  
7 questions.

8 MR. COHAN: Okay. It's about 20 after 12:00.  
9 And I -- I'm done with this document. And let's just  
10 take a moment to look at what we have, at least from --  
11 from my side, to review with this witness, and then plan  
12 the rest of the -- the deposition.

13 Um, it will go much more quickly. I'm not gonna  
14 go into any of the documents.

15 MR. THOMAS: Mr. Cohan, could I have your  
16 promise on that, that it won't go much longer?

17 MR. COHAN: Well, you -- you're welcome to it,  
18 Counsel. But the question is the enforceability of such  
19 a promise and if there are any consideration for that?

20 (Laughter in the room.)

21 MR. COHAN: Are we gonna enter into a contract  
22 on this? And if so, how do we measure the damages we've  
23 breached?

24 MR. THOMAS: I certainly will appreciate your  
25 consideration.

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1 (Laughter in the room.)

2 MR. COHAN: Okay. Well, there's the  
3 consideration then. And myself -- and I'm sure all of  
4 us are familiar with the norm of reciprocity. So I'll  
5 do my best in consideration -- of future consideration  
6 of my consideration in the future.

7 Um, I think we should stop right there.

8 Yeah, you have my promise. I -- I'm -- I'm  
9 anxious to conclude this, but I just want to do what I  
10 think is necessary. And so I'm looking at, um -- yeah, no,  
11 we're gonna take a break now.

12 The question is for how long. And I'm  
13 projecting, which I know I don't need to do, but I want to  
14 give you an idea how much longer we're gonna go on.

15 I don't think that I have more than another hour  
16 if that. All I'm gonna have the witness do is briefly  
17 review these documents, uh, that are documents that you saw  
18 yesterday with Mr. Chaffe.

19 And, uh, for him to verify, as far as he can  
20 tell, these documents not only create corporations --

21 MR. THOMAS: Do you want to go on now? Or do  
22 you want --

23 MR. COHAN: Well, I'd rather -- I think it  
24 will save more time since it's lunchtime any way, for us  
25 to review these things and then not have to do it while

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1 this witness and you all are sitting here and I'm  
2 reviewing this stuff.

3 MR. THOMAS: Okay.

4 MR. COHAN: So we can save everybody's time  
5 except mine. I have to do it any way, but you don't  
6 have to wait while I'm doing it.

7 MR. THOMAS: Okay.

8 MR. COHAN: So -- and I -- I don't know where  
9 places are right close by to have lunch, unlike  
10 yesterday where I think there were places close by.

11 So I'm gonna ask -- and -- and we can go off the  
12 record now.

13 THE VIDEOGRAPHER: So turn the cameras off?

14 MR. COHAN: Sure.

15 (End of recording.)

16 (Noon recess.)

17

18 FURTHER EXAMINATION

19 BY MR. COHAN:

20 Q Okay. Uh, we're back on the record in the  
21 deposition of Owen Foley, November the 18th, 2010. It's  
22 about 1:45 p.m. local time at the offices of Misick &  
23 Stanbrook.

24 Mr. Foley, you're still under oath, as you  
25 know. And we want to resume your deposition. And, um,

1 before I start on this, I just have a couple of  
2 questions to, uh, follow up with based on the trust.

3 And the terms of the trust we've been over,  
4 but the questions that I had for you were, being  
5 familiar as I take it you are now, having reviewed the  
6 trust: Would it have been permissible within the terms  
7 of this trust, for the trust to have made a  
8 distribution, um, as much as three million dollars to  
9 Joe Francis, um, without invalidating the trust?

10 A It wouldn't invalidate. That -- such as  
11 distribution would not invalidate the trust.

12 Q Okay. As long as the protector concurred, uh,  
13 it would be permissible pursuant to the provisions of  
14 this trust to disburse any amount of money in the  
15 trust --

16 A Yes.

17 Q -- or does that also include assets and  
18 corporations with shares of which are owned by the  
19 trust?

20 A Yes.

21 Q All right. If the trust or one of its -- one  
22 of the corporations the shares of which the trust owned,  
23 had purchased real property in Mexico or any portion of  
24 real property in Mexico, and donated the real estate so  
25 purchased to Mr. Francis, would it have invalidated the

1 trust?

2 A No. No.

3 Q Okay.

4 A It seems to me that -- well, can you explain  
5 to me the circumstances of which this Mexican real  
6 estate might be owned.

7 Q Right. Assuming for the sake of the question  
8 that, um, Rothwell Limited had provided funds to Island  
9 Films Limited, and, um, Summerland Holdings Limited, and  
10 assuming further that all the shares of Island Films  
11 Limited and Summerland Holdings Limited were owned by  
12 the trust, and assuming further that the two  
13 corporations, Island Films and Summerland Holdings had  
14 created the corporation in Mexico to acquire a 99-year  
15 lease on Mexican property, would it have invalidated the  
16 trust for that property to be transferred outright to  
17 Joe Francis as a beneficiary of the trust?

18 A No. But I -- I think what you're getting at,  
19 forgive me if I digress a bit. It seems to me that even  
20 when one cannot invalidated the trust, the trust exists.  
21 It can't be invalidated ex post facto --

22 Q Okay.

23 A -- by virtue of somebody doing something  
24 wrong.

25 Q Right.

1           A     So if the trustee does something, which is  
2     contrary to the terms of the trust, it doesn't  
3     invalidate the trust, it would just amount to a breach  
4     of trust. But the trust still exists.

5           Q     Okay.

6                             (Power went out.)

7           MR. THOMAS: A transformer?

8           MR. COHAN: Well, maybe.

9           THE WITNESS: Somebody just hit something.

10          MR. COHAN: Uh, we --

11          THE WITNESS: We have (inaudible).

12          THE VIDEOGRAPHER: Well, I think I'll need to  
13     reset the cameras. Oh, cameras are on battery.

14                             (Speaking at the same time.)

15          MR. THOMAS: If I might, I just want to renew  
16     my objection to Mr. Foley rendering opinions on basis  
17     that, uh, he's not, uh, properly an expert in this case.  
18     But for the reasons previously stated.

19          MR. COHAN: Very well. Objection so noted.

20          MR. THOMAS: Legal, legal opinions, I should  
21     say.

22     BY MR. COHAN:

23           Q     Okay. Um, let me ask some related questions  
24     in a somewhat different form. You familiarized yourself  
25     with the provisions of the trust?

1 A Yes.

2 Q We went through them this morning. Would a  
3 transfer by the trust to Joe Francis outright of a  
4 99-year lease on real property in Mexico, be consistent  
5 with the provisions of the trust, FT1 through FT21?

6 A Uh, assuming that the trust owns the real  
7 property and assuming that the protector is consented,  
8 yes.

9 Q Very well. Okay. Let me, uh -- I think we  
10 had provided the government already with, uh, IF1  
11 through IF44. And, uh, I want to hand that to the  
12 witness, and bear with me just a moment.

13 I earlier asked you whether it would make any  
14 difference to you in answering the question about a  
15 transfer to Mr. Francis, uh, of Mexican real estate  
16 owned by the trust. Would it make any difference if the  
17 property was actually owned by a Mexican corporation,  
18 the shares of which were owned by Island Films Limited  
19 and Summerland Holdings Limited. And the shares of  
20 Island Films Limited and Summerland Holdings Limited  
21 were owned by the trust?

22 A I don't believe it would make a difference,  
23 but that depends on the capacity in which Island Films  
24 or Summerland Holdings owned that real estate, or owned  
25 the company that owns the real estate.

1 Q Okay.

2 A And so I need to know more about that. I  
3 mean, I think I -- we'd need to know how the funds got  
4 to Island Films and, uh, and Summerland Holdings.

5 Q Okay. Assume, for the sake of my question,  
6 that the funds came from Rothwell Limited, another  
7 corporation, all the shares of which are owned by the  
8 Francis Trust?

9 A I'm afraid that begs another question before I  
10 can answer your question. Which is, how did Rothwell  
11 Limited get those funds?

12 Q Rothwell Limited got those funds from a  
13 distributions made by Joe Francis. That's what I wanted  
14 you to assume for, uh, for the question.

15 A Actually, I don't know -- I don't -- the long  
16 way around I accept, but I don't understand your answer,  
17 because is it the case that Joe Rothwell -- Joe Francis  
18 settled these funds on the trust, and the trust then  
19 capitalize Rothwell Limited, or made a capital  
20 contribution of Rothwell Limited, such that Rothwell  
21 Limited then had those funds?

22 Q That is correct. And that's the sequence of  
23 events as I understand it, and let me digress and  
24 provide one more detail. I want you to assume, because  
25 I believe these are the facts, that the funds were

1 transferred to, uh, Morgan Stanley. And I'm not sure  
2 whether they were transferred to Rothwell first and then  
3 Rothwell transferred them to Morgan Stanley, or whether  
4 they were transferred from Morgan Stanley and then  
5 transferred to Rothwell. Would that make any  
6 difference?

7           The funds came from Mr. Francis or a business  
8 entity over which he had control, and were settled on  
9 the trust either directly to the trust or to Rothwell.  
10 And then subsequent to that, actually -- I can't tell  
11 you the exact period of time subsequent to that, but  
12 subsequent to that, those funds wound up being invested  
13 through the Mexican corporation into the acquisition of  
14 a 99-year lease on real estate in Mexico.

15           A     The critical question -- the critical  
16 assumption I need to make here, is whether the funds  
17 were settled on the trust. And that the trust then, by  
18 whatever means, capitalized Rothwell with them.

19                     In other words, subscribed the shares in  
20 Rothwell or made a capital contribution to Rothwell.

21           Q     Made a capital contribution to Rothwell?

22           A     Okay. If -- if I assume that the funds -- if  
23 that was the routing of the funds, then those funds  
24 belonged to Rothwell. Those funds were not the trust's  
25 asset.

1 Q Well, I understand. The (inaudible) of  
2 Rothwell were -- were owned entirely by the Francis  
3 Trust.

4 A I -- I appreciate that.

5 Q Right.

6 A But -- so therefore, if Rothwell then, through  
7 some arrangement, ended up being Rothwell, Island Films  
8 and Summerland Holdings --

9 Q Yes.

10 A -- made an arrangement, whereby Rothwell  
11 funded those companies with money, which those companies  
12 then used to establish the Americas or the Mexican  
13 subsidiary, which acquired the real estate, it seems to  
14 me that everything below Rothwell, if you understand my  
15 drift.

16 Q Yes.

17 A Is not -- is not a trust matter. It -- it  
18 doesn't fall to be considered by the trust, because the  
19 funds used were Rothwell's own funds. They weren't the  
20 trust funds.

21 Q Notwithstanding the fact that the trust is the  
22 100 percent owner of the shares of Rothwell?

23 A Yeah, but the fact that the trust is the owner  
24 of the shares of Rothwell, doesn't mean that all funds  
25 owned by Rothwell, are funds of the trust.

1           If -- if the circumstance might be  
2 different -- well, I don't -- I -- I'm not gonna get  
3 into the circumstance that might be different. But  
4 if -- in the circumstances you described, where the  
5 trust capitalizes Rothwell, those funds and  
6 contributions, those funds then become Rothwell's funds.  
7 The trust assets in those circumstances, is the trust  
8 shares of Rothwell.

9           Q     All right.

10          A     This is -- this is not unlike the trust for  
11 example, uh, some of the trust in its own name or shares  
12 of Microsoft.

13          Q     All right.

14          A     Then the trust asset in those circumstances  
15 are shares of Microsoft. Not -- a percentage holding of  
16 Microsoft's stock in trade or whatever.

17          Q     I understand.

18          A     The trust assets are the shares. And then  
19 these circumstances, circumstances you described, the  
20 trust assets are the shares of Rothwell.

21                 Rothwell owns the money itself, because it has  
22 been fully capitalized. What they choose to do with the  
23 money is a matter of Rothwell.

24          Q     All right. So a distribution by Rothwell, if  
25 I understand your response, is neither consistent with

1 nor inconsistent with the trust instrument.

2 A No. It's -- it's -- the trust instrument  
3 doesn't affect.

4 Q Okay. Now, notwithstanding the fact that  
5 unlike the Microsoft example, this example is one in  
6 which the trust owns 100 percent of the shares of  
7 Rothwell of Island Films and of Summerland Holdings.

8 A No. Because the circumstances in which  
9 Summerland Holdings and Island Films receive those  
10 funds, it's separate and distinct from the trust.

11 Q So that depends then on the nature of the  
12 relationship between the, uh, trustee of the Francis  
13 Trust and the officers and directors of Rothwell  
14 Limited?

15 A Yes.

16 Q All right. If the director of Rothwell  
17 Limited, the sole share -- controlling person, acting,  
18 for Rothwell Limited was also the trustee, would that  
19 affect your analysis?

20 A No.

21 Q Okay. Very good. Thank you.

22 MR. COHAN: Well, do you have any questions on  
23 the subject matter? You want to ask now?

24 MR. THOMAS: No, sir.

25 MR. COHAN: Okay. Then let me go on to the,

1 uh, documents that I just handed you a moment ago, the  
2 44 pages consisting of IF1 through IF44.

3 And, uh, we apologize to everyone for our  
4 blinking lights. We don't have control over the electric  
5 power supply. It seems to be on. We are informed that our  
6 camera and our audio recording are being powered by  
7 batteries. Such that, that hasn't been interrupted, but  
8 the lighting here has.

9 And Counsel, is that creating any problems for  
10 you in following the inquiry?

11 MR. THOMAS: No.

12 MR. COHAN: Thank you. All right. Well, then  
13 there we have another loss of light. But assuming that  
14 we can proceed, uh, and if we have a problem, please,  
15 anyone who is having a problem, let me know and we'll  
16 stop.

17 BY MR. COHAN:

18 Q Uh, may I invite your attention to these 44  
19 pages and ask you to continue to do as you have been  
20 doing, which is flipping through these 44 pages to  
21 familiarize yourself at least superficially with the  
22 contents of these 44 pages, so that I can ask you some  
23 questions about these documents.

24 When you finish your cursory review, let me  
25 know so I can continue my inquiry.

1 (Pause in proceedings.)  
2 MS. MAKAREWICZ: Yes.  
3 MR. COHAN: Counsel, may I proceed?  
4 MR. THOMAS: Yes.  
5 MR. COHAN: Okay.  
6 BY MR. COHAN:  
7 Q Uh, Mr. Foley, do you recognize any, some or  
8 all of these 44 pages identified as IF1 through 44?  
9 A I recognize some, certainly not all.  
10 Q All right. Uh, do you recognize, um -- the  
11 first page is a document you've seen previously,  
12 "Memorandum of Association and Articles of  
13 Association" --  
14 A Yes.  
15 Q -- "Island Films Limited"?  
16 A Yes.  
17 Q Uh, and do you recall when you first saw this  
18 first page, approximately?  
19 A In April or May of 1999.  
20 Q Is that at or about the time that Island Films  
21 Limited was created?  
22 A Yes.  
23 Q All right. And that's the basis for your  
24 response?  
25 A Yes.

1 Q All right. Inviting your attention to IF2,  
2 the second page. You've reviewed this very briefly.  
3 Um, and just testified a moment ago, the date of  
4 creation. Do you know whether you played any role in  
5 the creation of a corporation known as Island Films  
6 Limited?

7 A Uh, yes, I do.

8 Q And what, if any role did you play?

9 A Uh, I was instructed to arrange its  
10 incorporation, which I did through our affiliate,  
11 corporate management business, Caribbean Management  
12 Services Limited.

