TC05677

Appeal number:TC/2012/10090 and TC/2012/10782

INCOME TAX – offset of trading losses against income – whether land was held as trading stock – whether declaration of trust was effective to transfer beneficial ownership of land to appellants – effect of s14 Stamp Act 1891 on admissibility of trust declarations - application of foreign laws – Recognition of Trusts Act 1987 - illegal return of capital - sham – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN SCHECHTER **Appellants**
LAWRENCE SCHECHTER

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at the Royal Courts of Justice on 29 September 2016

John Dewhurst of Chown Dewhurst LLP for the Appellants

John Corbett, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against closure notices issued by HM Revenue and Customs following an enquiry into self-assessment tax returns prepared by Stephen Schechter and his son Lawrence Schechter. The closure notices relate to the self-assessment tax returns for the tax year 2008/09.

2. In relation to Stephen Schechter, his self-assessment tax return showed total income before personal allowances and losses of £155,260.00. Against this were claimed losses of £123,567.00 and personal allowances of £6,035.00. His total taxable income was £25,658.00. After taking account of tax credits and tax withheld from income, Stephen Schechter claimed a tax refund of £47,521.43.

3. The effect of the closure notice of 30 March 2011 was to disallow the losses. His revised total taxable income was £149,225.00. After taking account of tax credits and tax withheld from income, Stephen Schechter was liable to pay £855.55 income tax.

4. In relation to Lawrence Schechter, his self-assessment tax return showed total income before personal allowances and losses of £201,441.00. Against this were claimed losses of £61,111.00 and personal allowances of £6,035.00. His total taxable income was £134,295.00. After taking account of tax credits and tax withheld from income, Lawrence Schechter claimed a tax refund of £9,037.62.

5. The effect of the closure notice of 4 November 2010 was to disallow the losses. His revised total taxable income was £195,406.00. After taking account of tax credits and tax withheld from income, Lawrence Schechter was liable to pay £15,406.78 income tax.

6. Both Stephen and Lawrence Schechter appealed against their closure notices. Since the factual circumstances and other issues arising in respect of their respective appeals are substantially the same, the Tribunal directed that the Appellants' appeals be heard together. The issue in the appeals is the ability of the Appellants to offset losses arising in respect of property transactions against other income.

7. Stephen Schechter is married to Sherry Schechter. Stephen, Sherry, Lawrence and Lawrence's brother (Scott) are the sole shareholders in Vinexsa International Limited ("Vinexsa"). They are also the directors of Vinexsa. As at 11 June 2003, Vinexsa had 1000 shares in issue, of which Stephen owned 245, Sherry owned 245, Lawrence owned 255, and Scott owned 255. In this decision, I refer to Stephen, Sherry, Lawrence and Scott as the "Vinexsa shareholders".

8. Vinexsa owns two flats in London at 12 Charles Street; it also owns all the issued shares in Sweet Revenge Limited ("Sweet Revenge"). Sweet Revenge owns a property in France at 20 Chemin de Bellevue.

9. It is the Appellants' case that as a result of a nominee agreement dated "as of" 11 June 2003 ("the Nominee Agreement") and a declaration of trust dated 11 June 2003 ("the Declaration of Trust"), Vinexsa and Sweet Revenge hold their respective

assets as nominees for the Vinexsa shareholders. They also assert that the French property and one of the London flats are held as trading stock. In consequence, the Appellants assert that trading losses arising in respect of those properties can be offset against other taxable income accruing to them.

10. In an appeal against closure notices, the Appellants have the burden of proving their case and showing that HMRC's decision is wrong.

Procedural matters

11. Neither party was legally represented. Lawrence and Stephen Schechter were represented by Mr Dewhurst (I do not know what professional qualifications, if any, Mr Dewhurst has). HMRC were represented by Mr Corbett, an officer of HMRC. Witness statements were provided by Stephen Schechter, Lawrence Schechter, Castino D Sands and Oliver Goldstein. Stephen Schechter gave oral evidence. None of Lawrence Schechter, Mr Sands or Mr Goldstein attended the hearing, and I deal with this in more detail below. In addition, bundles of documentary evidence were produced. Mr Corbett also produced a report on Sweet Revenge that summarised information available from the public file at Companies House, including summaries of the accounts of that company. None of the documentary evidence was challenged.

Case management hearing

12. At a case management hearing in January 2016, the Appellants applied pursuant to Rule 5(3)(e) of the Tribunal's Procedure Rules for certain matters to be determined as a preliminary issue. I refused that application. During the course of the application, it became apparent that as Vinexsa was incorporated in the Bahamas, and as Sweet Revenge owned a property in France, issues of Bahamian and French law could arise in relation to the appeals. I therefore gave directions permitting expert evidence to be adduced on matters of Bahamian and French law. I later supplemented these with further directions making it clear that paragraphs 1 to 3 (inclusive) of Part 35 of the Civil Procedure Rules and paragraphs 9 to 15 the Guidance for the Instruction of Experts in Civil Claims applied to the experts and their evidence (and extracts from the CPRs and the Guidance setting out these paragraphs were annexed to my directions for ease of reference). I also directed that the letters of instruction to the expert witnesses be exhibited to their witness statements, together with a list of all documents provided to them, I also expressly stated that paragraph 83 of the Guidance applied to the experts, which required their attendance at the hearing of the appeal.

Expert evidence

13. It also became apparent during the course of the case management hearing that the UK and French properties were treated as investments or fixed assets in the respective financial statements of Vinexsa and Sweet Revenge, notwithstanding that the Appellants' case was that these properties were beneficially owned by the Vinexsa shareholders and that they were held as trading stock. I stated to Mr Dewhurst (who represented the Appellants at the case management hearing as well as at the

substantive hearing) that this might be an issue that he would need to address at the substantive hearing of the appeals.

14. The Appellants instructed Castino D Sands of Lennox Patton to provide expert evidence in relation to Bahamian law and Oliver Goldstein of Reinhart Marville Torre to provide expert evidence in relation to French law. Both experts provided witness statements, which were served on HMRC and the Tribunal.

15. On 26 September, Mr Dewhurst e-mailed Mr Corbett about finalising the bundle of evidence. At the end of his email, he said, "I presume you do not require the presence of either of the experts at the hearing, but please confirm". Later that day Mr Corbett responded agreeing the content of the bundles. As regards the attendance of the experts, he confirmed that Mr Goldstein was not required to attend, but that unless the Appellants conceded issues relating to the validity of the nominee agreement, he did not consent to Mr Sands' non-attendance. Mr Dewhurst did not reply to this e-mail.

16. The Tribunal's directions required the attendance of both expert witnesses, and it was not within the power of the parties to agree otherwise without the consent of the Tribunal.

17. Neither expert attended the hearing, and neither party applied to the Tribunal to excuse the attendance of the experts. In addition, their witness statements did not fully comply with the Tribunal's directions – in particular, their witness statements did not exhibit their respective letters of instructions and Mr Goldstein's witness statement did not give details of the literature or other material upon which he relied.