13 Q Let me ask you just a couple questions on  
14 that. You just testified that -- of this implicitly.  
15 And I think you testified to this -- this morning,  
16 Caribbean Management Services Limited, is a corporation  
17 affiliated with Misick & Stanford?

18 A That's correct.

19 Q I just said "Misick & Stanford." I meant,  
20 Misick & Stanbrook, excuse me.

21 Uh, and do you recognize the name, Southaven  
22 Limited, which appears on Page IF2?

23 A Yes, I do.

24 Q And who are Southaven Limited and people  
25 identified as Clayton E. Been and Valerie Caley?

1           A       Southaven Limited is an entity used by  
2 Caribbean Management Services Limited as the, uh,  
3 subscriber of companies and corporates on behalf of  
4 clients.

5                   Clayton Been was the then manager of Caribbean  
6 Management Services Limited. Valerie Caley is an  
7 executive in Caribbean Management Services Limited and  
8 still works there.

9           Q       And who requested or instructed you to, um,  
10 cause the corporation, Island Films Limited, to be  
11 created and incorporated in the Turks & Caicos Islands?

12           A       Brian Rayment.

13           Q       Okay. And do you know whether Mr. Rayment was  
14 acting on his own behalf or whether he was acting on  
15 behalf of someone else?

16           A       Uh, I believe he was acting at the instance of  
17 Mr. Francis.

18           Q       Okay. And inviting your attention to pages  
19 IF3 through IF13. Do you recognize these pages, as  
20 being the Articles of Association of that certain Turks  
21 & Caicos Island Corporation known as Island Films  
22 Limited?

23           A       Yes. I've not gone through them in any  
24 detail, but I have no reason to doubt. But it is what  
25 it purports to be.

1 Q Okay. And I see an indication that is two  
2 concentric circles with the word "Exempt" in the middle  
3 of IF3.

4 Can you tell us what this, uh, symbol, the two  
5 concentric circles with the word, "Exempt" in the middle  
6 and "Registrar of Companies Turks & Caicos Island"  
7 means?

8 A That indicates that this company, Island Films  
9 Ltd., was incorporated as an exempt company in the  
10 islands, on the date of its incorporation. There are  
11 two types of -- there are a number of types of company,  
12 which you can incorporate under our companies ordinance.

13 The most common forms are either an ordinary  
14 company, which is analogous to a corporation in the  
15 U.S., or an exempt company, which is similarly analogous  
16 to a corporation of the U.S. but most file annually with  
17 the TCI registrar of companies, a declaration that  
18 conducts its business mainly outside the islands.

19 Q And what does the word "exempt," indicate as  
20 an exemption? Exempt from what?

21 A It's -- it's exempt from various filing  
22 requirements, which apply to ordinary companies under  
23 the companies ordinance.

24 Q Does this exemption have any relationship to  
25 taxes of any sort?

1 A Uh, no. I mean, they -- such companies do  
2 come with an automatic exemption for future taxation.

3 I think that's, uh -- that's one of these  
4 documents here. The second document, F14. I beg your  
5 pardon. IF14 is that -- is that exemption from  
6 taxation. But the -- the designation "exempt" does not  
7 relate to taxes. It relates to an exemption from --  
8 from various filing requirements under the companies  
9 ordinance.

10 Q Okay. Do you recognize IF14 as a type of  
11 document that you have seen previously?

12 A Yes.

13 Q And that -- I think you just explained what it  
14 was.

15 A Yes.

16 Q All right. Um, then is IF15, basically just a  
17 restatement in a slightly different form of the same  
18 status, legal status, as shown on IF14?

19 A No. IF14 is, uh -- is -- is an exemption from  
20 future taxation. IF15 is the actual Certificate of  
21 Incorporation of the entity evidencing its existence.

22 Q Thank you. Um, do you recognize IF16 and 17  
23 as documents made and kept in the ordinary course of the  
24 business of Island Films Limited?

25 A Well, they would appear to be.

1 Q Okay. And are you unable to say more than  
2 they appear to be at this point? Very well, let me  
3 invite your attention then to IF18 through 20.

4 Are these essentially standard, uh, minutes of  
5 the first meeting of a Turks & Caicos domiciled  
6 corporation?

7 A Yes, they are.

8 Q Okay. If I might invite your attention to  
9 IF21. Is the document identified as IF21 part of the  
10 process by which exemption is acquired?

11 A Yes, that's correct.

12 Q Okay. Inviting your attention, if I might, to  
13 IF28.

14 Do you have that before you?

15 A Yes.

16 Q Can you tell us what this document signifies?

17 A It signifies that Mr. Francis was settling his  
18 shares of Island Films Ltd. on Hallmark Trust, as  
19 trustee of the Francis Trust.

20 Q I assume, but I want to ask you, I've been  
21 referring to that abbreviation "Ltd." as Limited.

22 Is it correct that "Ltd." is the abbreviation  
23 for the word "Limited"?

24 A Yes, it is.

25 Q Is it required of, uh, corporations in Turks &

1 Caicos Islands to follow the name of the corporation  
2 with the word "Incorporated" or "Corporation" or  
3 "Limited" or "Company," in order for it, to retain its  
4 separate existence as a corporate entity?

5 A No.

6 Q Okay.

7 A I should clarify that. It is for ordinary  
8 companies, not for exempt.

9 Q Okay. Thank you. And looking just for one  
10 more moment, IF28, is this document -- assuming that  
11 it's genuine and that is Mr. Francis's signature,  
12 sufficient to effect the transfer of the stock, uh,  
13 which he owned at the time, assuming he did, to, um,  
14 Hallmark Trust?

15 A Yes.

16 Q Okay.

17 A In its capacity as trustee of the trust.

18 Q Right. In its capacity as trustee of the  
19 Francis Trust.

20 A Yes.

21 Q Inviting your attention to -- I want to just  
22 very quickly summarize here, the documents identified as  
23 IF32 through IF39.

24 A Yes.

25 Q Can you explain in summary fashion, what those

1 documents are?

2 A Yes. Every exempted company registered in the  
3 Turks & Caicos Islands is required by an annual  
4 declaration in the terms of these declarations.

5 Q And if a company failed to do that for more  
6 than one year, would it be possible for such a company  
7 to reinstate itself by any process?

8 A Well, first of all, were you -- your question  
9 assumes that the company has been struck off.

10 Q No, no. I -- I wasn't assuming it.

11 A Oh, I beg your pardon. I'm sorry, sir.

12 Q Well, I was just -- I was just asking  
13 hypothetical, not about this particular company, but  
14 what -- my question would apply to this company.

15 And could you explain the process, 'cause you  
16 refer to it already?

17 A Yes.

18 Q Anticipating that you have my questions.

19 A I beg your pardon.

20 Q That's all right.

21 A Uh, the -- yes. This declaration was the --  
22 must be filed annually for every exempted company. At  
23 the same time, a fee paid to the government; where a  
24 company doesn't make its annual filing, the government  
25 then from time to time does an audit of the various

1 exempted companies on its books, to see who's -- which  
2 are current on their filings and which are not. And  
3 then from time to time, will strike off companies, which  
4 are delinquent in their filing.

5           When a company is struck off. Uh, it's --  
6 it's not capable of conducting business. And however,  
7 there is a process whereby a company, which has been  
8 struck off, can be reinstated.

9           Once the company has been -- which was struck  
10 off, has been reinstated, typically by payments by  
11 filing the arrears and declarations by paying the  
12 arrears and dues and by paying a fine for late filing.  
13 Then -- then the company can be reinstated and once  
14 reinstated, it is legally deemed never to have been  
15 struck off.

16           Q     Okay. Now, did you say the arrear of Jews or  
17 the arrears of dues?

18           A     Sorry. That's my -- I'm Irish, you're  
19 American. I speak English.

20           Q     Right. Um, I'll withdraw the question.  
21 I'm -- given my heritage, perhaps I'm hearing things  
22 that weren't said of Jewish extraction. I thought I  
23 heard you say "arrears with Jews," but you must have  
24 said "dues."

25                   Uh, and I -- I'm not -- I have no arrears that

1 I'm aware of. Uh, but I am only speaking for myself.

2 Apparently -- well, let me -- strike "apparently."

3 May I invite your attention to IF40.

4 Were you made aware of any fax reflected in  
5 IF40 prior to this moment?

6 A Not that I can recall, no.

7 Q Okay. Is this transaction, which appears on  
8 its face to be a transfer of responsibility -- excuse  
9 me, a typical transaction in the Turks & Caicos Islands,  
10 whereby certain responsibilities are transferred from  
11 one place to another?

12 A Yes.

13 Q Okay. And IF41, can you explain what that  
14 document means?

15 A Uh, this document suggests that Island Films  
16 Limited, was struck from the registrar of companies at  
17 some stage for failure to file its annual declarations,  
18 and that application was made for its reinstatement.  
19 And that it was so reinstated.

20 Q And is that similar to what -- appears in  
21 IF42.

22 A I believe they're identical. It seems to me  
23 to be the same document.

24 Q It's just one of them has a seal on it and one  
25 of them does not. 41 has a seal, 42 doesn't. Um, other

1 than that, I don't see any difference.

2 That's all I have on this collection of  
3 exhibits.

4 MR. THOMAS: Can I interject --

5 MR. COHAN: Please.

6 MR. THOMAS: -- with a quick question or two?  
7 The -- and I'm sorry that -- we're counting this  
8 against your --

9 MR. COHAN: (Inaudible).

10 MR. THOMAS: I know. I know. My hour and 45  
11 minutes --

12 MR. COHAN: It's almost done, actually.

13 MR. THOMAS: Uh, and I'm sorry to go back.

14 There was one question that I meant to ask regarding the  
15 settlement document for the Francis Trust.

16 THE WITNESS: Yes.

17

18 FURTHER EXAMINATION

19 BY MR. THOMAS:

20 Q And looking at FT21, now we've scribbled a  
21 bunch of our own -- well, you have it there.

22 MR. COHAN: We do.

23 BY MR. THOMAS:

24 Q Uh, I'm just wondering if you can identify the  
25 signature of the witness?

1 A The witness to whose signature?

2 Q Uh, well, there was only one person that was  
3 listed.

4 A No. I've never seen this.

5 Q And the first one you pointed out appears to  
6 be initialed down below the signing.

7 Do you recognize that initial? Or do you know  
8 who that would be?

9 A No, I have no idea.

10 Q And then the -- some of the same question with  
11 respect to the documents that we were just looking at,  
12 IF -- if you look at IF28, is the, uh -- the signature  
13 there of Mr. Been? Oh, I'm sorry. No, I'm sorry.

14 What I wanted to ask uh, was, with respect to  
15 IF28, the "Assignment of Stock," which you were asked  
16 about before signed by Joe Francis, did you or the firm  
17 here create that document?

18 A No, we did not.

19 Q Okay. You didn't have anything to do with  
20 that?

21 A No.

22 Q It is dated the same date as the --

23 A Yes.

24 Q -- trust?

25 A We did not.

1 Q Very well, and then the signatures that I was  
2 wondering about, uh, were the signatures at the end of  
3 the Island Films Incorporation documents, page -- well,  
4 that's Clayton Been and that's Valerie. Those are  
5 identified. Okay. I had that. Thank you very much.

6 MR. COHAN: And now, the record should reflect  
7 that I'm handing the witness and the lawyers for the  
8 government what's been marked for purposes of  
9 identification as OF34 through OF256. Although, we  
10 don't have anywhere near that number of pages.

11 There are just excerpts that we chose -- chosen  
12 to inquire info. Although these -- I think they're  
13 consecutively numbered, there are nowhere near 200 pages  
14 here. There are only roughly 40 pages. And that's because  
15 we just selected the ones about which we wanted to inquire.

16 So, if I may, if you would do the same thing you  
17 did with the previous compilation, just take a few moments,  
18 if you would, to flip through and then I'll have a few  
19 questions.

20 (Exhibits OF34 through OF256 were marked.)

21 MR. THOMAS: Bill, can I excuse myself for a  
22 minute?

23 MR. COHAN: Sure. We won't, um, do any  
24 inquiry until you return. I take it you know where  
25 you're going.

1 MR. THOMAS: Yeah.

2 MR. COHAN: Okay.

3 (Pause in proceedings.)

4

5 FURTHER EXAMINATION

6 BY MR. COHAN:

7 Q Um, have you had the opportunity to review the  
8 40 or so pages, beginning with OF34 and concluding with  
9 OF256?

10 A Yes, I've had a very quick overview.

11 Q All right. I want to ask you first if you  
12 recognize OF34 and OF35?

13 A Yes, I do.

14 Q And how do you recognize those, sir?

15 A Because it's a letter that I prepared. A copy  
16 of the letter that I prepared.

17 Q A copy of the letter that you prepared. It  
18 doesn't bear your signature though, does it?

19 A No, it does not. It's an office copy.

20 Q Okay. Right. It bears the date on OF34 of  
21 10th May, 1999. Is it your belief that it was prepared  
22 at or about that date?

23 A Yes, that's my belief.

24 Q Okay. And do you recall the circumstances  
25 under which it was prepared?

1 A Uh, not vividly. I expect -- to the best of  
2 my recollection, there was an account to be opened for  
3 Island Films at Barclay's Bank locally. And this was  
4 sent in that regard.

5 Q I invite your attention to the statement in  
6 this letter, quote, This company has been incorporated  
7 at the instance of Mr. Joseph Francis.

8 Is that statement correct, as far as you know?

9 A Yes.

10 Q You have an independent recollection of it?

11 A Yes.

12 Q Under our laws in the United States, when  
13 confidential communication that would otherwise be  
14 privileged is disclosed to a third party, with respect  
15 to that particular communication, there is a waiver of  
16 the privilege. So I don't know whether that's a law  
17 here, but that's why I thought it was okay to answer --  
18 for you to answer this question, because I presumed,  
19 based on your prior testimony, that the original of  
20 which this is just an office copy, was sent to the  
21 manager at Barclay's Bank.

22 A Yes.

23 Q To your knowledge, that was done?

24 A Yes.

25 Q All right. If I might invite your attention

1 next to OF36 through OF42. Do you recall whether you  
2 participated in any way, shape or form in the drafting  
3 or execution of this document, which on OF36 purports to  
4 be some sort of an agreement between Island Films  
5 Limited and something called Memberworks Incorporated,  
6 with a date that appears to me to be May 11th, 1999  
7 between Memberworks and Island Films.

8 A I did not participate in this drafting.

9 Q Okay.

10 A I believe that this was sent to me at some  
11 stage. But I -- I -- I -- and I don't know what it's  
12 about.

13 Q Okay.

14 A I have seen it before.

15 Q All right. You've seen it before. You  
16 believe you saw it back in May of 1999?

17 A Yes, I believe so.

18 Q Okay. Do you know whether -- well, strike  
19 that.

20 Does this document, OF34 and OF35, the letter  
21 in which you testified earlier, um, refresh your  
22 recollection that you participated in assisting Island  
23 Films Limited in opening a bank account?

24 A Yes.

25 Q Okay. And that bank account that we're

1 referring to, is it Barclay's Bank in, uh, the Turks &  
2 Caicos Islands here in Providenciales?

3 A Yes, that's correct.

4 Q After you performed those services and  
5 performed the services relating to creating the Francis  
6 Trust, about which you've already testified earlier, did  
7 you continue to assist the trust in Island Films in  
8 conducting the business of either the trust for Island  
9 Films, past the year 2000, if you recall?

10 A I don't believe so. Not to any material  
11 extent.

12 Q Okay. To your knowledge, did Hallmark Trust  
13 Limited, acting through Nicola Jordan and Colin Chaffe,  
14 undertake that responsibility?