18. During the course of the hearing it became increasingly clear that neither of the experts' witness statements addressed all the points of foreign law in issue in this appeal in sufficient detail (or at all). Mr Dewhurst applied to adjourn the hearing to a date to be agreed, in order to allow the experts to provide supplemental witness statements and to attend the adjourned hearing (or to give evidence by a conference telephone call). Mr Corbett objected to the adjournment, and I refused the application. Rule 2(1) of the Tribunal's Procedure Rules provides an overriding objective that the Tribunal deals with cases fairly and justly. Rule 2(2) specifies that dealing with a case fairly and justly includes avoiding delay. These appeals were filed many years ago. At the January 2016 case management hearing, I had drawn the attention of Mr Dewhurst to the points of foreign law that could be in issue in this appeal and reminded him that the onus of proof lay upon the Appellants to show that HMRC's closure notices were incorrect. The Appellants had plenty of time to arrange for expert evidence to address any issues of foreign law. The Tribunal's directions had made it clear that the experts were expected to attend the hearing, and the date of the hearing had been arranged well in advance taking account of the parties "dates to avoid". Mr Corbett had not consented to Mr Sands not attending. If the Appellants had applied in good time, I might well have consented to the experts providing their evidence by video link, but I was not prepared to adjourn the hearing at this late stage.

Inadequate submissions and citations

19. Quite apart from the underlying question of tax law, this appeal raises issues of company law, property law, trust law and conflicts of law. The representatives of the parties either made no submissions on these points, or the submissions were utterly inadequate to deal with the issues in the Appeal. No relevant legislation or authorities were cited to me by the representatives in respect of these matters. There was no escaping that these points of law had to be considered and addressed in order for me to reach a conclusion on the Appeal before me, and that the representatives of the parties appeared not to be competent to formulate submissions in respect of these issues. Having taken account of the overriding objective in Rule 2 of the Tribunal Rules, I decided that I would issue a decision in draft form to the parties, and give them an opportunity to make written submissions in respect of the issues of law raised in it. I would then finalise the decision after taking account of such submissions as the parties might make.

20. During the course of finalising my decision, I realised that the Declaration of Trust and the Nominee Agreement were executed before the abolition of stamp duty in respect of land transactions and in respect of declarations of trust (see s125 Finance Act 2003 and Sch 32, Finance Act 2008). I therefore invited the Appellants to make further written submissions in relation to the liability of these instruments to stamp duty and their admissibility in evidence before the Tribunal.

21. This decision takes account of the submissions I received from the parties in relation to the both issues of law raised in my draft decision and to the application of stamp duty to the Declaration of Trust and the Nominee Agreement (and their admissibility in evidence).

22. Since the receipt of the submissions of the parties, the Supreme Court has released its decision in *Akers and others v Samba Financial Group* [2017] UKSC 6. As the decision of the Supreme Court confirms that an effective declaration of trust can be made over shares in a company incorporated in a country which does not recognise the trust concept, I have not considered it necessary to seek further submissions from the parties.

Reliability of evidence

Stephen Schechter

23. I did not find Stephen Schechter to be a wholly reliable witness.

24. Stephen Schechter's long career has been as an investment banker working for leading banks on Wall Street and in the City of London. He described his work in his witness statement and in the course of his oral evidence, and it is clear that during his career he has been involved in arranging debt finance for companies where the borrowings have been secured on land and buildings (that is not to say that he has not been involved in other kinds of transactions). He has been responsible for devising and implementing novel and sophisticated debt finance structures, particularly for sports businesses. He has an MBA degree. I have no doubt that Stephen Schechter

has a deep understanding of the nature (and subtleties) of debt finance, of the nature of security over real estate, and of the interpretation of company financial statements.

25. On a number of occasions when I was able to compare his oral evidence with documentary evidence relating to the same events, his oral evidence was inconsistent with the documents.

26. During the course of his oral evidence, Stephen Schechter explained that he had negotiated a long term loan facility with Coutts to finance the purchase of 20 Chemin de Bellevue was (notwithstanding his submission that the property was held as trading stock) – and that this was because he had always advised his clients to obtain long term finance to avoid any refinancing risk. Yet Coutts' Advice of Borrowing (setting out the terms of this facility) which was provided to the Tribunal after the hearing states that the facility was "on demand" (with an expectation that half would be repaid within two years, and the balance by December 2015). When this was refinanced in December 2009 (replacing a facility dated 25 June 2009, a copy of which was not provided), the replacement facility was described on its face as providing bridging finance, and it was repayable in approximately 6 months. None of these facilities could be described as "long term", and whilst these subtle differences might go over the head of a layperson, these details are bread and butter to an experienced banker, such as Stephen Schechter, who is experienced in the debt markets.

27. More critically, his oral evidence (on which he was closely cross-examined) was very firmly that the Nominee Agreement was executed by himself, his wife and his son Lawrence on 11 June 2003, and was then sent to his other son, Scott (who was in the USA), who executed it shortly after receiving it. Stephen Schechter's clear oral evidence was that the Nominee Agreement was executed by all the parties either on or within a few days of 11 June 2003. Yet it is clear on an analysis of the document (which I address later in this decision) that the Nominee Agreement could not have been executed before 25 August 2003.

28. There were also inconsistencies between Stephen Schechter's evidence given at the hearing, and the statements given by his representatives to HMRC during the course of the enquiry into his tax return (and thereafter). For example, correspondence between his representatives and HMRC refers to Stephen and Shelly Schechter renting the flats at 12 Charles Street from Vinexsa, yet in his oral evidence, Stephen Schechter stated that he did not rent the flat, but that he was paid personally an accommodation allowance by his employers (although in written submissions made after the hearing, the allowances were said to have been paid directly to Vinexsa's bank account and used to pay its mortgage obligations).

29. I have therefore given little weight to Stephen Schechter's oral evidence unless it is self-evidently uncontroversial or is corroborated by other evidence.

Expert evidence

30. The principle that, in an English court or tribunal, foreign law is issue of fact has been long established. It must be proved by appropriate evidence, normally expert evidence. The burden of proving foreign law lies on the party relying upon it.

31. In the absence of satisfactory proof of foreign law, the court or tribunal will assume that foreign law is the same as English law (or, perhaps more properly, that the court will apply English law if there is insufficient evidence of the foreign law – see Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 9-025).

32. I have before me two witness statements as to foreign law purported to be given by experts.

33. The first witness statement is given by Castino D Sands, who says that he is qualified to practice law in the Commonwealth of the Bahamas; he has an LLB degree and is a member in good standing of the Bahamas Bar Association, and has practised law in the Bahamas for ten years.

34. Mr Sands' evidence, in summary, is as follows:

(a) Vinexsa is (and at all material times has been) a company duly incorporated under Bahamian law

(b) The Nominee Agreement was executed by the shareholders and directors of Vinexsa

(c) As a matter of Bahamian law, Vinexsa is a legal person capable of owning and otherwise dealing in property in its own name, and has the power to perform all acts and engage in all activities conducive to its objects and purpose.

(d) Vinexsa, acting through its directors, had the power and capacity to effect the transactions described in the Nominee Agreement

(e) As between Vinexsa and the other parties to the Nominee Agreement, Bahamian law would generally not operate to prevent the Nominee Agreement from taking effect from 11 June 2003 where this was expressed to be the intention of the parties, even if the agreement was actually executed after that date.

(f) As a matter of Bahamian law, Vinexsa has the power, capacity and authority to declare itself as holding its property as trustee for the benefit of third party beneficiaries. In consequence, as a matter of Bahamian law, there was nothing to prevent Vinexsa, by virtue of the Declaration of Trust and the Nominee Agreement, from transferring to its shareholders (as beneficiaries) with effect from 11 June 2003 its entire beneficial interest in any property or assets owned by it – including the shares in Sweet Revenge and the property at 12 Charles Street.

(g) The Nominee Agreement, the Declaration of Trust, and the transactions purportedly effected and described in those documents are not contrary to applicable Bahamian law.

35. I note that although Mr Sands' evidence confirms that Vinexsa had the corporate capacity to enter into the Declaration of Trust and the Nominee Agreement (and to perform its obligations under those instruments), his witness statement does not address whether Vinexsa had taken all necessary corporate actions to authorise the entering into, and performance of its obligations under, the Declaration of Trust and the Nominee Agreement. Further, the witness statement does not confirm whether the obligations of Vinexsa under the Nominee Agreement and the Declaration of Trust constitute its legal, valid, binding and enforceable obligations. The witness statement does not address whether the act of the directors vesting of the beneficial ownership of Vinexsa's assets in the hands of its shareholders for no consideration would be in breach of their fiduciary obligations, or whether as a matter of Bahamian law Vinexsa requires distributable reserves in order to effect, what is in substance, a distribution in specie of its assets. Finally, the witness statement does not consider the proper law of the Nominee Agreement or the Declaration of Trust (and, in that context, the jurisdiction in which Vinexsa is resident). As the Appellants' instructions to Mr Sands were not included in the bundle (contrary to my directions), I do not know whether Mr Sands was instructed to advise on these issues (but declined to do so), or whether the instructions were inadequate.

36. Olivier Goldstein gave the other expert witness statement. Mr Goldstein says that he is qualified to practise law in France as an *avocat*, and has practised as such for 19 years. He has a master's degree in French law and an LLM in German commercial law.

37. Mr Goldstein's evidence, in summary, is as follows:

(a) The provisions of the Nominee Agreement are not prohibited by French law, and French law does not preclude the provisions of the Nominee Agreement.

(b) French law does not recognise the distinction between legal and beneficial ownership. There is therefore no formal method of effecting a transfer of beneficial ownership.

(c) French tax law adopts a look-through rule in order to hold any individual who, personally or jointly with his or her spouse and their relatives in the ascending or descending line, has a majority shareholding in an entity that owns French property as the actual owner of that property. This rule applies irrespective of the number of interposed entities. Therefore, even if the Nominee Agreement had not been executed, Stephen, Sherry, Larry and Scott Schechter (or their assignees) would be and are viewed as the actual owners of 20 Chemin de Bellevue.

38. I note that Mr Goldstein's witness statement does not address whether French law respects the separate legal personality of Sweet Revenge, and therefore whether an instrument executed by a member of a company can have effect in relation to

French *situs* assets of the company. The witness statement does not address the alienability of 20 Chemin de Bellevue. Nor does the witness statement address whether the purported vesting of 20 Chemin de Bellevue in the Vinexsa shareholders for French tax purposes extends to all other purposes of French law – or is merely a conceit for French taxes only.

39. Mr Goldstein's evidence as to deemed ownership for French tax purposes is also at odds with the evidence of Mr Schechter, that he had been advised by his French tax advisors that an express declaration was required in order for 20 Chemin de Bellevue to be treated owned by Sweet Revenge as nominee for the Vinexsa shareholders, so that any French tax arising on the sale of the property would arise in their hands (and therefore be creditable against the US taxes that the shareholders would suffer on that same sale).

40. I also note that Stephen Schechter's evidence was that SAFER could exercise pre-emption rights in the event of a transfer of the French property. Mr Goldstein's evidence does not address whether such pre-emption rights could arise on the transfer of an interest in the property effected by creating a nominee relationship.

41. I have placed little weight on the expert evidence. Not only do the witness statements not comply with my directions (in particular the instructions given to the experts have not been produced), but neither expert attended the hearing and so could not be questioned about the gaps and inconsistencies in their evidence.

Background facts

42. I find the background facts to be as follows.

43. Lawrence Schechter is the son of Stephen Schechter. He was born in, and is a citizen of, the USA. He moved to the UK and became resident for tax purposes in 2003. His domicile is outside the UK. Since 2004 he has personally developed and managed ten properties the USA, and two properties in the UK. Lawrence Schechter is deemed a "real estate professional" for tax purposes in the United States.

44. Stephen Schechter is a US citizen born and brought up in New York. By profession, Stephen Schechter is an investment banker, having spent 52 years working in Wall Street and in the City of London – retiring two years ago.

45. On leaving school, he joined an investment bank in Wall Street. He studied at night school and subsequently attended university, obtaining a bachelor's degree and a master's degree in business administration (MBA). He eventually became a director of Wertheim & Co, a New York investment bank. Schroder's (the British merchant bank) acquired a 50% interest in Wertheim in the 1986, and acquired complete control in 1994. Not long after Schroder's acquired control of Wertheim, Stephen Schechter became group managing director of Schroder's and head of debt capital markets.

46. Stephen Schechter and his wife Sherry moved to London in 1998. Stephen Schechter has since then been resident in, but not domiciled within, the UK for tax purposes.

47. Lawrence and Stephen Schechter, as US citizens, are both liable to United States federal income tax.

48. Stephen Schechter had a successful career at Schroder's, and was responsible for some particularly innovative debt financing of football stadia developments. In the course of describing these transactions, Stephen Schechter explained that he always advised his clients to obtain long term financing in order to avoid the refinancing risk that arises with short-term debt.

49. Schroder's sold their investment banking business to Citibank in 2000. In common with other senior Schroder's directors, Stephen Schechter did not join Citibank. He was headhunted by Lazard's (another investment bank), and joined them shortly after leaving Schroder's. He subsequently left Lazard's to set up in business on his own account (Schechter & Co Limited), and continued to advise on debt finance through that business until his retirement.

50. Vinexsa was incorporated in the Bahamas in 1992. In the bundle of documents produced in evidence, its address is given as 12 Charles Street (Stephen Schechter's London home) in its US tax return (Form K12), in a capital account statement prepared by Tanton and Company LLP (Vinexsa's accountants), in the documents filed with the US Internal Revenue Service relating to its US "check the box" election, and in most of the mandates given to estate agents in France to market the shares in Sweet Revenge. The minutes of its board meetings included in the bundles do not state where board meetings were held. Its original trade was stated to be the distribution of French wine to customers outside France (I assume that this may have related to the vineyard owned by the Stephen Schechter to which reference is made below), but that trade ceased in 1994.