15 A Yes.

16 Q May I ask you --

17 A I can clarify that I was engaged in connection  
18 with, uh, the -- the initial acquisition of the  
19 subsequent sale of -- by Summerland Holdings of a  
20 condominium here, but that's --

21 Q Okay.

22 A But that's --

23 Q All right. We'll inquire about that briefly  
24 in a moment. Other than that transaction, or actually  
25 those two transactions with respect to the real estate

1 you just referred to, did you continue to function in  
2 any way, assisting Hallmark Trust or the Francis Trust  
3 or the corporations, the shares of which are owned by  
4 the Francis Trust?

5 A Not in any material way.

6 Q Very well. Now, there are some peculiar  
7 markings on OF34 and OF35 that frankly looks like  
8 someone's drooled on this. But I just thought I'd  
9 inquire, if -- if you can explain those markings.  
10 They're not typical of correspondence that I've seen.

11 A Uh, yes. The -- the file from which these  
12 were taken, was in our archive file storage, which until  
13 about 18 months ago, was in a storage building about  
14 200-yards that way.

15 Q And you're pointing in which direction?

16 A I pointed south.

17 Q South. All right.

18 A And -- and that was on the edge of Salina,  
19 which goes right into the ocean. In September --

20 Q Salina?

21 A Salina. Salt flat.

22 Q Salt flat. Thank you.

23 A In September -- first week of September of  
24 2008, we had two hurricanes in the span of five days.  
25 First of which, had a very significant storm surge

1 attached to it. And the storm -- the storm surge went  
2 up about 8 feet above sea level. So the building in  
3 which the storage unit in which this and any other files  
4 were stored at the time was flooded, and the markings  
5 you see here, I think are a reflection of water damage.

6 Q Thank you for that clarification. I thought  
7 there was one other page in this collection, but I'm not  
8 really sure. That's so -- that's all I have on this  
9 batch. Oh, wait. Oh, I take that back.

10 Inviting your attention to OF154 and 155,  
11 would you take a moment to review those two pages,  
12 because I have a few questions and I suspect the  
13 government might have a few. The government only has, I  
14 think has used about an hour and 40 minutes give or  
15 take.

16 MR. THOMAS: Which page is it?

17 MR. COHAN: Oh, OF154 and OF155, Darwin. The  
18 letter of wishes or one iteratin of it.

19 THE WITNESS: Yes.

20 BY MR. COHAN:

21 Q Okay. Do you recognize this document,  
22 consisting of two pages identified as OF154 and 155?

23 A Yes.

24 Q Do you recall approximately when you first saw  
25 this document? Or another version of it?

1 A I think that it was in May of 1999.

2 Q Inviting your attention to the very top of the  
3 page, do you see what we sometimes refer to as a tag  
4 line that identifies or can identify a fax machine?

5 MS. MAKAREWICZ: Thanks, Bill.

6 MR. COHAN: I missed, apparently. I  
7 apologize.

8 THE WITNESS: Yes, I do.

9 BY MR. COHAN:

10 Q Do you know why that appears on this document?

11 A I can only make an assumption. Maybe --

12 (End of recording.)

13 BY MR. COHAN:

14 Q Okay. But the date on it -- well, never mind.  
15 I take it you can't account for -- the July 15th, 1999  
16 date, according to the fax tag line?

17 A No.

18 Q And so you have no -- when or if this document  
19 was actually faxed?

20 A No.

21 Q All right. But you recall that you saw this  
22 document in May of 1999. And it's called the letter of  
23 wishes.

24 Do you recall whether you had any discussion  
25 with anyone about a letter of wishes that would be

1 signed by Joe Francis?

2 A I believe that I'm faced with the same  
3 conundrum I was faced with earlier.

4 Q Well, I've phrased the question a certain way.  
5 I just asked whether you could recall whether you had  
6 any communications about -- about this document, not the  
7 content of any such communications.

8 A Um, yes, I had discussions regarding a letter  
9 of this type.

10 Q Okay. Now, can you tell us whether letters of  
11 wishes are typically submitted by Settlers who create,  
12 um, asset protection trusts of the type represented by  
13 FT1 through FT21 that we reviewed pretty extensively  
14 this morning?

15 A Yes, they are commonplace.

16 Q And what function do letters of wishes perform  
17 as you understand it?

18 A The letter of wishes is -- a means by which  
19 the Settlor of the trust, who has no power over the  
20 trustees, can indicate to the trustees his wish as to  
21 how the trustees should exercise their power according  
22 their discretions. The trustees have no obligation  
23 whatsoever to pay any attention to the letter of wishes.  
24 And -- but they are a commonplace.

25 Q Is it your standard practice to discuss with

1 clients who come to you, um, considering to -- excuse  
2 me, considering whether to establish a trust of the type  
3 represented by the Francis Trust.

4 Is it your standard practice to have a  
5 discussion with them about letters of wishes?

6 A Yes.

7 Q And what is, if you could just summarize it,  
8 your standard explanation of the availability and  
9 purpose and effect of letters of wishes in connection  
10 with trust of the type represented by FT1 through 21?

11 A Um, the -- when someone establishes a  
12 discretionary trust of this type, as I mentioned  
13 earlier, there is a leap of faith for them because  
14 they're giving material assets to a trustee, who has  
15 very broad powers and discretions. And they often like  
16 some comfort, as to how the trustee, when exercising  
17 powers and discretions, they have a material manner in  
18 which they can limit the powers or discretions by  
19 appointing a protector. They themselves cannot limit  
20 him, but assuming the protector is somebody who they  
21 know and trust, then that person may give -- by virtue  
22 of its -- or his or its consent being required can limit  
23 the exercise of the trustees for the trustees of their  
24 discretions. And the -- the letter of wishes is  
25 intended as something else to give a Settlor comfort.

1 Now, the trustee has no obligation to pay any  
2 attention to the letter of wishes. It has no legal  
3 effect whatsoever. It's not legally binding. All it is  
4 an earnest wish addressed to a trustee as to how he  
5 might exercise his discretions. And that's always made  
6 clear to the client. So it is what it is.

7 Q Okay. I just wanted to make sure that we had  
8 the context that you can provide us of letters of  
9 wishes, uh, were there -- well, I won't ask anymore  
10 questions about this.

11 MR. COHAN: Now, did I -- did I hit you with  
12 this clip? I really didn't mean to send it flying,  
13 because I've got much bigger heavier ones, but I'll more  
14 careful.

15 MR. THOMAS: May I ask a couple questions?

16 MR. COHAN: Please. Please. I hope you do.

17

18 FURTHER EXAMINATION

19 BY MR. THOMAS:

20 Q Um, we -- if I understood your testimony,  
21 Mr. Foley, you did participate, uh, in, uh, a review or  
22 a creation of the letter of wishes.

23 A No, I didn't.

24 Q You did not. Were you familiar with these at  
25 the time the trust was settled?

1 A I believe so.

2 Q I mean, these specific ones?

3 A Yes, I believe so. I'm -- I might. I mean,  
4 I'm subject to correction on this. But I'm -- this --  
5 this was -- a copy of this was on my file. I don't know  
6 when precisely it was received.

7 Q But it was not created by you?

8 A No, it was not me (inaudible).

9 Q Okay. And can a -- can a Settlor be a  
10 protector?

11 A A Settlor can be -- in theory can be a  
12 protector. But if he's the protector, then he -- it  
13 leaves him in a delicate position, I think.

14 MR. THOMAS: That -- that was it. Thank you.

15

16 FURTHER EXAMINATION

17 BY MR. COHAN:

18 Q Well, you've whetted my appetite, because I'm  
19 always interested in delicacies. And the delicacy,  
20 which I refer -- what do you mean by it leaves the  
21 Settlor in a delicate position?

22 A Well --

23 Q If the Settlor becomes or puts himself in  
24 position to also be the protector?

25 A It -- it -- well, it goes to the sham issue

1 that we discussed earlier.

2 Q Right.

3 A If the Settlor is the protector, and the  
4 trustee can't exercise any of its powers of immaturity,  
5 such as the significant powers of discretions without  
6 the consent of the protector then depending on what  
7 those limitations are, it might be argued that the  
8 powers are so vast, that the Settlor is really  
9 controlling the assets.

10 Q In which case the asset protection feature  
11 would essentially be useless because the control would  
12 not truthfully and factually have passed to the trustee,  
13 is that --

14 A Well, it would go to a -- I suppose there are  
15 two functions. There are two aspects of it. One, is  
16 that if you were doing a sham analysis, the type in my  
17 memo, which is numbered at the bottom of -- circulated  
18 earlier.

19 Q Uh, it's OF200007.

20 MS. STANDLEY: Three zeros.

21 BY MR. COHAN:

22 Q Seven and --

23 A Eight and nine.

24 Q Eight and nine.

25 A So the first question would seem to me would

1 be, would be to consider in the context of the sham  
2 analysis.

3           So if for instance at the outset, the Settlor  
4 of the trust said yes, I am going to settle all these  
5 assets on you, and you have always powers and  
6 discretions, but by the way, I'm gonna be the protector,  
7 and the terms of the trustee defect to take away the  
8 powers of discretions, then it seems to me that it's --  
9 it's certainly arguable that the Settlor was keeping  
10 undue control.

11           Now, it remains to be seen what view the judge  
12 would take on that, but it certainly opens that subject.  
13 And the other aspects -- the second aspect is, if we  
14 assume that that doesn't arise because that's -- and I  
15 mean on the sham side of things for instance, we --  
16 we -- as I said earlier, that there has to be an  
17 intention on the part of the Settlor and on the part of  
18 the trustee, that the thing would be a sham. And -- and  
19 suppose the analysis that was just given on that phase  
20 for various reasons, one which might be the trustee  
21 regarding them as a sham. So then, so then the trust is  
22 still valid, regardless of the fact that he's exercising  
23 that control. But suppose he's exercising that kind of  
24 control, and then becomes a subject of a lawsuit  
25 somewhere. And so there's a judgment entered against

1 him. And the judge says, okay, you know, here's an  
2 order. Pay this money to the court, wherever you can  
3 pay. The judge says, this is an attachment order or  
4 something of that nature.

5 Q Collection proceedings.

6 A Yeah. Collection proceedings. And then it  
7 seems to me that if -- if the Settlor has very very  
8 onerous powers, then in theory, that gives the court  
9 more leverage to say to him, yes, we know you don't have  
10 the asset, but you've got all these powers. So please  
11 do something with them.

12 Q All right. Now, if the Settlor designates a  
13 person who is his attorney to act as protector, what  
14 issues arise in -- in this connection, if any, as you  
15 understand it?

16 A I don't know that any issues arise. I mean,  
17 it's -- it's perfectly commonplace to designate an  
18 attorney because they are somebody who is -- in whom  
19 they repose great faith and trust.

20 Q Okay.

21 A It seems to me to be the kind of person you  
22 would appoint as a protector, rather than some passing  
23 stranger. I mean, it's easier -- for attorneys is no --  
24 gonna be no different in that respect than, you know,  
25 your banker or, or, I don't know, your accountant or

1 something of that nature.

2 Q Is it correct that the protector owes a  
3 fiduciary duty to the beneficiaries of the trust?

4 A Yes.

5 MR. COHAN: Okay. That's all I have on the  
6 subject.

7 Anything further?

8 MR. THOMAS: (Inaudible).

9 MR. COHAN: Go ahead.

10 MR. THOMAS: I don't even have copies to it.

11 MS. MAKAREWICZ: (Inaudible).

12

13 FURTHER EXAMINATION

14 BY MR. THOMAS:

15 Q Uh, Mr. Foley, I don't know what these are.  
16 I'm gonna ask. There's some sort of document, I believe  
17 connected with Barclay's Bank, you identified before  
18 that -- that letter is just -- anyway, do you -- do you  
19 know what those are or -- uh, do you have any  
20 familiarity with those particular -- the documents?

21 A These are banking documents. I don't know  
22 whether --

23 Q Do you -- do you know which ones I'm referring  
24 to?

25 MS. MAKAREWICZ: Can you identify them?

1 THE WITNESS: Yeah. They were -- OF00163  
2 through --

3 BY MR. THOMAS:

4 Q It's not in the stack that you just --

5 A -- through 175.

6 MR. COHAN: Okay.

7 MS. STANDLEY: It may be that we just didn't  
8 bring it.

9 MR. COHAN: We went through these with, uh, I  
10 think -- or these similar ones yesterday with  
11 Mr. Chaffe, and we weren't gonna go through them again.

12 MR. THOMAS: Can I show them to, uh --

13 MR. COHAN: Sure.

14 MS. MAKAREWICZ: He has them.

15 MR. THOMAS: -- Mr. Foley.

16 MR. COHAN: Sure. I -- I just don't have a  
17 set. But that's fine.

18 BY MR. THOMAS:

19 Q They appear to be some type of deposit  
20 document.

21 A That's what they look like.

22 MS. STANDLEY: (Inaudible.) Let me see, just  
23 one minute.

24 BY MR. THOMAS:

25 Q And, uh -- I'm gonna state for the record,

1 that they do identify Island Films on them, and they,  
2 um, have dates that are, uh, a little bit subsequent to  
3 the creation of Island Films. These are June and July,  
4 for the most part of 1999, August 5.

5 You -- you didn't have any -- did you, in any  
6 way, um, participate in these transactions that are  
7 reflected by these documents?

8 A Uh, I don't know. And certainly the funds did  
9 not come through our accounts.

10 Q And do you have any knowledge of these  
11 transactions, other than what I'm showing you right now?

12 A No. I don't think -- I don't believe so.

13 Q Okay.

14 A I mean, I may have, uh, various copies of on  
15 the files we discovered there were copies of items like  
16 this.

17 MR. COHAN: What are you referring to?

18 THE WITNESS: I beg your pardon. The items.  
19 These -- these deposit slips. But -- but -- and I don't  
20 know why we would have been given copies of them. But I  
21 was not privy to -- what the transactions were or why --

22 MR. THOMAS: Thank you.

23 FURTHER EXAMINATION

24 BY MR. COHAN:

25 Q Okay. Um, let me hand you --

1           Were these provided to the government?

2           MS. STANDLEY: I just did.

3           MR. COHAN: Oh, you did.

4           MS. STANDLEY: Oh, I'm sorry. I did not.

5           MR. COHAN: You didn't? Ah, then we've got  
6 two really -- recently produced sets of documents here.  
7 I'll do them one at a time.

8                   I'm handing you what's been marked for  
9 identification as OF20001 through 4. And I ask you to take  
10 a look, if you would, to review those four pages.

11                   (Exhibits OF20001 through OF20004 were marked.)

12 BY MR. COHAN:

13           Q     Do you recognize this?

14           A     Uh, yes.

15           Q     OF20001 through 4?

16           A     Yes, I do.

17           Q     Can you briefly summarize what these four  
18 pages are?

19           A     Uh, this relates to the acquisition by  
20 Summerland Holdings Limited which is a trust owned  
21 entity of Beach Front Condo Condominiums of Development  
22 for Royal West Indies at Grace Bay, Providenciales.

23                   The development was under construction and the  
24 unit when purchased, when the contract for the purchase  
25 of the unit was signed by Summerland Holdings, the unit

1 was under construction. And -- and so what this letter  
2 relates to is, it's a letter from the developer pointing  
3 out that though the unit was just about finished at that  
4 stage, they expected that there would be a delay between  
5 the date on which the unit was finished and ready for  
6 occupancy, and the date by which they would be ready to  
7 close the legal aspects of the transaction.

8           The reason for that delay was because the,  
9 uh -- as the contractors could move at one speed, the  
10 land registry could only move at a much slower speed.  
11 And so the land registry could only do the work it had  
12 to do when the building was completed and the  
13 certificate of occupancy had been issued by the planning  
14 department and inspected the building.

15           Then the land registry, would then after  
16 register was called a strata plan and give a separate  
17 type of number to each unit of the building. All of  
18 which takes a fair amount of time in the land registry.  
19 And so the developer was pointing out that there could  
20 potentially be a gap of several weeks between the time  
21 the unit was finished and the time -- the time the unit  
22 was finished and ready to be occupied, and the time when  
23 they would legally close the transaction.

24           And it was referring to a clause in the  
25 contract, which offered buyers a number of options in

1 that respect should that occur and is inviting the buyer  
2 to choose an option.

3 Q Do you know if you took any action or response  
4 to receiving this letter? I guess I should ask, first  
5 of all, do you recall whether you received this letter  
6 it's dated, June 14th of 2000 and it's addressed to you  
7 and we received it from you, uh, a couple days ago?

8 A Yes. I'm -- I'm -- I remember receiving this,  
9 yes.

10 Q Do you know why this letter was not provided  
11 to us earlier when you provided us other documents?

12 A Uh, because when we did the search for the  
13 files -- first of all, in archive storage we found a  
14 number of Francis Trust files arising out of  
15 correspondence in the last -- discussions in the last  
16 few days. It reminded me that at some stage we had  
17 acted in relation to the same by Summerland of this  
18 unit, something which I'd forgotten about before then.  
19 So then I initiated a search for other files, to see if  
20 there's anything else. And then this -- they located  
21 the file which this matter was --

22 Q To the best of your -- excuse me.

23 Were you finished with your answer?

24 A Yes.

25 Q To the best of your knowledge and belief, have

1 you now provided us with everything that you or this  
2 office had in your possession that was done by or on  
3 behalf of Summerland, Island Films, Rothwell, and  
4 Francis Trust?

5 A So far as I know, yes.

6 Q Okay. Now, inviting your attention then to  
7 documents identified as OF20005 through 20006.

8 (Exhibits OF20005 through OF20006 were marked.)

9 MR. COHAN: Did we give you a copy of this?

10 MS. MAKAREWICZ: Uh-huh.

11 MR. THOMAS: Yes.

12 MR. COHAN: Okay. Well, I've just got an  
13 extra one here for some reason. Oh, the witness hasn't  
14 received one yet. I'm sorry.

15 BY MR. COHAN:

16 Q The record should reflect, I'm handing you  
17 what has been marked as OF20005 and 20006 and I ask you  
18 to take a moment to review these two pages so that I can  
19 ask you if you recognize that.

20 MS. STANDLEY: (Inaudible).

21 MR. THOMAS: Oh, we don't.

22 MR. COHAN: Are you sure?

23 MR. THOMAS: I'm sorry. We -- we do have  
24 those. I'm very sorry.

25 MR. COHAN: Shocking that you could possibly

1 mislead me in such an obscene fashion. I'm just  
2 kidding, of course. Just trying to cover the waterfront  
3 here. Give you everything we have that's the  
4 governments.

5 MR. THOMAS: Thank you.

6 THE WITNESS: Yes.

7 BY MR. COHAN:

8 Q Okay. Just now you've had a moment to review  
9 this two-page letter. Do you recall whether you  
10 received this sometime in June of 2000?

11 A Well, I don't recall it, but it was in my file  
12 I expect I did receive it, yes.

13 Q Okay. Does this refresh your recollection at  
14 all in connection with the transaction that you  
15 testified about earlier that involved the trust or one  
16 of the entities including Summerland Holdings, um,  
17 ownership of and sale of some real property here?

18 A Yes. To a limited extent, yes.

19 Q Right. And I just wanted to -- to complete  
20 the discussion on the subject that -- your testimony  
21 about how you participated to some extent in the  
22 acquisition of real estate prior to this construction  
23 and the subsequent sale, is this real estate that is  
24 reflected on OF20005 and 20006, and on the immediately  
25 preceding exhibit --

1 A Yes. That's correct.

2 Q Okay. Thank you. Fine.

3 MR. COHAN: Now, the ordinances?

4 MS. STANDLEY: (Inaudible). Summerland --

5 MR. COHAN: Oh, I didn't do Summerland yet?

6 Sorry.

7 Now, I only have two of these.

8 Did you give one of these to the government  
9 already?

10 MS. STANDLEY: Yes.

11 MR. COHAN: All right. Okay. The record  
12 should reflect that we provided SH four zeros followed  
13 by a 1 through SH54 to the government yesterday, in  
14 connection with the examination of Mr. Chaffe. And that  
15 I'm handing that group of documents to this witness,  
16 Mr. Foley, now. And then I ask if you would take a few  
17 moments to review these 54 pages.

18 And this is gonna be in very cursory fashion,  
19 only to enable you to familiarize yourself with these  
20 documents, to testify as to your recollection about your  
21 role because they look to me, anyway, like pretty much the  
22 same type of documentation just went through for Island  
23 Films Limited.

24 (Pause in proceedings.)

25 MR. THOMAS: May I inquire? Is this SH0 --

1 well, we'll skip the zeros. 1 through 54?

2 MR. COHAN: Yes.

3 BY MR. COHAN:

4 Q Okay. Do you recognize some of these 54  
5 pages?

6 A Yes.

7 Q And do you recognize Pages 1 through 12?

8 A Yes.

9 Q Okay. And how do you recognize SH1 through  
10 SH12?

11 A Well, it looks to be uh, a set of --  
12 Memorandum of Articles Association of the TCI Companies  
13 Summerland Holdings, Summerland Holdings, (inaudible)  
14 which are in the standard form used at the time by  
15 Caribbean Management Services our corporate management  
16 affiliate and I believe I've seen these before.

17 Q And do you know whether you played any role in  
18 the preparation of SH1 through SH12?

19 A Yes. I was the director -- of it's  
20 incorporation by Caribbean Management Services Limited.

21 Q By Caribbean Management Services Limited?

22 A Yes.

23 Q Okay. And, um, was this basically parallel to  
24 the creation of Island Films Limited, meaning, at the  
25 same time and --

1 A I don't know if it was parallel, but it was  
2 approximately the same time, yes.

3 Q Well, the documents look to me, at least these  
4 first 12 pages, S1 through S12, to be virtually  
5 identical as between Summerland Holdings and Island  
6 Films, say -- except for the names, uh, of the  
7 corporations.

8 A Yes. But --

9 Q I realize they're totally separate and  
10 distinct corporations.

11 A Yeah. The -- the -- the Memorandum of  
12 Articles of Association will probably be identical in  
13 any event.

14 Q Right. And that's because the process of  
15 creating corporations required the identical --

16 A Yes.

17 Q -- preparations that's at issue?

18 A I beg your pardon?

19 Q I'm leading now.

20 A Yes. That's all right.

21 Q I'm just trying to move on.

22 Um, inviting your attention to SH15, if I  
23 might.

24 A Yes.

25 Q Uh, I note that on what purports to be a

1 certificate of a corporation, I do not see anything  
2 indicating exemption.

3 Do you know why that is?

4 A Yes, because this is not an exempt company.

5 Q Okay. So that's one difference between the  
6 two corporations? That is to say that Summerland  
7 Holdings is not an exempt company and Island Films is.

8 A That's correct.

9 Q Okay. And do you know the purpose for which  
10 this corporation was created without being exempt  
11 company as opposed to Island Films Limited?

12 MR. THOMAS: Objection. Foundation.

13 MR. COHAN: I just asked whether he knew.

14 THE WITNESS: Yes, I know.

15 BY MR. COHAN:

16 Q Okay. And how do you know?

17 A Because I was involved in the instructions to  
18 start the incorporation of both entities.

19 Q Okay. And you -- you testified briefly about  
20 the difference between exempt and non-exempt companies.

21 Is it correct that an exempt company is  
22 exempted in part because it's not doing commercial  
23 business within Turks & Caicos Islands?

24 A Yes.

25 Q Whereas a non-exempt company is non-exempted,

1 because it is created to do business in Turks & Caicos  
2 Islands?

3 A Either created to do business in the Turks &  
4 Caicos Islands or to hold assets in the Turks & Caicos  
5 Islands.

6 Q Okay. And was it your understanding when you  
7 created Summerland Holdings, that it was created in part  
8 to hold assets in --

9 A Yes.

10 Q -- Turks & Caicos Islands?

11 A I beg yoru pardon. Yes.

12 MR. COHAN: Okay. I have no further questions  
13 on these 54 pages.

14 Can we take a moment in case, Counsel, you might  
15 like to inquire about any of this?

16 MR. THOMAS: Uh, just a few moments.

17 MR. COHAN: Take -- take your time. A minute  
18 and 44 -- an hour and 44 minutes. I'm just joking.  
19 Take your time.

20 As you can see, we're almost done.

21

22 FURTHER EXAMINATION

23 BY MR. THOMAS:

24 Q Let me -- if you look at SH22. Again, I just  
25 wanted to ask you, did you or your firm have any

1 participation in -- in drafting and creating that  
2 document.

3 A No, we did not have it.

4 MR. THOMAS: That's it. Thanks.

5 BY MR. THOMAS:

6 Q Oh, do you know if Island Films and Summerland  
7 still exist?

8 A I don't know.

9 Q Do you know if that condominium that was, uh,  
10 listed for sale by Summerland sold?

11 A Yes, it did.

12 Q Okay. And the proceeds were delivered to  
13 Summerland?

14 A Uh, yes. My recollection is they went to  
15 Hallmark Trust in Summerland's behalf.

16 MR. THOMAS: Thank you.

17 MR. COHAN: Okay. Um, handing you what's been  
18 marked for purposes of identification as TC480 through  
19 TC515, and handing the government, the same thing.

20 (Exhibits TC480 through TC515 were marked.)

21 MS. STANDLEY: (Inaudible).

22 MR. COHAN: Okay. Very well. All right. I  
23 need one as well.

24 ///

25 ///

1 FURTHER EXAMINATION

2 BY MR. COHAN:

3 Q If you would very cursorily, if you would,  
4 Mr. Foley review, what I believe constitutes a copy of  
5 the Turks & Caicos Islands Trust Ordinance, effective as  
6 of 15th of May, 1998. Just so that you either can  
7 confirm or disaffirm whether what I just stated as  
8 belief is in fact correct?

9 (Pause in proceedings.)

10 THE WITNESS: Yes, that's correct.

11 BY MR. COHAN:

12 Q And were you familiar with the contents of  
13 this document, marked for purposes of identification as  
14 TC480 through TC515, uh, immediately prior to your work  
15 for Mr. Francis and for the Francis Trust that we've  
16 been reviewing here today?

17 A Yes, I was.

18 Q And is this, as you understand it, at least  
19 part of the law governing the creation and validity of  
20 the conduct of the affairs of trusts created and  
21 domiciled in the Turks & Caicos Islands?

22 A Yes.

23 Q Okay. That's all I have on that.

24 MR. THOMAS: We've got nothing.

25 MR. COHAN: Okay.

1 MR. THOMAS: I've got nothing.

2 MR. COHAN: Okay. Well, you don't have to be  
3 so gleeful about it.

4 What we're doing here -- and that's why, uh,  
5 we're gonna wind this up fairly quickly. I really wanted  
6 to -- and I will put this witness on -- thank you, what we  
7 think are the pertinent laws, in effect at the pertinent  
8 time, through this witness, notwithstanding the  
9 questionable nature of his qualification, uh, we believe is  
10 sufficient, to, uh, authenticate these as the government  
11 statutes.

12 MR. THOMAS: I -- you know, Bill, you're  
13 welcome to do what you wish. We would obviously object  
14 to the introduction of these documents, based upon  
15 Mr. Foley's review and identification, uh, for the  
16 reason that he's not exactly sitting there going through  
17 to make sure that everything is exact. I think the  
18 proper way to get these documents before the court is  
19 simply to request that they be judicially noticed, which  
20 we would not oppose. Whatever was in force as the laws  
21 at Turks & Caicos at that time, was in force as the law  
22 at the Turks & Caicos at that time.

23 MR. COHAN: I understand. But I'm doing this  
24 in an abundance of caution to assist the court and the  
25 government in identifying what was enforced anticipating

1 an attempt to avoid any question about that. And  
2 obviously if the government has a question, it can be  
3 raised but at least what we're doing while we're here on  
4 this island, so far from Los Angeles, is to find out,  
5 identify and limit the universe of things we have to  
6 inquire about, that we might have asked about while we  
7 were on the island.

8 And perhaps, it's an excess rather than merely an  
9 abundance of caution. Nevertheless, I will proceed  
10 notwithstanding your objection. But it's noted for the  
11 record.

12 And I note that Mr. Foley is leafing through page  
13 by page, what's been identified for purposes of this  
14 deposition as TC00100 through 132, which on its face  
15 purports to be a statute known as "The Company Management  
16 paren, Licensing, end parens, Ordinance of 1999."

17 (Exhibits TC00100 through TC00132 were marked.)

18 BY MR. COHAN:

19 Q Mr. Foley, does the compilation of documents  
20 totalling the 33 pages that begin with TC100 and  
21 culminating TC132, look familiar to you?

22 A Yes, it does.

23 Q And how is that, sir?

24 A Uh, because it's a copy of "The Company  
25 Management Licensing Ordinance" and regulations made

1 under it.

2 Q Were you generally familiar with the contents  
3 of these 32 pages in early 1999, and thereafter?

4 A Uh, not in early 1990 -- well, I don't know  
5 when was this enacted. The Ordinance 1 of 1999,  
6 February 26. I had a passing familiarity. (Inaudible)  
7 I'd like to say that I was in all honesty familiar with  
8 it.

9 MR. THOMAS: Can I ask a one-minute question?

10 MR. COHAN: Feel free.

11

12 FURTHER EXAMINATION

13 BY MR. THOMAS:

14 Q Was this -- was this, we'll call it ordinance.  
15 Was this in effect at the time that the, uh, the --

16 A Trial? No, it was not.

17 Q Oh, okay. Well, fine.

18 A The ordinance commenced September 9th, 2000 --

19

20 FURTHER EXAMINATION

21 BY MR. COHAN:

22 Q Do you know whether this ordinance, uh,  
23 substantially amended prior legislation?

24 A Uh, there -- there -- prior to this, there was  
25 no regime for being licensed as a company manager; so it

1 was entirely new piece of legislation.

2 Q Okay. And when it came effective in September  
3 of 2000, did it govern the operation of certain  
4 businesses, including trust businesses in the Turks &  
5 Caicos Islands?

6 A Govern the operation of company managers.  
7 Um -- and, uh, yes, it trust -- the trust companies to  
8 the extent they carried on company management business  
9 were governed by it, yes.

10 Q Thank you. I think you testified earlier that  
11 there were two different types of licenses that, uh, a  
12 company management services establishment could perform  
13 and trust establish in connection with the limited  
14 services--

15 (Background noise.)

16 BY MR. COHAN:

17 Q -- that Misick & Stanbrook's, uh, affiliate,  
18 Caribbean Management Services to perform.

19 Do you recall that?

20 A Yes. Caribbean Management Services, it's a  
21 company manager, it is not a trust company manager.

22 Q Okay. Was Caribbean Management Services  
23 subject to the provisions of these 32 pages subsequent  
24 to the enactment of the law that's reflected in the 32  
25 pages?