51. Shortly after Stephen and Sherry Schechter moved to the UK, Vinexsa acquired a flat at 12 Charles Street for their use. The acquisition was partly financed with a mortgage from the bank Coutts & Co ("Coutts").

52. Stephen Schechter was advised to structure the ownership in this way principally to avoid any potential liability to UK inheritance tax that would have arisen if the property were owned directly by Stephen and Sherry Schechter when they died. This was a common structure adopted at the time by non-domiciled individuals who owned property in the UK.

53. The flat is a traditional "mansion flat". The leasehold title included a "butler's apartment" which was located separately in the basement of the mansion block. The main flat was designated flat 10, whereas the butler's apartment was designated flat B. Stephen Schechter had flat B fitted out with shelving and filing cabinets, and he arranged for his work files to be transferred to London from New York and stored in flat B.

54. The leases on the flats in the block had less than 40 years remaining. Stephen Schechter co-ordinated the enfranchisement of all the leases with other flat owners, and the freehold to the block was acquired by a company incorporated and owned by the flat owners for this purpose. Following the acquisition of the freehold, the individual flat leases were extended to 999 years. In the case of flat 10 and flat B, Stephen Schechter arranged for their titles to be separated, and separate leases to be granted for each unit.

55. Flat B continued to be used to store Stephen Schechter's old files until 2002 when he set up in business on his own account through Schechter & Co Limited ("Schechter & Co"), a company that he incorporated. From 2002, Vinexsa let flat B to Schechter & Co. and received rental income and Schechter & Co converted flat B into its office. In 2007 a successful application was made to Westminster City Council for a certificate of lawful use of Flat B as a private office (use class B1) on the basis that it had been so used by Stephen Schechter for at least 10 years.

56. The evidence as to whether Stephen Schechter paid Vinexsa rent for the use of the flats is inconsistent. Reference to rent being paid are included in a report sent by Chown Dewhurst to HMRC in October 2014, and in a memorandum of advice from Withers Bergman (Stephen Schechter's US lawyers) in June 2003. However, in the course of his oral evidence, Stephen Schechter was adamant that he did not pay any rent to Vinexsa for the use of the accommodation – rather Schroder's and Lazard's paid him, personally, an accommodation allowance to compensate him for the additional housing costs he incurred as a result of moving from New York to London (although after the hearing, in written submissions he stated that the accommodation allowance was paid by his employers directly into Vinexsa's bank account with Coutts, and was used by it to pay its obligations under the mortgage used to purchase the property). He acknowledged that the position changed when Schechter & Co leased flat B, and it did pay Vinexsa rent.

57. In addition to his work as an investment banker, since the 1980s Stephen Schechter also engaged in some property related transactions on his own account, including investment in real estate and investment in real estate development (in circumstances where the development was managed and undertaken by someone else).

58. In 1987 he acquired a vineyard in France, which he improved and subsequently sold. In late 1999, Stephen Schechter decided to undertake a property development in South Eastern France. He had never previously undertaken a property development on his own account on a greenfield site – but believed that there was greater opportunity for profit, albeit at a larger risk. In April 2000 he identified a site of just under one hectare at 20 Chemin de Bellevue in Chateauneuf de Grasse in the Alpes Maritime in France. Sweet Revenge was incorporated in England under the Companies Act 1985 to acquire the site and undertake the development. In his evidence, Stephen Schechter said that he was advised to buy and develop the site through a company that had a tax treaty with France (such as a company owned by Vinexsa and incorporated in the UK) for two main reasons. The first was to avoid French succession issues (including forced heirship) in the event that he died. The

second was so that the eventual sale of the developed property would be effected by selling the shares in the company – this would avoid French registration duties, notarial costs and the pre-emption rights conferred upon the local *société d'aménagement foncier et d'établissement rural* ("SAFER") (a French government agency).

59. In October 2000 the site was extended by acquiring an adjoining plot of 0.3 hectare. A building permit was obtained and construction of a substantial mansion commenced in 2001. The development was financed with a loan from Coutts. A copy of the loan facility was not included in the hearing bundle. Stephen Schechter's unchallenged oral evidence at the hearing was that the loan was secured on the property and by personal guarantees from Stephen Schechter. His oral evidence was that it was a long-term loan (in accordance with Stephen Schechter's philosophy of borrowing long-term to avoid refinancing risk). However, (in order to meet Coutts' requirements in relation to Euro denominated lending) the interest rate was set by reference to short-term rates, and the loan could be repaid at any time without penalty. After the hearing the Appellants submitted a copy of Coutts' Advice of Borrowing Terms dated 21 June 2000 (together with a copy of a loan facility with Vinexsa dated 14 December 2009 and a copy the French registrar's certificate (*Certificate du Conservateur*) dated 23 November 2012 of the security over 20 Chemin de Bellevue). From these documents it transpires that the loan was originally for £1 million (to be drawn in Euros) repayable on demand (although Coutts' intention was that 50% of the loan be repaid by June 2002, with the balance repayable on or before December 2015), it carried interest at 1.5% above 3 months EUR LIBOR, and was secured over Vinexsa's interest in Flat 10 and Flat B at 12 Charles Street, over 20 Chemin de Bellevue and had the benefit of a personal guarantee from Stephen and Sherry Schechter (limited to £1 million). This loan facility was subsequently replaced and increased to €7 million, and the terms of the replacement facility allowed interest to be fixed for 1, 3, 6 or 12 month periods, and was repayable in full on 30 June 2010 from the proceeds of sale of Vinexsa's then current French and Monegasque properties (but could be prepaid in whole or in part by the borrower on 7 days' notice) - the security package was revised to include all of the assets of Vinexsa and of its subsidiaries, and the limit of the personal guarantee extended to €7 million. It was a term of the replacement loan facility that Vinexsa shall not and shall not permit Sweet Revenge to

> "sell, transfer, lease or otherwise dispose of assets (other than assets which are disposed of in the ordinary course of business, providing they are not subject to a fixed charge in favour of [Coutts]) the subject of any Security".

60. Copies of the charges over the real estate and of the personal guarantees were not submitted (although the *Certificate due Conservateur* shows that 20 Chemin de Bellevue was subject to security in favour of Coutts, the terms of the security are not apparent from the face of the entries).

61. As US citizens, Stephen and Lawrence Schechter remain liable to US federal income tax, notwithstanding that they are resident outside the USA. In June 2003 Withers Bergman (his US lawyers) advised Stephen Schechter that to avoid multiple

layers of US taxes at high rates, he should file "check the box" ("CTB") elections in respect of Vinexsa and Sweet Revenge. The effect of the elections is to treat both companies as fiscally transparent for US federal income tax purposes, and in consequence any taxable income or gains accruing in respect of the activities of those companies would be deemed to be the income and gains of the shareholders for the purposes of US federal income tax. The applications were filed on behalf of Vinexsa and Sweet Revenge in June 2003, and approved by the US Internal Revenue Service on 25 August 2003.

62. The Vinexsa shareholders decided not to sell the shares in Sweet Revenge on completion of construction in 2004, as they believed that a materially higher price could be obtained if they waited, and allowed the grounds to mature. In addition, in order that the disposal proceeds were taxed in Stephen Schechter's hands in the US at the lower rates for long-term capital gains, the shares could not be sold for at least one year following its completion. However, by the time the shares were marketed in 2006/7, the French property market had collapsed, and they could not be sold. Sweet Revenge was able to sell part of the grounds to a neighbour in 2014, but otherwise the shares in Sweet Revenge are still on the market, and have not been sold. In the meantime, in order to cover some of the costs incurred, the property has been let from time to time as holiday accommodation.

63. For the purposes of US federal income tax, the CTB elections have the effect of treating Vinexsa as if it were a partnership between its shareholders, and as if Sweet Revenge was a branch of that deemed partnership. The CTB elections have effect solely for the purposes of US taxes and Stephen Schechter was advised by his French and UK tax accountants that because of the CTB elections, a foreign double tax credit would not be available for any US taxes that he suffered against any French or UK taxes arising on that same income or gains. In order to ensure that credit was available, he was advised that the companies should declare that they held their assets as nominees for the Vinexsa shareholders. (I note – in passing – that the effect of such a nominee declaration appears entirely to negate the reasons why the flats at 12 Charles St and the French property were acquired through corporate wrappers in the first place – so, for example, the flats at 12 Charles St would as a result become beneficially owned by Stephen Schechter and the other Vinexsa shareholders, and his share in their ownership would become liable to IHT in the event of his death). Stephen Schechter submitted that the original structure provided flexibility in allowing in relation to 20 Chemin de Bellevue either for the disposal by Vinexsa of the shares in Sweet Revenge, or the disposal by Sweet Revenge of 20 Chemin de Bellevue, and of course that flexibility would have been lost as a result of the nominee arrangement, as beneficial ownership of the properties would be vested in the Vinexsa shareholders).

64. On 11 June 2003, Lawrence Schechter signed a document headed "Declaration of Trust" which reads as follows:

> Vinexsa International Limited
>
> 43 Elizabeth Avenue

Nassau

Bahamas

Company number: 9601B

Declaration of Trust

The company hereby resolves that it holds the whole of the issued share capital of the UK company Sweet Revenge Limited (registered office, Suite B, 12 Charles Street, London W1J 5DR, United Kingdom, UK Companies House Number 3989765) as bare nominees and trustees for the beneficial owners of the shares, being the persons set out below:

	Number of shares*
Stephen L Schechter	245
Sherry Feinstein	245
Lawrence B Schechter	255
Scott M Schechter	255

The company acknowledges that it has no beneficial interest in the shares of Sweet Revenge Limited and holds them to the order of the individual beneficial owners.

Signed the 11th day of June 2003

(signature)

Lawrence B Schechter

Director

Vinexsa International Limited

*after issue of 998 new ordinary shares

65. At the time the Declaration of Trust was made, Lawrence was living in the UK. There is no evidence before me to indicate that Lawrence travelled out of the UK in order to sign the Declaration of Trust, and on the balance of probabilities, I find that it was executed in the UK.

66. For some reason, this document was not regarded as satisfactory, and a "Nominee Agreement" was subsequently concluded. The material terms of this instrument are as follows:

Nominee Agreement effective as of 11th day of June, 2003, by and among Stephen Lloyd Schechter ("Stephen"), Sherry Lynn Schechter ("Sherry"), Lawrence Brandon Schechter ("Larry") and Scott M Schechter ("Scott"), individually and as Directors of Vinexsa International Limited ("Vinexsa")

Whereas, Vinexsa is an International Business Company existing and operating under the laws of the Commonwealth of the Bahamas;

Whereas, the current shareholders of Vinexsa and their respective share ownership are as follows:

Stephen	12 Charles Street, London W1J 5DR United Kingdom US Citizen and UK Resident -	245 shares
Sherry	12 Charles Street, London W1J 5DR United Kingdom US Citizen and UK Resident -	245 shares
Scott	1 W, Highland Drive Seattle, WA 98119 US Citizen and US Resident -	255 shares
Larry	Flat 6 11 Cranley Gardens, London SW7 3BB United Kingdom US Citizen and UK Resident -	255 shares

Whereas, while Vinexsa was created as a Bahamian International Business Corporation under the 1990 IBC Act, the intent for income tax purposes, as all shareholders are United States citizens and taxpayers, has always been for Vinexsa to be treated as a transparent entity whereby all profits and losses of Vinexsa flow-through to its shareholders. Thus, in that regard, a Form 8832 Entity Classification Election, was filed on behalf of Vinexsa. A copy of the filed Form 8832 is attached hereto as Exhibit "A;"

Whereas, on April 3, 2003, the Internal Revenue Service approved the filed Form 8832 so that for United States Federal income tax reporting purposes, Vinexsa would be treated as a partnership, not a corporation. A copy of the Internal Revenue Service approval of Form 8832, Entity Classification Election, is attached hereto as Exhibit "B;"

Whereas, the Internal Revenue Service, for intents and purposes, has recognized the entity classification of Vinexsa as a partnership and has accepted its filings for income tax purposes as a partnership (i.e., a transparent, flow-through entity which issues K-1s to all of its owners so that the appropriate profits and losses inure to them on their personal income tax returns);

Whereas, Vinexsa is the sole owner of the United Kingdom company, Sweet Revenge Limited, and other properties in the United Kingdom outside of Sweet Revenge Limited;

Whereas, for United States income tax purposes, Sweet Revenge Limited is treated as a foreign entity classified as a single owner disregarded entity. A copy of the filed Form 8832, Entity Classification Election, and approval is attached hereto as Exhibit "C;"

Whereas, on June 11, 2003, a Declaration (the "2003 Declaration") was executed by Larry, a Director of Vinexsa, evidencing that Vinexsa resolves and holds the shares of Sweet Revenge Limited, and thus by

> ownership of such shares, the underlying property owned by Sweet Revenge Limited, in addition to the other properties owned by Vinexsa, as bare nominees for the beneficial owners of the shares of Vinexsa; such owners as currently set forth above. A copy of the executed 2003 Declaration is attached hereto as Exhibit "D;"
>
> Whereas, the parties wish to reiterate the terms of the 2003 Declaration and recognize that Vinexsa is acting as the bare nominee to hold the shares of Sweet Revenge Limited, and, thus, all the property owned by Sweet Revenge Limited, in addition to other properties owned by Vinexsa, for the beneficial owners of Vinexsa, namely, Stephen, Sherry, Larry and Scott;
>
> Whereas, the parties wish to memorialize the ownership of such legal and beneficial interests; and
>
> Now therefore, the parties hereto agree as follows:
>
> First: Vinexsa shall continue to hold legal title in and to the interests in Sweet Revenge Limited, and, thus, all property owned by Sweet Revenge Limited, in addition to other properties owned by Vinexsa, but only as nominee for the current owners of Vinexsa, Stephen, Sherry, Larry and Scott.
>
> Second: This Nominee Agreement shall be binding upon and inure to the benefit of the parties hereto, their personal representatives, successors and assigns.
>
> Third: This Agreement may be executed in any number of counterparts with the same effect as if all the parties had all signed the same document.
>
> In whereof, the parties hereto have executed this Agreement effective as of the 11th day of June 2003

67. The document was signed by each of Stephen, Sherry, Scott and Lawrence Schechter. In addition, the seal of Vinexsa was impressed onto the document.