1 A Yes, it was.

2 Q Okay. And that also applied to any other  
3 business on this island conducting company management  
4 services?

5 A That's correct. Yes.

6 Q Thank you. We'll move on.

7 MR. COHAN: Handing the government and  
8 Mr. Foley a copy of what's been marked for purposes of  
9 identification as TC00543 through 587.

10 (Exhibits TC00543 through TC00587 were marked.)

11 BY MR. COHAN:

12 Q Uh, do you know whether this compilation of  
13 documents totaling 45 pages was the law in effect as it  
14 states on its front page, 15th of May 1998 and  
15 thereafter?

16 A Sir, let me go through this.

17 Q Certainly. I thought I said that these were  
18 marked for purposes of identification as TC543 through  
19 TC587. But apparently I failed to do that and I  
20 don't -- want to do that now, those pages 543 through  
21 587, uh, preceded by the letters TC, uh, are identified  
22 as the business licensing ordinance and subsidiary  
23 legislation showing a law as at 15 May 1998.

24 So the question is whether this witness  
25 recognizes this to be the law it purports to be at the

1 time it purports to be the law.

2 (Pause in proceedings.)

3 THE WITNESS: I'm sorry. Could you repeat the  
4 question?

5 BY MR. COHAN:

6 Q Yes. The question is whether you recognize  
7 TC543 through TC587 as the business licensing ordinance  
8 in effect from 15 May, 1998 and thereafter in this  
9 jurisdiction, the Turks & Caicos Islands?

10 A I recognize TC543 through TC572, as being in  
11 force as of 15 May, 1998. There are subsequent  
12 subsidiary items which came into power later.

13 Q To the best of your knowledge and belief --  
14 did the effective dates of -- of the subsequent pages  
15 beginning with 574 of those dates are correct, to the  
16 best of your knowledge and belief?

17 A I believe so. But that's not something that  
18 I'm aware of on a daily basis.

19 Q Very well. That's all I have on this  
20 compilation of documents.

21 (Speaking at the same time.)

22 MR. THOMAS: I don't have much time to get to  
23 my questions, so please.

24 MR. COHAN: I, uh, as you know, I'm moving as  
25 rapidly as humanly possible and as close to the speed of

1 light as the law permits here.

2 (Laughter.)

3 MR. COHAN: Okay. I am inclined to abandon  
4 this exercise in favor of Mr. Thomas earlier suggestion  
5 that we could ask the court to take judicial notice, if  
6 the issue should arise.

7 MR. THOMAS: And we will -- we will not  
8 object.

9 MR. COHAN: Okay. Good. I'm glad to hear  
10 that. I would hate to learn later that I should have  
11 gone through this in more detail.

12 This is a little shorter, and perhaps we should  
13 take a moment for one. This is the Confidential  
14 Relationships Ordinance and it's the last exhibit that I  
15 have, I believe.

16 Is that right?

17 MS. STANDLEY: That's it.

18 MR. COHAN: Okay. Handing to counsel, what's  
19 been marked for purposes of identification as TC516  
20 through TC523. And the final assault on the forests of  
21 the world, um, because of all this paper we're going  
22 through.

23 (Exhibits TC516 through TC523 were marked.)

24 MR. COHAN: I would ask you to take a moment  
25 to review this one. Uh, and that is, these -- let's

1 see. Eight pages. Yes, eight pages beginning with  
2 TC516 and ending in TC523. Uh, and tell us, if you can,  
3 whether this is the Confidential Relationship Ordinance  
4 to which you adverted earlier in your testimony as a  
5 limitation on the information that you were free to  
6 disclose pursuant to the laws of this jurisdiction?

7 A Yes.

8 MR. COHAN: It is. Okay. I will conclude  
9 there. I think it speaks for itself. And now, and  
10 being only the roughly 20 minutes after 3:00, do you  
11 have any questions?

12 MR. THOMAS: We have asked all the questions  
13 that we, uh, wish to ask of this witness.

14 MR. COHAN: Okay. Very well. Then, uh, we  
15 might as well continue on -- I'm sorry.

16 I -- I was just gonna say we're currently set to  
17 reconvene tomorrow morning at 9:30 at Allied House. And I  
18 tell you, in all candor, that I do not know whether  
19 Mr. Trowbridge will or not appear.

20 I think we all need to meet there at that time  
21 regardless. If he's there, we'll take his deposition. If  
22 he isn't, we'll make a record that we were there for that  
23 purpose. And whether and to what degree and by what means  
24 we'll pursue his nonappearance if that eventuates, I think  
25 we'll just have to stay tuned.

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MR. THOMAS: Very good. We'll be there.

MR. COHAN: Okay. Thank you. And, Mr. Foley,  
thank you very much for your patience and your energy  
and attention.

(Whereupon the videotaped deposition was concluded.)

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\* \* \*

I hereby declare under penalty of perjury that the foregoing is my deposition under oath; that I have read my deposition and have made the necessary corrections, additions or changes to my answers that I deem necessary.

In witness thereof, I hereby subscribe my name this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_

OWEN FOLEY

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STATE OF CALIFORNIA )  
COUNTY OF SAN DIEGO )

I, Lorena Barrón, Certified Shorthand Reporter,  
in and for the State of California, do hereby certify:

That I listened to tape recordings of the  
foregoing proceedings;

That I made stenotype notes from said recordings  
which were later transcribed into typewriting;

That the foregoing transcript represents a true  
and complete record of the proceedings reflected on the  
tape recording within my ability to prepare such record.

In witness whereof, I have hereunto set my hand  
this \_\_\_\_\_, day of \_\_\_\_\_, 2011.

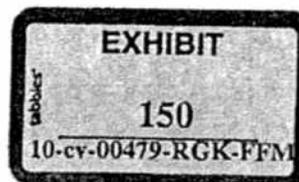
\_\_\_\_\_

Lorena Barrón, CSR No. 12058

OWEN FOLEY

Owen Foley is a partner with the firm of Misick & Stanbrook in the Turks & Caicos Islands. He is a graduate of University College, Dublin (1978) and of the Law Society of Ireland's Law School (1982). He is admitted to practice as a solicitor of the High Court of Ireland (1982), as a barrister and solicitor of the Supreme Court of Victoria (Australia) (1985) and as an attorney of the Supreme Court of the Turks & Caicos Islands (1988).

Owen joined Misick & Stanbrook as partner in 1998. He practises primarily in the areas of corporate and commercial law and trusts. He has been a regular contributor to international publications on Turks & Caicos Islands corporate and trust law and is a member of the Society Trust & Estate Practitioners.



*OF 20007*

**Kimberly Ewing**

**From:** Owen Foley [owen@misickstanbrook.tc]  
**Sent:** Thursday, November 18, 2010 9:55 AM  
**To:** kimberly@misickstanbrook.tc  
**Subject:** FW: Rothwell and USA - fj5464

**From:** Owen Foley [mailto:owen@misickstanbrook.tc]  
**Sent:** Wednesday, November 17, 2010 4:29 PM  
**To:** 'William Cohan'  
**Cc:** 'kimberly@misickstanbrook.tc'; 'Sharon Standley'  
**Subject:** Rothwell and USA - fj5464

17<sup>th</sup> November 2010

Mr. Bill Cohan,

Dear Bill,

**RE: SHAM TRUST, INFLUENCE OF THE SETTLOR ETC.**

Further to our conversations yesterday afternoon, I thought it would be worthwhile before tomorrow's deposition to clarify for you the position under TCI law in relation to sham trusts, influence of the settlor on the trustee and so on.

- a. A trust will be deemed to be a sham and therefore ineffective as a trust if the parties to the trust declaration (the trust deed) intended not to create a trust but rather to give a false impression to third parties and ultimately to the court.[1]
- b. Subsequent actions of the parties in disregarding the trusts declared are admissible in evidence to establish that they intended at the time when the trusts were declared never to carry them out.[2]
- c. In considering subsequent actions of the trustees in complying with the settlor's wishes about the administration of the trusts, it is necessary to see whether the trustees were acting in disregard of the trusts declared, which would point towards a shamming intent, or whether they were instead exercising their own discretions under the trusts, albeit in ways influenced by the settlor, which would not point to such an intent.
- d. If a sham is not established, then in subsequently disregarding the trusts declared, the trustees are simply in breach of trust.
- e. If the trustees are parties to the declaration of trust, then they normally must, for it to be held a sham, be implicated in the intention that the trusts are not to be given effect. All parties to the trust must share the necessary intent.[3]
- f. A trust is either a sham or it is valid and enforceable: there is no third state of affairs between a valid trust on the one hand and a sham on the other[4].

11/18/2010



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9. The effect of a trust being held to be ineffective as a sham is that third parties can treat the trust property as still belonging to the settlor or the settlor's estate.

In short, the critical issue is the intention at the time of establishment of the trust. Subsequent conduct may shed light on that intention but if the intention was there to establish a trust at the outset, subsequent conduct in breach of the provisions of the trust would not mean that the trust was a sham: it would simply mean that the trustees were acting in breach of trust.

I hope that this is helpful.

Regards,

Owen Foley  
Misick & Stanbrook

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- 
- [1] Midland Bank v Wyatt [1997] 1 B.C.L.C. 242; Rahman v. Chase Bank (C.I.) Trust Co. Ltd [1991] J.L.R. 103 (Jersey)  
[2] A.G. Securities v Vaughan [1990] 1 A.C. 417 at 475-476  
[3] Snook v London & West Ridings Investments Ltd [1967] 2 Q.B. 789  
[4] Esteem Settlement [2003] J.C.R. 092

11/18/2010



TURKS AND CAICOS ISLANDS

**CHAPTER 124  
TRUSTS ORDINANCE**

**Revised Edition**  
showing the law as at 15 May 1998

This is a revised edition of the law, prepared by the Law Revision Commissioner under the authority of the Revised Edition of the Laws Ordinance 1997.

This edition contains a consolidation of the following laws—

**TRUSTS ORDINANCE**

Ordinance 25 of 1990 .. in force 1 February 1991 (G.N. 22/91)

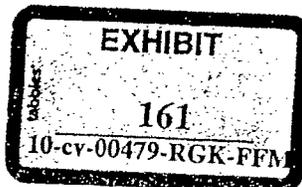
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No Subsidiary Legislation has been made under this Ordinance



2

CAP. 124

*Trusts*

LAWS OF TURKS &  
CAICOS ISLANDS

Revision Date: 15 May 1998

CHAPTER 124  
TRUSTS ORDINANCE  
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3. Existence of a trust
4. Applicable law of a trust
5. Jurisdiction of the Court

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13. Application of foreign laws
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61. Assets protection trusts
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CAP. 124

*Trusts*

LAWS OF TURKS &  
CAICOS ISLANDS

Revision Date: 15 May 1998

CHAPTER 124

TRUSTS ORDINANCE

(Ordinance 25 of 1990)

AN ORDINANCE TO MAKE PROVISION WITH REGARD TO TRUSTS, TRUSTEES AND PERSONS INTERESTED UNDER TRUSTS AND MATTERS INCIDENTAL AND RELATED THERETO.

[1 February 1991] Commencement

PART I

PRELIMINARY

1. This Ordinance may be cited as the Trusts Ordinance. Short title

2. (1) In this Ordinance, unless the context otherwise requires— Interpretation

“beneficiary” means a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised;

“breach of trust” means a breach of any duty imposed on a trustee by this Ordinance or by the terms of the trust;

“charitable purpose” means a purpose recognised as charitable by the law governing the validity of the trust for which the purpose was created;

“corporate trustee” means a trustee which is a corporation;

“corporation” means a body corporate wherever incorporated;

“Court” means the Supreme Court of the Turks and Caicos Islands;

“foreign trust” means a trust as to which the law governing validity is the law of some jurisdiction other than that of the Islands;

“heirship right” means any right, claim or interest in, against or to property of a person arising or accruing in consequence of that person’s death, other than any such right, claim or interest created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of the property to such person;

"insolvent" means being subject to liabilities, whether actual, contingent or prospective, of which the value exceeds that of the assets available to meet such liabilities as they become due;

"insurance" includes assurance;

"interest of a beneficiary" means his interest under a trust and references to his interest have a corresponding meaning;

"minor" means a person who either under the law of the Islands or under the law of his domicile has not reached the age of legal capacity;

"personal relationship" includes every form of relationship by blood or marriage, including former marriage, and in particular a personal relationship between two persons exists if—

(a) one is the child of the other, natural or adopted (whether or not the adoption is recognised by law), legitimate or illegitimate; or

(b) one is married to the other (whether or not the marriage is recognised by law); or

(c) one cohabits with the other or so conducts himself or herself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife; or

(d) personal relationships exist between each of them and a third person,

but no change in circumstances causes a personal relationship, once established, to terminate;

"personal representative" means the executor or administrator for the time being of a deceased person;

"property" means property of any description wherever situated, and, in relation to rights and interests, includes those rights and interests whether vested, contingent, defeasible or future;

"settlor" means a person who provides trust property;

"terms of a trust" means the written or oral terms of a trust, and any other terms made applicable by the laws governing its validity, construction or administration;

"trust" includes—

(a) the trust property; and

(b) the rights, powers, duties, interests, relationships and obligations under a trust;

"trust property" means the property for the time being held in a trust;

"Turks and Caicos Trust" means a trust as to which the law governing validity is the law of the Islands; and

"unit trust" means any trust established for the purpose, or having the effect, of providing for persons having funds available for investment, facilities for the participation by them as beneficiaries under the trust in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever.

(2) This Ordinance shall not be construed as a codification of laws regarding trusts, trustees and persons interested under trusts.

3. A trust exists where a person (known as a trustee) holds or has vested in him or is deemed to hold or have vested in him property which does not form, or which has ceased to form, part of his own estate—

Existence of a trust

(a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence; or

(b) for any purpose which is not for the benefit only of the trustee; or

(c) for such benefit as is mentioned in paragraph (a) and also for any such purpose as is mentioned in paragraph (b).

4. (1) Subject to subsection (3) and to section 40, the law governing the validity, administration and construction of a trust shall be—

Applicable law of a trust

(a) the law chosen by the settlor to be the applicable law, the choice being expressed or implied in the terms of the trust; or

(b) if no such choice is ascertainable, the law with which the trust had its closest connection at the time it was created.

(2) In ascertaining the law with which a trust had the closest connection at the time it was created, reference shall be made in particular to—

(a) the place of administration of the trust designated by the settlor;

- (b) the *situs* of the assets of the trust;
- (c) the place of residence or business of the trustee; and
- (d) the objects of the trust and the places where they are to be fulfilled.

(3) A severable aspect of a trust may be governed by a law different from that applicable to another aspect. The law applicable to the validity of a trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.

Jurisdiction of  
the Court

5. The Court has jurisdiction where—

- (a) the trust is a Turks and Caicos Trust; or
- (b) a trustee of a foreign trust is resident in the Islands; or
- (c) any trust property of a foreign trust is situated in the Islands; or
- (d) administration of any trust property of a foreign trust is carried on in the Islands.

PART II

PROVISIONS APPLICABLE ONLY TO A TURKS AND CAICOS TRUST

Application of  
Part II

6. This Part applies only to a Turks and Caicos Trust.

Creation of a  
trust

7. (1) Subject to subsection (3), a trust may come into existence in any manner.

(2) Without prejudice to the generality of subsection (1), a trust may come into existence by oral declaration, or by an instrument in writing (including a will or codicil) or arise by conduct.

(3) A unit trust may be created only by an instrument in writing.

Property which  
may be placed in  
a trust

8. Subject to section 12(2)—

- (a) any property may be held by or vested in a trustee upon trust; and
- (b) a trustee may accept from any person property to be added to the trust property.

9. (1) A beneficiary shall be—

Beneficiaries of a trust

(a) identifiable by name; or

(b) ascertainable by reference to—

(i) a class; or

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

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

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

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

10. (1) Subject to the terms of the trust, a beneficiary may disclaim his interest or any part of it, whether or not he has received any benefit from it.

Disclaimer of a beneficial interest

(2) A disclaimer shall be in writing and, subject to the terms of the trust, may be temporary and may, if the disclaimer so provides, be revoked in the manner and circumstances described or referred to therein.

(3) A disclaimer is not effective until received by a trustee.

11. The interest of a beneficiary is movable property and, subject to the terms of the trust, may be sold, pledged, charged, or otherwise dealt with in any manner applicable to such property.

Nature of beneficial interest

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

Validity of a Turks and Caicos Trust

(2) A trust shall be invalid and unenforceable—

(a) to the extent that—

(i) it purports to do anything the doing of which is contrary to the law of the Islands; or

(ii) it purports to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of the Islands; or

- (iii) it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose;
- (b) to the extent that the Court declares that—
- (i) the trust was established by duress, fraud, mistake, undue influence, misrepresentation or in breach of fiduciary duty; or
- (ii) the terms of the trust or its subject are so uncertain that its performance is rendered impossible.
- (3) Where a trust is created for two or more purposes of which some are lawful and others are unlawful—
- (a) if those purposes cannot be separated, the trust shall be invalid;
- (b) where those purposes can be separated the Court may declare that the trust is valid exclusively for the purposes which are lawful unless a distinct share of income or capital of the trust is allocated for an unlawful purpose in which case the trust shall be invalid as to that share.
- (4) Property in respect of which a trust is wholly or partially invalid shall, subject to any order of the Court, be held by the trustee in trust for the settlor absolutely or if he is dead for his personal representative.
- (5) In subsection (4), "settlor" means the person who provided the property in respect of which the trust is wholly or partially invalid.

Application of  
foreign laws

13. (1) All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including, without prejudice to the generality of the foregoing, questions as to—

- (i) the capacity of any settlor;
- (ii) any aspect of the validity of the trust or disposition or the interpretation or effect thereof;
- (iii) the administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal; or

- (iv) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined according to the laws of the Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected,

Provided only that—

- (a) this section does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this section affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power;
- (b) this section takes effect subject to any express contrary term of the trust or disposition;
- (c) as regards the capacity of a corporation this section does not affect the recognition of the laws of its place of incorporation;
- (d) this section does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;
- (e) this section does not validate any trust or disposition of real property situate in a jurisdiction other than the Islands which is invalid according to the laws of such jurisdiction;
- (f) this section does not validate any testamentary trust or disposition which is invalid according to the laws of the testator's domicile.
- (2) Without limiting the generality of subsection (1), it is expressly declared that no trust governed by the laws of the Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that—
- (a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or
- (b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial

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CAP. 124

Trusts

LAW OF TURKS &  
CAICOS ISLANDS

Revision Date: 15 May 1998

or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests.

Duration of a  
Turks and Caicos  
Trust

14. (1) An instrument creating or varying a trust may provide for the duration and date of termination of the trust.

(2) The rule of law known as the rule against perpetuities shall not apply to a Turks and Caicos Trust.

(3) For the avoidance of doubt it is declared that the rule referred to in subsection (2) includes—

(a) the application or effect of that rule in respect of accumulations; and

(b) the rule of law prohibiting trusts of perpetual duration.

Number of  
trustees

15. (1) Subject to the terms of the trust, the number of trustees shall be not less than two, unless one trustee was originally appointed or the sole trustee is a corporation.

(2) Where there is no trustee or less than the number required under subsection (1) a trust shall not fail on that account.

Appointment out  
of Court of new  
or additional  
trustee

16. (1) Where the terms of a trust contain no provision for the appointment of a new or additional trustee the trustees for the time being or the last remaining trustee or the personal representative or the liquidator of the last remaining trustee may appoint a new or additional trustee.

(2) Subject to the terms of the trust, a trustee appointed under this section shall have the same powers, discretions and duties and may act as if he had been originally appointed a trustee.

(3) A trustee having power to appoint a new trustee who fails to exercise such power may be removed from office by the Court.

(4) On the appointment of a new or additional trustee anything requisite for vesting the trust property in the trustees for the time being of the trust shall be done.

Prohibition of  
renunciation  
after acceptance

17. (1) No person shall be obliged to accept appointment as a trustee, but a person who knowingly does any act or thing in relation to the trust property consistent with the status of a trustee of that property shall be deemed to have accepted appointment as a trustee.

(2) A person who has not accepted and is not deemed to have accepted appointment as a trustee may disclaim such appointment within a reasonable period of time after becoming aware of it by notice in writing to the settlor or to the trustees.

(3) If the settlor is dead or cannot be found and there are no other trustees a person to whom subsection (2) applies may apply to the Court for relief from his appointment and the Court may make such order as it thinks fit.

18. (1) Subject to subsection (3), a trustee, not being a sole trustee, may resign his office by notice in writing delivered to his co-trustees, but such resignation shall not take effect until the resigning trustee has executed the documents and performed the acts necessary to vest the trust property in the new or continuing trustees.

Resignation or  
removal of a  
trustee

(2) A resignation—

(a) given in order to facilitate a breach of trust; or

(b) which would result in there being no trustee or fewer than the number of trustees required under section 15(1), shall have no effect.

(3) A trustee shall cease to be a trustee of the trust immediately upon—

(a) his removal from office by the Court; or

(b) his resignation becoming effective; or

(c) the operation of a provision, in the terms of a trust under which he is removed from office or otherwise ceases to hold his office.

19. Subject to the terms of the trust, where the number of trustees falls below the minimum number required under section 15(1), the required number of new trustees shall be appointed and until such minimum number is reached the surviving or continuing trustees shall act only for the purpose of preserving the trust property.

Position of  
continuing  
trustees on  
reduction in  
number of  
trustees

20. (1) A trustee shall in the execution of his duties and in the exercise of his powers and discretions—

Duties of trustee

(a) act—

(i) with due diligence;

(ii) as would a prudent person;

(iii) to the best of his ability and skill; and

(b) observe the utmost good faith.

(2) Subject to this Ordinance, a trustee shall carry out and administer the trust in accordance with its terms.

(3) A trustee shall, subject to the terms of the trust, preserve and enhance so far as is reasonable the value of the trust property.

(4) Except—

(a) with the approval of the Court; or

(b) as permitted by this Ordinance or expressly provided by the terms of the trust,

a trustee shall not—

(i) directly or indirectly profit from his trusteeship; or

(ii) cause or permit any other person to profit directly or indirectly from such trusteeship; or

(iii) on his own account enter into any transaction with the trustees or relating to the trust property which may result in such profit.

(5) A trustee shall keep accurate accounts and records of his trusteeship.

(6) A trustee shall keep trust property separate from his own property and separately identifiable from any other property of which he is trustee.

Duty of co-trustees to act together

21. (1) Subject to the terms of the trust, where there is more than one trustee all the trustees shall join in performing the trust.

(2) Subject to subsection (3), where there is more than one trustee no power or discretion given to the trustees shall be exercised unless all the trustees agree on its exercise.

(3) The terms of a trust may empower trustees to act by a majority but a trustee who dissents from a decision of the majority of the trustees may require his dissent to be recorded in writing.

Impartiality of trustee

22. Subject to the terms of the trust, where there is more than one beneficiary, or more than one charitable purpose, or at least one beneficiary and at least one charitable purpose, a trustee shall act fairly as between one and the other.

Powers of trustee

23. (1) Subject to the terms of the trust and subject to his duties under this Ordinance, a trustee shall in relation to the trust property have all the same powers as a natural person acting as the beneficial owner of such property.

(2) A trustee shall exercise his powers only in the interests of the beneficiaries and in accordance with the terms of the trust.

(3) The terms of a trust may require a trustee to obtain the consent of some other person before exercising a power or discretion.

(4) Subject to the terms of the trust, a person whose consent is required as provided in subsection (3) shall—

(a) not be deemed to be a trustee by reason only of such requirement or of the giving or withholding of such consent or of any act incidental thereto;

(b) be entitled to remuneration and reimbursement of expenses in respect of services rendered in connection with the giving or withholding of consent or of any act incidental thereto.

24. (1) A trustee shall not delegate his powers unless permitted to do so by this Ordinance or by the terms of the trust.

Delegation by trustee

(2) Except where the terms of the trust specifically provide to the contrary, a trustee, whether or not there is any necessity—

(a) may delegate management of trust property to and employ investment managers whom the trustee reasonably considers competent and qualified to manage the investment of trust property; and

(b) may employ professional or skilled persons to act in relation to any of the affairs of the trust or to hold any of the trust property.

(3) A trustee shall not be liable for any loss to the trust arising from a delegation or appointment under subsection (2) who, in good faith and without neglect, makes such delegation or appointment or permits the continuation thereof.

(4) A trustee may authorise a person referred to in subsection (2) to retain any commission or other payment usually payable in relation to any transaction.

(5) Where a trustee enters into an agreement for the employment of an investment manager under subsection (2) (a) he may agree on the same terms as are customarily found in an agreement between the investment manager and beneficial (as opposed to fiduciary) owners of property and he shall not be liable for breach of trust by virtue of agreeing to such terms except that he shall not agree to any term excluding or limiting the liability of the investment manager for negligent performance of duties unless he considers that in all the circumstances a prudent man of business would accept such a term.

25. (1) Unless authorised by—

(a) the terms of the trust; or

Remuneration and expenses of trustee

(b) the consent in writing of all of the beneficiaries; or

(c) any order of the Court,

a trustee shall not be entitled to remuneration for his services.

(2) A trustee may reimburse himself or pay out of the trust all expenditure properly incurred by him in connection with the trust.

Power to appropriate

26. Subject to this Ordinance and to the terms of the trust, a trustee may, without the consent of any beneficiary, appropriate trust property in or towards satisfaction of the interest of a beneficiary in such manner and in accordance with such valuation as he thinks fit.

Corporate trustee acting by resolution

27. A corporate trustee may—

(a) act in connection with a trust by a resolution of such corporate trustee or of its board of directors or other governing body; or

(b) by such a resolution appoint one or more of its officers or employees to act on its behalf in connection with the trust.

Trustee may refuse to make disclosure

28. Subject to the terms of the trust and subject to any order of the Court, a trustee shall not be required to disclose to any person, any document which—

(a) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or

(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reasons shall or might have been based; or

(c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or

(d) relates to or forms part of the accounts of the trust,

unless, in a case to which paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust.

29. (1) A trustee who commits or concurs in a breach of trust shall be liable for—
- (a) the loss or depreciation in value of the trust property resulting from such breach; and
  - (b) the profit, if any, which would have accrued to the trust property if there had been no such breach.
- (2) Where there are two or more breaches of trust, a trustee shall not set off a gain from one breach of trust against a loss resulting from another breach of trust, unless they arise in the same transaction or result from the same unauthorised policy.
- (3) A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person.
- (4) A trustee shall not be liable for a breach of trust committed by a co-trustee unless—
- (a) he becomes aware or ought to have become aware of the commission of such breach or of the intention of his co-trustee to commit a breach of trust; and
  - (b) he actively conceals such breach or such intention or fails within a reasonable time to take proper steps to protect or restore the trust property or prevent such breach.
- (5) A beneficiary may—
- (a) relieve a trustee of liability to him for a breach of trust; and
  - (b) indemnify a trustee against liability to him for a breach of trust.
- (6) Subsection (5) shall not apply unless the beneficiary—
- (a) has legal capacity;
  - (b) has full knowledge of all material facts; and
  - (c) is not improperly induced by the trustee to take action under subsection (5).
- (7) Where two or more trustees are liable in respect of a breach of trust, they shall be liable jointly and severally.
- (8) A trustee who becomes aware of a breach of trust, to which subsection (3) relates shall take all reasonable steps to have such breach remedied.

(9) Subject to the terms of the trust, a trustee shall not be liable—

(a) for the default of a co-trustee unless—

(i) he concurs in the default of that trustee; or

(ii) he fails to take reasonable care to prevent it; or

(b) for any loss to the trust property unless such loss is due to—

(i) his wilful default, act or concurrence; or

(ii) his neglect or failure to exercise reasonable care to prevent such loss.

(10) A term of a trust shall be invalid if it purports to relieve a trustee from liability arising from his own fraud, wilful misconduct or negligence.

Trustee acting in respect of more than one trust

30. (1) A trustee acting for the purposes of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if he has obtained notice of it by reason of his acting or having acted for the purposes of another trust.

(2) A trustee of a trust shall disclose to his co-trustee any interest which he has as trustee of another trust, if any transaction in relation to the first mentioned trust is to be entered into with the trustee of such other trust.

Dealing by trustee with third party

31. (1) Subject to subsection (2), and without prejudice to the liability of a trustee for any breach of trust, where in any transaction or matter affecting a trust a trustee informs a third party that he is acting as trustee, a claim by such third party in relation thereto shall extend only to the trust property.

(2) Where the circumstances set out in subsection (1) exist, and the transaction or matter involved a breach of trust, and the third party knew that it involved a breach of trust, the third party shall have no claim against the trust property.

(3) Where in any such transaction or matter a trustee fails to inform a third party that he is acting as trustee—

(a) he shall be personally liable to such third party in respect thereof; and

(b) he shall have a right of recourse to the trust property by way of indemnity against such personal liability unless he acted in breach of trust.

(4) In this section "third party" means any person not being a settlor, trustee or beneficiary of the trust.

32. (1) Subject to subsection (2), where a person (in this section referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust he shall be deemed to be a trustee of that profit, gain, or advantage and of any property which represents it or is obtained by application of it.

Constructive trustee

(2) Subsection (1) shall not apply to a *bona fide* purchaser of property for value and without notice of a breach of trust or to a person who derives title from such a purchaser unless that person has, at the time of deriving title, notice of a breach of trust.

(3) A person who is or becomes a constructive trustee shall deliver up the property of which he is a constructive trustee to the person properly entitled to it.

(4) This section shall not be construed as excluding any other circumstance under which a person may be or become a constructive trustee.

33. (1) When a trustee resigns, retires or is removed, he shall duly surrender trust property in his possession or under his control.

Position of outgoing trustee

(2) A trustee who resigns, retires or is removed and has complied with subsection (1) shall be released from liability to any beneficiary, trustee or person interested under the trust for any act or omission in relation to the trust property or his duty as a trustee except liability—

(a) arising from any breach of trust to which such trustee (or in the case of a corporate trustee any of its officers or employees) was a party or to which he was privy; or

(b) in respect of actions to recover from such trustee (or, in the case of a corporate trustee, any of its officers or employees) trust property or the proceeds of trust property in the possession of such trustee, officer or employees.

(3) Any provision in the terms of a trust purporting to indemnify a trustee to an extent greater than is provided by this section shall be invalid.

34. (1) The terms of a trust may make the interest of a beneficiary liable to termination.

Protective trusts

(2) Without prejudice to the generality of subsection (1), the terms of a trust may make the interest of a beneficiary in the income or capital of the trust property subject to—

(a) a restriction on alienation or disposal; or

(b) diminution or termination in the event of the beneficiary becoming insolvent or any of his property becoming liable to sequestration for the benefit of his creditors.

(3) A trust under which the interest of a beneficiary is subject to restriction, diminution or termination under subsection (2) may be referred to as a protective trust.

Class interests

35. (1) Subject to the terms of a trust, the following rules shall apply where a trust or an interest under a trust is in favour of a class of persons—

Rule 1. A class closes when it is no longer possible for any other person to become a member of the class.