68. Attached to the document were the various listed exhibits.

69. In his oral evidence, Stephen Schechter said that the Nominee Agreement was signed by himself, Sherry and Lawrence together on 11 June 2003. The Nominee Agreement was then sent to his son Scott in the USA. Stephen Schechter's evidence was that Scott would have signed the Nominee Agreement shortly after receiving it, and therefore within a few days of 11 June 2003. Stephen Schechter was closely questioned by HMRC's representative on this point during cross-examination, and Stephen Schechter was resolute in his oral evidence. Stephen Schechter stated in his written submissions made after the hearing that he had possession of the corporate seal of Vinexsa in London. It is therefore implicit in this statement that the Nominee Agreement was in fact signed by Stephen, Sherry and Lawrence in London, and that the corporate seal of Vinexsa was impressed onto the agreement in London, and I so find.

70. Notwithstanding Stephen Schechter's oral evidence as to the date of execution of the Nominee Agreement, I do not believe him for the following reasons. First, the

recitals in the document refer to the IRS Forms 8832 relating to Vinexsa and Sweet Revenge, and to the approval by the IRS of the CTB election made in those forms. These are exhibited to the document. The Forms 8832 and approval for Vinexsa included in the exhibits are dated 12 June 2003 and 25 August 2003. The Forms 8832 and approval for Sweet Revenge included in the exhibits are dated 12 June 2003 and 18 August 2003. Given that the exhibits are all dated after the date of the Nominee Agreement, it must follow that the Nominee Agreement can only have been signed on or after the last of the exhibits. Secondly, I find it strange that the "Declaration of Trust" made by Vinexsa on 11 June 2003 should be replaced so comprehensively by another declaration apparently executed later that same day – and this reinforces my view that the Nominee Agreement was not executed on 11 June 2003. Thirdly, I note that the document is dated "effective as of the 11th day of June 2003" which carries an implication that it was executed after 11 June 2003 but was intended as between the parties to have effect from 11 June 2003. Finally, I note that at a meeting on 10 October 2013, Mr Dewhurst told HMRC that although the agreement was dated as of 11 June 2003, his clients had told him that it had in fact been executed in early July 2003. I find that the Nominee Agreement must have been signed sometime after 25 August 2003 given that it refers to another document of that date.

Issues in this Appeal

71. The following are the issues that need to be resolved in this appeal.

72. First, are the "Declaration of Trust" and the "Nominee Agreement" admissible in evidence before this tribunal?

73. Second, do the "Declaration of Trust" and the "Nominee Agreement" have the effect of transferring to the Vinexsa shareholders the beneficial ownership of Flat B, 12 Charles Street and 20 Chemin de Bellevue?

74. Third, are Flat B, 12 Charles Street and 20 Chemin de Bellevue held as trading stock of a property dealing trade undertaken by the Appellants?

75. Fourth, does all of the expenditure deducted in computing the trading profits of the property dealing trade of the Appellants actually qualify for deduction against their taxable income?

Admissibility in evidence of Declaration of Trust and Nominee Agreement

76. Stamp Duty Land Tax ("SDLT") was enacted by the Finance Act 2003, and came into force with effect from 1 December 2003. Upon the introduction of SDLT, stamp duty was abolished on instruments other than those relating to stock and marketable securities (s125, Finance Act 2003). Therefore, instruments giving effect to transactions relating to real property were not subject to stamp duty with effect from the introduction of SDLT.

77. Stamp duty continues to apply to instruments relating to stock or marketable securities. However, fixed duties on instruments relating to stock and marketable

securities were abolished by Sch 32, Finance Act 2008, including fixed duties on declarations of trust. But, of course, to the extent that a declaration of trust is also a transfer on sale, *ad valorem* duty continues to be chargeable.

78. In this context, I note that where assets are transferred subject to a debt that is charged on the asset, then on the transfer of the asset, that debt may be deemed to be consideration for the conveyance or transfer, and the instrument could be chargeable to *ad valorem* duty (s57 Stamp Act 1891). The issue is whether the terms of the transfer include an express or implied covenant on the part of the transferee either to pay the liability or to indemnify the transferor for its liability to the lender (see, for example, HMRC Statement of Practice SP6/90).

79. Section 14 Stamp Act 1891 governs the terms upon which instruments liable to stamp duty may be received in evidence. It provides as follows:

> (1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and the instrument may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and any interest or penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.
>
> (2) The officer, or arbitrator, or referee receiving the duty and any interest or penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and any interest or penalty and the date and description of the instrument, and shall pay over to such person as the Commissioners may appoint the money received by him for the duty and any interest or penalty.
>
> (3) On production to the Commissioners of any instrument in respect of which any duty, interest or penalty has been paid, together with the receipt, the payment of the duty, interest and penalty shall be denoted on the instrument.
>
> (4) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was executed.

80. The Declaration of Trust was executed in the UK on 11 June 2003 and relates to the shares in Sweet Revenge. The Nominee Agreement was dated as 11 June 2003 and it relates to not only to the shares in Sweet Revenge, but all of the other assets of Vinexsa, including the flats at 12 Charles Street, and purports to extend to the assets of Sweet Revenge (in particular the property at 20 Chemin de Bellevue). Both

instruments therefore relate to property situate in the United Kingdom – in the case of the Declaration of Trust, it relates to the shares in Sweet Revenge, and in the case of the Nominee Agreement, it relates to the shares in Sweet Revenge and to the flats at 12 Charles Street. The flats at 12 Charles Street are self-evidently situate in the UK. Registered shares have a *situs* at the location of the register of members. In the case of a UK incorporated company (such as Sweet Revenge), the register of members must be kept in the UK, and therefore the shares in Sweet Revenge are situate in the UK.

81. Neither instrument was certified under the Stamp Duty (Exempt Instruments) Regulations 1987 (SI 1987/516) nor did they include any certificate of value under paragraph 6, Schedule 13, Finance Act 1999.

82. The Appellants submit that neither the Declaration of Trust nor the Nominee Agreement are liable to stamp duty because they were not instruments that effected a conveyance or transfer on sale, since there was no consideration either in the form of payment or in the form of the assumption of liability. Even if these instruments were a conveyance or transfer on sale, the correct approach, according to the Appellants, would have been for the documents to have contained a statement that the transaction effected by the document did not form part of a larger transaction or series of transactions in respect of which the amount or value of the consideration exceeded £60,000. They therefore submit that there was no requirement for the Declaration of Trust and the Nominee Agreement to be stamped.

83. I disagree with the Appellants' submissions for the following reasons.

84. The Declaration of Trust relates to marketable securities (namely the shares in Sweet Revenge), and was executed before fixed duties were abolished. I find that it is therefore liable to £5 fixed duty as a declaration of trust.

85. The Nominee Agreement cannot be stampable as a conveyance or transfer of the beneficial ownership of the shares in Sweet Revenge, as the beneficial ownership of these shares would have already transferred to the Vinexsa shareholders under the Declaration of Trust, which was executed previously. It would however be liable to £5 fixed duty as a declaration of trust if it was executed before 13 March 2008. The Nominee Agreement was dated "as of" 11 June 2003, but I have found that it must have been executed after 25 August 2003. To be outside the scope of stamp duty altogether, it must have been executed on or after 13 March 2008 – more than four years from the date on its face and the date of the Declaration of Trust. This is a very long time after the purported date of execution, and on the balance of probabilities, I think it unlikely that the execution happened on or after 13 March 2008. I therefore find that the Nominee Agreement was executed before 13 March 2008, and is therefore liable to £5 fixed duty as a declaration of trust.

86. Even if the failure to stamp these instruments could have been cured by the inclusion of a certificate of value, no certificate of value had been included in either instrument. And, of course, a certificate of value does not cancel the requirement to pay fixed duty in respect of a declaration of trust.

87. The Appellants' case rests on the transfer of the beneficial and equitable interests in the flats at 12 Charles Street and the property at 20 Chemin de Bellevue having been transferred to the Vinexsa shareholders (who include the Appellants) in consequence of the Nominee Agreement and the Declaration of Trust. As these two instruments are liable to £5 fixed duty, and that duty has not been impressed on these instruments, they are inadmissible in evidence. It follows that their appeal must fail.

88. It remains open to the Appellants to submit these two instruments to HMRC for adjudication, and to have them stamped (upon payment of interest and penalties in addition to any duty). As the substantive issues arising in this appeal were considered in the hearing and in the subsequent written submissions, I have set out below what my findings would have been had these instruments been duly stamped.

89. I note that the Declaration of Trust and the Nominee Agreement may also be liable to *ad valorem* duty if there is an express or implied term that the Vinexsa shareholders would indemnify Vinexsa in respect of any debt charged on the assets which are the subject of these instruments. This is not a point which needs to be determined for the purposes of this decision – and can be left to be addressed by HMRC if these instruments are ever submitted to HMRC's stamp office for adjudication.

Legal effect of the Declaration of Trust and the Nominee Agreement

90. Neither the Declaration of Trust nor the Nominee Agreement specify the legal jurisdiction governing those documents.

91. Mr Dewhurst submits that the proper law of these documents is the law of the Bahamas, since the central party to the documents is Vinexsa, a company incorporated in the Bahamas. However Mr Dewhurst made no submissions as to why (as a matter of English law) the place of incorporation of Vinexsa was relevant to the determination of the law governing these documents, and there was nothing in Mr Sands' evidence to support this submission.

Hague Convention

92. I find that the proper law of the Declaration of Trust and the Nominee Agreement should be determined pursuant to the Recognition of Trusts Act 1987. This gives effect in the United Kingdom to the Hague Convention on the law applicable to trusts and on their recognition ("the Convention"). The Act provides that the provisions of the Convention set out in the schedule to the Act have the force of law in the UK.

93. Article 2 of the Convention provides as follows:

> For the purposes of this Convention, the term "trust" refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

> A trust has the following characteristics -
>
> a) the assets constitute a separate fund and are not a part of the trustee's own estate;
>
> b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
>
> c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

94. I find that both the Declaration of Trust and the Nominee Agreement are "trusts" for the purposes of the Act and the Hague Convention. The purported effect of both documents is to transfer beneficial or equitable ownership of the specified assets to the shareholders of Vinexsa, whilst retaining title in the name of Vinexsa or Sweet Revenge – with the effect that the assets no longer form part of the estate of Vinexsa or Sweet Revenge, and with Vinexsa and Sweet Revenge becoming obliged to manage the assets in accordance with the terms of the Declaration of Trust and the Nominee Agreement.

95. The fact that French law does not recognise the distinction between legal and beneficial ownership, and that French law does not recognise trusts is irrelevant to the treatment of the Declaration of Trust and the Nominee Agreement as "trusts" for the purposes of the Act and the Hague Convention. The definition of a trust within the Convention is clearly capable of application to arrangements made under civil law jurisdictions (such as France) which do not have the concept of a trust. The Court of Appeal in *Akers and others v Samba Financial Group* [2014] EWCA Civ 1516 held that the Convention applied in circumstances where the *lex situs* of the property subject to the trust (in that case shares in a company incorporated in Saudi Arabia) did not recognise trusts.

96. The decision of the Court of Appeal was reversed by the Supreme Court [2017] UKSC 6. But in reaching its decision the Supreme Court upheld the validity of a declaration of trust in circumstances where the trust's assets were in a jurisdiction which does not recognise a division between legal and equitable interests – see paragraph 22 *et seq* of the judgment of Lord Mance.

97. Where a settlor declares himself as trustee (as is the case here – where Vinexsa declares itself as holding its assets and those of Sweet Revenge as nominee), doubt has been expressed as to whether those "assets have been placed under the control of a trustee" within the meaning of Article 2, and this might suggest that such declarations are excluded from the Convention. However, I agree with the authors of Dicey, Morris & Collins (at paragraph 29-004) that there is no principled reason to exclude declarations by the settlor of himself as trustee from the scope of the Convention, and I find that they fall within its scope. I am satisfied that the legal relationship which the Declaration of Trust and the Nominee Agreement establish (assuming that they have legal effect) falls within the definition of a "trust" for the purposes of the Convention, and I so find. The Declaration of Trust and the Nominee Agreement are in writing, and therefore satisfy the requirements of Article 3 (which

provides that the Convention only applies to trusts created voluntarily and evidenced in writing – although I note that section 1(2) of the Act extends the provision of the Convention to certain other trusts).

98. Article 4 of the Convention provides that "The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee." Preliminary issues relating to the transfer of asset to the trustee will generally be governed by the *lex situs* of the assets being transferred. In the case of immovable property – such as land and buildings, the *lex situs* will be the law of the jurisdiction in which the land and buildings are located (so in the case of 20 Chemin de Bellevue, French law, and, in the case of Flat B, 12 Charles Street, English law). In the case of shares in a company, the *lex situs* will be where the register of members is kept – so in the case of shares in Sweet Revenge, their *lex situs* will be England (as the share register of an English company must be kept in England).