Rule 2. A woman who is over the age of fifty-five years shall be deemed to be no longer capable of bearing a child.

Rule 3. Where any class interest relates to income and for any period there is no member of the class in existence the income shall be accumulated and shall be retained until there is a member of the class in existence or the class closes.

(2) In this section "class interest" means a trust or an interest under a trust which is in favour of a class of persons.

Power to provide for variation of terms of trust

36. (1) The terms of a trust may be varied in any manner provided by its terms.

(2) This section is in addition to section 47 (which provides for the variation of the terms of a Turks and Caicos Trust by the Court).

Power of accumulation and advancement

37. (1) The terms of a trust may direct or authorise the accumulation for any period of all or part of the income of the trust.

(2) Subject to subsection (3), income of the trust which is not accumulated under subsection (1) shall be distributed.

(3) Subject to the terms of the trust and subject to any prior interests or charges affecting the trust property, where a

beneficiary is a minor and whether or not his interest is vested or contingent the trustee may—

- (a) accumulate the income attributable to the interest of such beneficiary;
- (b) apply such income or part of it to or for the maintenance, education or other benefit of such beneficiary;
- (c) advance or appropriate to or for the benefit of any such beneficiary all or part of the capital to which his share of income is attributable.

(4) The receipt of a parent or the lawful guardian of a beneficiary who is a minor shall be a sufficient discharge to the trustee for a payment made under subsection (3).

(5) Subject to the terms of the trust and subject to any prior interests or charges affecting the trust property, the trustee may advance or apply for the benefit of a beneficiary part of the trust property prior to the date of the happening of the event upon the happening of which the beneficiary becomes entitled absolutely thereto.

(6) Any part of the trust property advanced or applied under subsection (5) shall be brought into account in determining from time to time the share of the beneficiary in the trust property.

(7) No part of the trust property advanced or applied under subsection (5) shall exceed the presumptive, contingent or vested share of the beneficiary in the trust property.

38. The terms of a trust may confer on the trustee or any other person power to appoint or assign all or any part of the trust property or any interest in the trust property to, or to trustees for the benefit of, any person, whether or not such person was a beneficiary of the trust immediately prior to such appointment or assignment.

Power of  
appointment

39. (1) A trust and any exercise of a power under a trust may be expressed to be—

Power of  
revocation

- (a) revocable whether wholly or partly; or
- (b) capable of variation.

(2) No such revocation or variation shall prejudice anything lawfully done by a trustee in relation to a trust before he received notice of such revocation or variation.

(3) Subject to the terms of the trust, if it is revoked the trustee shall hold the trust property in trust for the settlor absolutely.

(4) Where a trust is partly revoked subsection (3) shall apply to the property which is the subject of such revocation.

(5) In subsection (3) "settlor" means the particular person who provided the property which is the subject of revocation.

Power to provide for change of applicable law

40. The terms of a trust may provide for the law referred to in section 4(1) or the law governing a severable aspect thereof to be changed from the law of the Islands to the law of another jurisdiction but such provision shall not be valid unless the terms also provide that—

(a) the change cannot invalidate any other terms of the trust, any purpose of the trust, and any interest of a beneficiary; and

(b) the change is consistent with the intention of the settlor.

Failure or lapse of interest

41. (1) Subject to the terms of a trust and subject to any order of the Court, where—

(a) an interest lapses; or

(b) a trust terminates; or

(c) there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust; or

(d) property is vested in a person which is not for his sole benefit and the trusts upon which he is to hold the property are not declared or communicated to him;

the interest or property affected by such lapse, termination, lack of beneficiary or lack of declaration or communication of trusts shall be held by the trustee or the person referred to in paragraph (d), as the case may be, in trust for the settlor absolutely or if he is dead for his personal representative.

(2) In subsection (1) "settlor" means the particular person who provided the interest or property affected as mentioned in subsection (1).

Application cy-pres of charitable gift

42. (1) Subject to subsection (2) the circumstances in which the original purpose of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres shall be as follows—

(a) where the original purposes, in whole or in part—

(i) have been as far as may be fulfilled; or

- (ii) cannot be carried out, or cannot be carried out according to the directions given and to the spirit of the gift; or
- (b) where the original purposes provide for part only of the property available by virtue of the gift; or
- (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or
- (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practicable in administering the gift; or
- (e) where the original purposes, in whole or in part, have, since they were laid down—
  - (i) been adequately provided for by other means; or
  - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or
  - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.

(2) References in subsection (1) to the original purposes of gift shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.

(3) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case requires the property or some part of it to be applied *cy-pres*, to secure its effective use for charity by taking steps to enable it to be so applied.

43. (1) On the termination of a trust the trust property shall be distributed by the trustee within a reasonable time in accordance with the terms of the trust to the persons entitled thereto.

Termination of a  
Turks and Caicos  
Trust

(2) Notwithstanding subsection (1), the trustee may retain sufficient assets to make reasonable provision for liabilities whether existing, future, contingent or otherwise.

(3) Without prejudice to the powers of the Court and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained and none are minors or persons other than minors who under the law of the Islands or of their domicile do not have legal capacity, they may require the trustee to terminate the trust and distribute the trust property among them.

Appointment of resident trustee

44. (1) Where there is no trustee resident in the Islands a beneficiary may apply to the Court for the appointment of a person nominated for the purpose in the application, who shall be a person who resides in the Islands, as an additional trustee.

(2) The Court—

- (a) upon being satisfied that the notice of the application by the beneficiary has been served upon the trustees;
- (b) having heard any representations made by the trustees or any other beneficiary; and
- (c) having ascertained that the person nominated for the purpose in the application is willing to act;

may make an order appointing such person as an additional trustee.

Power to relieve trustee from personal liability

45. (1) The Court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the Court that—

- (a) he is or may be personally liable for the breach of trust; and
- (b) he has acted honestly and reasonably; and
- (c) he ought fairly to be excused—
  - (i) for the breach of trust; or
  - (ii) for omitting to obtain the directions of the Court in the matter in which such breach arose.

(2) Subsection (1) shall apply whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Ordinance.

Power to make beneficiary indemnify for breach of trust

46. (1) Where a trustee commits a breach of trust at the instigation or at the request or with the consent of a beneficiary, the Court may by order impound all or part of the interest of the

beneficiary by way of indemnity to the trustee or any person claiming through him.

(2) Subsection (1) applies whether or not such beneficiary is a minor or a person other than a minor, who under the law of the Islands or under the law of his domicile does not have legal capacity.

47. (1) Subject to subsection (2), the Court may, if it thinks fit, by order approve on behalf of—

Variation of  
Turks and Caicos  
Trust by Court  
and approval of  
particular  
transactions

- (a) a minor or a person other than a minor who under the law of the Islands or his domicile does not have legal capacity, having, directly or indirectly, an interest, whether vested or contingent, under the trust; or
- (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons; or
- (c) any person unborn; or
- (d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

any arrangement, by whomsoever proposed and whether or not there is or may be any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.

(2) The Court shall not approve an arrangement on behalf of any person coming within paragraphs (a), (b) or (c) of subsection (1) unless the carrying out thereof appears to be for the benefit of that person.

(3) Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the Court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law, the Court may confer upon the trustee either generally or in any particular circumstances a power for that purpose on such terms and subject to such provisions and conditions, if any, as the Court thinks fit and may direct in what manner and from what property

any money authorised to be expended and the costs of any transaction are to be paid or borne.

(4) This section applies to a trust whose law governing administration is the law of the Islands.

PART III

PROVISIONS APPLICABLE TO A FOREIGN TRUST

Application of Part III

Enforceability of a foreign trust

48. This Part applies only to a foreign trust.

49. (1) Subject to subsection (2), a foreign trust or a severable aspect thereof shall be governed by the foreign law applicable to the validity, construction and administration thereof.

(2) A foreign trust shall be enforceable in the Islands except to the extent that it purports to do anything the doing of which is contrary to the law of the Islands or to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of the Islands.

PART IV

PROVISIONS OF GENERAL APPLICATION

Application of Part IV

Vesting of trust property in new or continuing trustees

50. This Part applies to a Turks and Caicos Trust and, to the extent that the context admits, applies to a foreign trust.

51. (1) Where a new trustee is appointed by instrument in writing, then—

(a) if the instrument contains a declaration by the appointor to the effect that any property subject to the trust shall vest in the persons who, by virtue of the instrument, are to be the trustees, the instrument shall operate without conveyance, transfer or assignment, to vest in those persons, as joint tenants, and for the purposes of the trust, the property to which the declaration relates; and

(b) if the instrument does not contain such a declaration, it shall subject to any express provision to the contrary contained in it, operate as if it contained such a declaration by the appointor extending to all

the property with respect to which a declaration could have been made.

(2) Where by a written instrument an outgoing trustee is discharged without a new trustee being appointed, then the provisions of subsection (1) shall apply, *mutatis mutandis*, to the vesting of the property concerned in the continuing trustees as joint tenants for the purposes of the trust.

(3) This section does not apply to the transfer or purported transfer of title to land held under a lease or subject to a charge if such lease or charge contains a provision to the effect that assignment or transfer is prohibited, or is subject to a consent which has not been obtained at the date of execution of the written instrument referred to in subsections (1) and (2).

(4) This section does not affect any requirement imposed by law or by a legally binding obligation on the appointor, or on the person in whom property is vested by reason of this section or on any other person, to perform any act additional to the transfer of title represented by the vesting created by this section, including, but not limited to, acts of registration and the giving of notice.

(5) In this section, "lease" includes an underlease and an agreement for lease or underlease.

52. (1) A trustee may apply to the Court for directions concerning the manner in which he may or should act in connection with any matter concerning the trust and the Court may make such order, if any, as it thinks fit.

Application to,  
and certain  
powers of, the  
Court

(2) The Court may, if it thinks fit—

(a) make an order concerning—

(i) the execution or the administration of any trust;  
or

(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into Court or otherwise; or

(iii) a beneficiary or any person having a connection with the trust;

(b) make a declaration as to the validity or the enforceability of any aspect of a trust;

(c) rescind or vary any order or declaration made under this Ordinance, or make any new or further order or declaration.

(3) An application to the Court for an order or declaration under subsection (2) may be made by the Attorney General or by the trustee or a beneficiary or, with leave of the Court, by any other person.

(4) Where the Court makes an order for the appointment of a trustee, it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.

(5) Subject to any order of the Court, a trustee appointed under this section shall have the same powers, discretions and duties and may act as if he had been originally appointed as a trustee.

Execution of  
instruments by  
order of the  
Court

53. Where any person neglects or refuses to comply with an order of the Court directing him to execute or make any conveyance, assignment or other document or instrument or indorsement, for giving effect to any order of the Court under this Ordinance, the Court may, on such terms and conditions, if any, as may be just, order that the conveyance, assignment, or other document or instrument or indorsement, shall be executed, made or done by such person as the Court nominates for the purpose, at the cost of the person in default, or otherwise, as the Court directs, and a conveyance, assignment, document, instrument or indorsement so executed, made or done shall operate and be for all purposes valid as if it had been executed, made or done by the person originally directed to execute, make or do it.

Payment of costs

54. The Court may order the costs and expenses of and incidental to an application to the Court under this Ordinance to be raised and paid out of the trust property or to be borne and paid in such manner and by such persons as it thinks fit.

Nature of  
trustee's estate,  
following trust  
property and  
insolvency of  
trustee

55. (1) Subject to subsection (2)—

(a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and

(b) such property shall not be deemed to form part of his assets.

(2) Where a trustee is also a beneficiary of the same trust, subsection (1) shall not apply to his interest in the trust property as a beneficiary.

(3) Without prejudice to the liability of a trustee for breach of trust, trust property which has been alienated or converted in

breach of trust or the property into which it has been converted may be followed and recovered unless—

- (a) it is not identifiable; or
- (b) it is in the possession of a person to whom section 32(2) applies.

(4) Where a trustee becomes insolvent or upon distraint, execution or any similar process of law being made, taken or used against any of his property, his creditors shall have no right or claim against the trust property except to the extent that the trustee himself has a claim against the trust or has a beneficial interest in the trust.

56. (1) Subject to subsection (3) a *bona fide* purchaser for value—

- (a) may deal with a trustee in relation to trust property as if the trustee were the beneficial owner of the trust property; and
- (b) shall not be affected by the trusts on which such property is held.

Protection from  
personal liability  
of persons  
dealing with  
trustees

(2) Subject to subsection (3), no person paying or advancing money to a trustee shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the propriety of the transaction or the application of the money.

(3) A person who deals with a trustee shall not be personally liable in respect of any breach of trust on the part of the trustee unless, in respect of that dealing, that person—

- (a) has actual knowledge of the breach of trust; or
- (b) wilfully disregards circumstances which would cause an honest and reasonable person to conclude, on a balance of probabilities, that a breach of trust exists; or
- (c) would have actual knowledge of the breach of trust if he made the enquiries which would be made in the circumstances by an honest and reasonable man.

(4) For the purposes of subsection (3), it shall be presumed that an honest and reasonable man would, if the circumstances reasonably so required, seek professional advice including where appropriate legal advice.

57. (1) This section applies to a corporate trustee which, being constituted or operated for the purpose of acting as a trustee

Liability of  
directors of a  
corporate trustee

(whether or not it is also constituted or operated for other purposes)—

- (a) is a trustee of a Turks and Caicos Trust;
- (b) is resident in the Islands; or
- (c) is carrying on business in the Islands or from an address in the Islands.

(2) Where a breach of trust has been committed by a corporate trustee to which this section applies, every person who at the time of the commission of the breach of trust was a director of such corporate trustee shall be deemed to be a guarantor of such corporate trustee in respect of any pecuniary damages and costs awarded by the Court against such corporate trustee in respect of such breach:

Provided always that the Court may relieve a director either wholly or partly from personal liability as a guarantor of such corporate trustee where it appears to the Court that he ought fairly to be excused from such liability, because—

- (a) he has proved that he was not aware of such breach of trust being contemplated or committed, and in being not so aware, was not behaving in a reckless or negligent manner; or
- (b) he expressly objected, and exercised such rights as he had by way of voting power or otherwise as a shareholder, director or other officer of the company so as to try to prevent the commission of such breach of trust.

(3) For the purposes of subsection (2)—

- (a) "director" includes a person occupying the position of director by whatever name called, a person in accordance with whose directions or instructions the directors of the corporation or of a corporation of which it is a subsidiary (or any of them) are accustomed to act, and a person who either alone or with or through an associate is entitled to exercise or control the exercise of one third or more of the voting power at a general meeting of the corporation or of a corporation of which it is a subsidiary;
- (b) "subsidiary" means a corporation in respect of which another corporation is entitled to exercise or can control the exercise of one third or more of the voting power;

(c) where used in this subsection "associate" in relation to a person means any relative, partner or other person who is, has been or may be influenced by that person.

58. (1) No period of limitation or prescription shall apply to an action brought against a trustee—

Limitation of  
actions or  
prescription

(a) in respect of any fraud to which the trustee was a party or to which he was privy; or

(b) to recover from the trustee trust property—

(i) in his possession; or

(ii) under his control; or

(iii) previously received by him and converted to his use.

(2) Save as provided in subsection (1), the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary is—

(a) three years from the delivery of the final accounts of the trust to the beneficiary; or

(b) three years from the date on which the beneficiary first has knowledge of the occurrence of a breach of trust,

whichever period shall first begin to run.

(3) Where the beneficiary is a minor the period referred to in subsection (2) shall not begin to run before the day on which the beneficiary ceases to be a minor.

## PART V

### SUPPLEMENTAL

59. Subject to section 60, this Ordinance shall apply to trusts constituted or created either before or after the commencement of this Ordinance.

Application of  
Ordinance

60. (1) Nothing in this Ordinance shall—

(a) abridge or affect the powers, responsibilities or duties under any provision of law of the Governor or of any special or general attorney;

Saving  
provisions

(b) affect the legality or validity of anything done before the commencement of this Ordinance in relation to a trust existing before the commencement of this Ordinance; or

(c) affect the legality of a trust arising from a document or disposition executed or taking effect before the commencement of this Ordinance.

(2) Nothing in this Ordinance shall derogate from the powers of the Court which exist independently of this Ordinance—

(a) to set aside or reduce any transfer or other disposition of property; or

(b) to vary any trust; or

(c) to reduce or vary any testamentary or other disposition; or

(d) to make an order relating to matrimonial proceedings.

(3) Nothing in this Ordinance shall affect a personal representative where he is acting as such.

Assets protection trusts

61. (1) If by virtue of a disposition made by or on behalf of a settlor his property becomes trust property which is the subject of a Turks and Caicos Trust, and—

(a) the settlor is an individual;

(b) the settlor is not insolvent when the disposition is made; and

(c) the settlor does not become insolvent by reason of the disposition,

that disposition shall not be voidable at the instance of any creditor of the settlor.

(2) In any proceedings in which the provisions of this section are to be applied, the burden of proof of the fact that a settlor is or has been insolvent shall be upon the person asserting that fact.

Rules of Court

62. The Court may make rules of Court for the purposes of proceedings under this Ordinance.

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*Trusts*

LAW OF TURKS &  
CAICOS ISLANDS

Revision Date 31 October 1997

TURKS AND CAICOS ISLANDS

THE COMPANY MANAGEMENT (LICENSING)  
ORDINANCE 1999

*(Ordinance 1 of 1999)*

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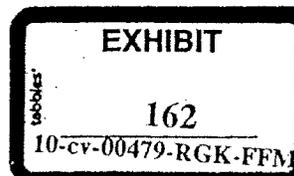
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- 4. Restriction on carrying on the business of company management and company agent
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**TURKS AND CAICOS ISLANDS**

**THE COMPANY MANAGEMENT (LICENSING)  
ORDINANCE 1999**  
*(Ordinance 1 of 1999)*

*Assent..... February 26, 1999*

*Publication in Gazette ..... March 12, 1999*

*Commencement.....September 9, 2000*

**AN ORDINANCE TO PROVIDE FOR THE LICENSING AND  
REGULATION OF THE BUSINESS OF COMPANY MANAGEMENT AND  
COMPANY AGENT; AND FOR CONNECTED PURPOSES.**

**ENACTED** by the Legislature of the Turks and Caicos Islands.

**PRELIMINARY**

Citation and  
commencement

1. This Ordinance may be cited as the Company Management (Licensing) Ordinance 1999, and shall come into operation upon such day as the Governor may appoint by notice published in the *Gazette*.

Interpretation

2. In this Ordinance –

“accountant” means a person who –

(a) is qualified as an accountant by examination of one of the institutes of chartered accountants or certified accountants in England and Wales, Ireland or Scotland, the Canadian Institute of Chartered Accountants or the American Institute of Certified Public Accountants, and is a current member of good standing of one of those institutes; or

(b) possesses such other qualifications in accountancy recognised by the Permanent Secretary, Finance for the purposes of this Ordinance;

"auditor" means an accountant or a firm of accountants holding a currently valid certificate under the hand of the Permanent Secretary, Finance certifying that in his opinion such person is of good standing and qualified to undertake the audit of a company;

"business of company agent" means the provision in or from within the Islands for profit or reward, of the following services for companies –

(a) the incorporation or registration of companies under the Companies Ordinance;

(b) the provision of agents and officers (including company secretary or resident representative), other than agents or officers having direction or control over the assets of a company, for companies wherever incorporated or registered; and

(c) the provision of registered office services for companies wherever incorporated or registered;

"business of company management" means the provision in or from within the Islands for profit or reward, of -

(a) directors;

(b) persons having direction or control over the assets; and

(c) shareholders,

of companies wherever incorporated or registered and includes the business of company agent;

"company agent" means a person who engages in the business of company agent;

"company manager" means a person who engages in the business of company management;

"Code of Conduct" means the Code of Conduct set out in Schedule 2 (as may be amended from time to time);

"Islands" means the Turks and Caicos Islands;

"licence" means a licence granted under section 6;

"licensee" means a person holding a company management licence or, as the case may be, a company agent's licence granted pursuant to this Ordinance; and when used in relation to the word "licensee" the words "it", "its" and "itself" shall include "him", "his" and "himself" respectively;

"Superintendent" means the Superintendent of Company Management.

3. For the purposes of an application for a licence under this Ordinance, a person has a controlling interest in a company in the following circumstances –

Controlling interest defined

- (a) a company is controlled by a person if any shares in the company carrying voting rights sufficient to elect a majority of the directors of the company are, except by way of security only, held directly or indirectly, by or on behalf of that person;
- (b) a company is the holding company of another company if that other company is its subsidiary;
- (c) a company is a subsidiary of another company if it is controlled by that other company.

LICENSING OF COMPANY MANAGERS AND COMPANY AGENTS

4. No person shall carry on the business of company management or the business of company agent in or from within the Islands without being the holder of a licence issued under this Ordinance.

Restriction on carrying on the business of company management and company agent

5. An application for a licence shall be made to the Permanent Secretary, Finance in the form set out in Schedule 1, and shall be accompanied with –

Application for a licence Schedule 1

- (a) the prescribed fee ;
- (b) a list of the names and addresses of the persons who it is proposed would act as directors, secretary or resident manager of the applicant;
- (c) particulars of the qualifications and experience of the applicant;

- (d) the documents in support of the application; and
- (e) such other documents and such further particulars as the Permanent Secretary, Finance may require to be furnished to him in any case for the purpose of determining the application.

Permanent Secretary Finance may grant licence

6. The Permanent Secretary, Finance upon being satisfied that an applicant –

- (a) is in all respects, by virtue of integrity and solvency a fit and proper person to be issued with a licence ;
- (b) has adequate knowledge and practical experience in the management and administration of companies; or is a person qualified by his knowledge of company law and the management and administration of companies;
- (c) is capable of complying with the provisions of this Ordinance and the terms and conditions of any licence granted hereunder;
- (d) has paid the prescribed licence fee;
- (e) has a manager, being –
  - (i) an individual who is ordinarily resident in the Islands; and who has adequate knowledge and practical experience in the management and administration of companies or who is qualified by his knowledge of company law and the management and administration of companies ; or
  - (ii) a company which has as a manager an individual as described in subparagraph (i); and
- (f) if a company, has articles of association which do not authorize the issue of any shares in the company as bearer shares,

may grant the applicant a licence in the prescribed form to carry on the business of company management or as the case may be, the business of company agent, and shall cause a notice to that effect

to be published in the Gazette within thirty days of the grant of the licence.

7. (1) A person applying for a licence under section 5 shall pay to the Permanent Secretary, Finance such fees as may be prescribed; and different fees may be prescribed for different circumstances; Fees

(2) In the event of the application being refused the Permanent Secretary, Finance shall refund the fees to that person less an administrative charge of \$200.

(3) A licensee shall, not later than 31<sup>st</sup> March in each year following the year in which it was issued with a licence, pay to the Permanent Secretary, Finance such fees as may be prescribed.

8. (1) Subject to the provisions of this section, the Permanent Secretary, Finance may grant a licence upon such conditions as he thinks fit and may vary such conditions at any time during the currency of the licence. Conditions of a licence

(2) Subject to subsection (3), it shall be a condition of every licence that –

(a) the licensee shall comply with paragraphs 1, 2, 4(2) and 6(a), (b), (c), (e) and (f) of the code of conduct set out in Schedule 2; Schedule 2

(b) the licensee shall notify the Permanent Secretary, Finance within fourteen days of any change or proposed change in the information contained in, or supplied in connection with the application for a licence;

(c) the licensee shall maintain sufficient capital to meet liabilities as and when they fall due;

(d) the licensee shall send to the Permanent Secretary, Finance, not later than 31<sup>st</sup> March in each year –

(i) a certificate signed by a director or partner of or the sole proprietor where he is, the licensee or such other person as the Permanent Secretary, Finance may approve, stating that to the best of his knowledge and belief the licensee has conducted its business in compliance with the Ordinance and any conditions attached to its licence; and

- (ii) a list of all companies for which it has acted in the year ending 31<sup>st</sup> December of the immediately preceding year specifying the type of company and indicating any additions to or deletions from, the immediately previous list.
  - (e) the licensee shall pay the prescribed annual licensing fee;
  - (f) the licensee shall cause to be kept such books of accounts as are necessary to give a true and fair view of the licensee's affairs with respect to –
    - (i) all sums of money received and expended by the licensee and the manner in respect of which the receipt and expenditure take place;
    - (ii) all sales and purchases by the licensee; and
    - (iii) the assets and liabilities of the licensee; and
  - (g) the Permanent Secretary, Finance may at any time if he considers it desirable to do so, make an order requiring the licensee –
    - (i) to submit to him its accounts within such time as he may specify; and
    - (ii) to have its accounts audited by an auditor and sent to him within such time as he may specify.
- (3) It shall be a condition of every company manager's licence that the licensee shall –
- (a) comply with paragraphs 3, 4(1), 5, 6 (d) and 7 of the code of conduct set out in Schedule 2;
  - (b) effect a policy of insurance with a company approved by the Permanent Secretary, Finance against any or all of the following risks -
    - (i) losses arising out of claims of negligence or breach of duty by the licensee or by an employee of the licensee;
    - (ii) dishonesty of the licensee or employees of the licensee;
    - (iii) loss of documents,

in such amount and of such nature as the Permanent Secretary, Finance may determine to be fit and proper, having due regard to the nature and type of business carried on by the licensee; and

(c) notify the Permanent Secretary, Finance within fourteen days of –

(i) any change or proposed change to;

(ii) withdrawal or cancellation of; or

(iii) failure to renew,

an insurance policy effected under paragraph (b).

9. A licence shall come into force on the day on which it is issued and, unless revoked under the provisions of this Ordinance, shall remain in force –

Licence in force

(a) if issued on or before 31<sup>st</sup> March in any year, until the expiration of 31<sup>st</sup> March in the immediately following year; or

(b) if issued on or after 1<sup>st</sup> April in any year, until the expiration of 31<sup>st</sup> March in the immediately following year.

10. (1) An application for renewal of a licence may be made to the Permanent Secretary, Finance before the expiry of a licence and he may renew the licence either upon the same or different conditions.

Application for renewal of licence

(2) An application for renewal of a licence under subsection (1) shall be made in such form as may be prescribed or, until a form is prescribed, in such form as the Permanent Secretary, Finance may require and shall be accompanied with –

(a) the documents in support of the application; and

(b) such other documents and such particulars as the Permanent Secretary, Finance may require to be furnished to him for the purpose of determining the application.

(3) If an application for renewal under subsection (1) is received by the Permanent Secretary, Finance before the expiry of the licence, the licensee shall be deemed to be licensed until the

decision on renewal takes effect notwithstanding that that decision may take effect after the expiry of the existing licence.

(4) Without prejudice to the generality of the discretion of the Permanent Secretary, Finance under subsection (1), the Permanent Secretary, Finance shall not renew a licence under this section unless he is satisfied that the licensee making the application has during the continuance of the existing licence, fulfilled and is, at the time the application is made, continuing to fulfill the requirements of this Ordinance.

Licence to be displayed

11. A licence shall be prominently displayed on the premises where the business of company management or company agent is being carried on.

Carrying on business detrimental to the public interest

12. (1) Where the Permanent Secretary, Finance is of the opinion that a licensee is-

- (a) carrying on the business of company management or company agent in a manner detrimental to the public interest, or to the interest of the companies for which it is providing services or to any of them;
- (b) acting in contravention of this Ordinance; or
- (c) acting in breach of any term or condition of its licence,

he may serve on the licensee a notice in writing requiring it to take such action as he considers appropriate within a specified period of time (being not less than fourteen days from the date of service of notice) to rectify the matter.

(2) Where the licensee fails to comply with a notice served under subsection (1), the Permanent Secretary, Finance may order an examination to be held by the Superintendent into the affairs of the licensee under section 18(3)(d), and shall inform it in writing of his decision.

(3) Where an examination has been ordered under the provisions of this section, the licensee shall not take on any new business until after the Permanent Secretary, Finance has made his decision on the report of the Superintendent.

13. (1) Subject to this section, the Permanent Secretary, Finance may revoke a licence -

Revocation of licence

- (a) if the licensee ceases to carry on the business in respect of which it has been issued with the licence;
- (b) if the licensee goes into liquidation, is wound up or dissolved, is made bankrupt or enters into an arrangement or a composition with its creditors;
- (c) if, having received a report from the Superintendent upon the licensee under section 18(3)(d), he is of the opinion that the licensee is no longer a fit and proper person to continue to be licensed under this Ordinance.

(2) If the Permanent Secretary, Finance proposes to revoke a licence, he shall before doing so, give the licensee notice in writing of his proposal and his reasons for it.

(3) A notice given under subsection (2) shall also state that within twenty-one days of service, the licensee may make representations in writing to the Permanent Secretary, Finance concerning the matter; and the Permanent Secretary, Finance shall not revoke the licence without considering any representations received within such period.

(4) If, after considering any representations made by the licensee, the Permanent Secretary, Finance nevertheless decides to revoke the licence, he shall-

- (a) serve on the licensee notice in writing of revocation of the licence and shall inform him of his right of appeal under section 16; and
- (b) cause to be published in the Gazette a notice of revocation of the licence.

(5) A licensee, on receipt of a notice of revocation under subsection (4) shall, not later than -

- (a) thirty days after service of notice of revocation; or
- (b) thirty days after the date of the lodging of an appeal against the decision of the Permanent Secretary, Finance,

whichever is later serve on the directors and beneficial owners of each of its client companies notice in the prescribed form.

(6) A licensee who fails to serve the notice required by subsection (5) is guilty of an offence and liable on summary conviction to a fine of \$1,000.00.

Transfer to another licensee.

14. (1) A client company in respect of which notice was served upon its directors and beneficial owners pursuant to section 13(5) shall, within thirty days of receipt of the notice, make arrangements satisfactory to the Permanent Secretary Finance for another licensee to assume the duties formally undertaken by the licensee whose licence has been revoked.

(2) The Permanent Secretary, Finance may where a company has not made the arrangements required by subsection (1), apply to the Supreme Court for directions and may with the approval of and subject to the Order of, the Court, take such action as appears necessary in the interest of the client company and its creditors.

Surrender of licence

15. (1) Subject to this section, a licensee may at any time surrender its licence to the Permanent Secretary, Finance.

(2) A licensee which intends to cease carrying on business shall, not less than thirty days before the cessation of the business, notify the Permanent Secretary, Finance in writing of its intention to do so and of the reasons for it.

(3) The licensee shall as soon as practicable but not later than seven days before the date of cessation of business, serve on the Permanent Secretary, Finance its proposals respecting the arrangements made -

(a) for the transfer of assets held or administered on behalf of companies managed by it, and of the repayment of deposits held by it;

(b) for the transfer of -

(i) the offices of directors, officers, agents and persons having direction or control over the assets;

(ii) shareholder services; and

(iii) the provision of registered office services presently provided by the licensee.