99. The Court of Appeal considered the application of the Convention to preliminary issues in its decision in *Akers and others v Samba Financial Group*. One of the issues before the Court was whether the alienation of an equitable interest in property by a declaration of trust was excluded from the provisions of the Convention by Article 4. The Court held that where assets were vested in a settlor who declared himself as trustee holding those assets on trust for beneficiaries, that declaration was not a "preliminary issue" for the purposes of Article 4. This was because the declaration of trust is not an act by virtue of which assets are transferred to the trustee. According to the Court's judgment, once it is clear that the relevant asset can be alienated in some form according to the *lex situs*, that law does not govern the trust or its validity or effects (including the declaration by the settlor that he henceforth held the asset on trust for the beneficiaries). All that is a matter for the law identified by Chapter II of the Convention. In the Supreme Court, it was held that even if the Court of Appeal was wrong in its interpretation of Article 4, this was an issue on which it was unnecessary to reach any final conclusion, as there is nothing invalid about a declaration of trust merely because the trust's assets are in a jurisdiction which does not recognise a division between legal and equitable interests – "Rather, the contrary - since one object of the Convention was to provide for the recognition of trusts in jurisdictions which did not themselves know the institution." (*per* Lord Mance at paragraph 39).

Preliminary Issues – protection of third parties

100. Article 15 of the Hague Convention provides as follows

> Article 15
>
> The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters -
>
> a) the protection of minors and incapable parties;

b) the personal and proprietary effects of marriage;

c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;

d) the transfer of title to property and security interests in property;

e) the protection of creditors in matters of insolvency;

f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

101. The effect of Article 15(d) and (e) is to ensure that the law of the trust does not override mandatory provision of the *lex situs* in relation to the transfer of title to property and in relation to security interest in property.

102. Both Flat B, 12 Charles Street and 20 Chemin de Bellevue were financed by loans from Coutts. Copies of the loan facilities were not included in the bundles, but were provided after the hearing. However, the documents governing the security taken over the assets of Vinexsa and Sweet Revenge were not provided. Mr Goldstein's expert evidence as to French law does not address the nature of any security taken by Coutts over it. I have therefore assumed that French law is the same as English law for these purposes.

103. I asked Stephen Schechter whether Coutts' consent was required to the Declaration of Trust and the Nominee Agreement – and his response was that such consent had not been sought. He explained that this was because Coutts' principal recourse was to the personal guarantee given by him and their security over the London properties, and that they were not really interested in their security over 20 Chemin de Bellevue – which was given as a matter of form only. I have to say, that I find it surprising and unlikely that a bank would take such a view.

104. On the basis of the loan documents submitted following the hearing, I find that in June 2000, Coutts took security over Vinexsa's interest in the Flat 10 and Flat B at 12 Charles St, and over Sweet Revenge's interest in 20 Chemin de Bellevue. Although by the time the December 2009 facility was in place, the security package had been extended to include Vinexsa's shareholding in Sweet Revenge, it is unclear whether those shares were subject to Coutts' security at the time the Declaration of Trust and the Nominee Agreement were concluded.

105. Coutts' Advice of Borrowing dated 21 June 2000 does not include any provision prohibiting Vinexsa or Sweet Revenge from declaring a trust over their assets (as the documents governing the security interests granted over the properties were not provided, I do not know whether such a prohibition was included in them). I note that the December 2009 facility agreement includes an express prohibition on Vinexsa disposing of any of the secured assets by way of "sale, transfer, lease or otherwise …", and that Vinexsa must procure that Sweet Revenge must not permit Sweet Revenge to make any such disposal. However, the terms of the facility agreement do not expressly prohibit Vinexsa or Sweet Revenge from declaring a trust

over the secured assets. In view of the decision of the High Court in *Don King (Productions) Inc v Warren* [2000] Ch 291, I would construe the list "sale, transfer, lease or otherwise …" *ejusdem generis*, and find that it does not extend to prohibiting effective economic disposal by way of a declaration of a bare trust. However, I find that the effect of Article 15 would have been to preserve Coutts' security interest over those assets notwithstanding the trust.

Preliminary issues – piercing the corporate veil

106. Another point that can conveniently be addressed as a preliminary issue is whether a declaration by Vinexsa can extend to assets owned by Sweet Revenge. The Declaration of Trust is expressed to be made by Vinexsa and signed on its behalf by one of its directors. The Nominee Agreement is expressed to be made by the four Vinexsa shareholders individually and as directors of Vinexsa. Neither instrument is expressed to have been made by or on behalf of Sweet Revenge.

107. It is trite English law that a company incorporated under the Companies Acts (such as Sweet Revenge) is a body corporate which has a separate existence from that of its members (see *Salomon v Salomon and Co Ltd* [1897] AC 22). And it follows that (otherwise than in particular circumstances, not relevant here), that actions of its members (in their capacity as such) cannot bind the company. It therefore must follow that neither the Declaration of Trust nor the Nominee Agreement can have the effect of transferring the beneficial or equitable interest in 20 Chemin de Bellevue to the Vinexsa shareholders, as neither instrument was executed by or on behalf of Sweet Revenge.

108. I also find that to the extent that French tax law has the effect of treating all or some of the Vinexsa shareholders as if they were directly owners of 20 Chemin de Bellevue, that deemed ownership is relevant solely for the purpose of computing the shareholders' liability to French taxes, and for no other purpose. Mr Goldstein's evidence is that the look-through rule is a matter of French tax law, and there is nothing in his witness statement to suggest that this rule is of wider application.

Preliminary issue – breach of directors' fiduciary obligations

109. It was acknowledged during the course of the evidence that Sweet Revenge's sole purpose was to own and develop 20 Chemin de Bellevue, and that it had no other activities. Up until the respective dates of the Declaration of Trust and the Nominee Agreements, Sweet Revenge had only incurred costs, and had not realised any profit. It must therefore follow that Sweet Revenge would have no distributable reserves, and this is supported by the summaries of the balance sheets of Sweet Revenge produced in evidence.

110. The purported transfer of the beneficial and equitable ownership of 20 Chemin de Bellevue to the Vinexsa shareholders was made for no consideration. Although the purported transfer was possibly ratified by Sweet Revenge's shareholder (Vinexsa) (since the Nominee Agreement was executed by the Vinexsa shareholders "individually" as well as in their capacity as directors), the consent would have been

ineffective, because at the time of the transfer, Sweet Revenge had no distributable reserves, and the transfer must therefore have been an unlawful return of capital. Such a transaction is ultra vires and is incapable of ratification (*Aveling Barford v Perion* [1989] BCLC 626) (I note that the transaction took place before s845 Companies Act 2006 was in force).

111. It is possible that similar issues arise in relation to the transfer by Vinexsa of the beneficial and equitable interest its assets to its shareholders (and for these purposes I have assumed that Bahamian law is the same as English law). However, there is nothing before me that would suggest that Vinexsa did not have distributable reserves as at 11 June 2003 (and I note that previously Vinexsa had owned a vineyard in France and had carried on a trade of dealing in wine, and so may well have earned profits capable of giving rise to distributable reserves). In addition, as the Nominee Agreement was executed by Stephen, Sherry, Lawrence and Scott both as individuals and as directors, any transfer of beneficial and equitable ownership of Vinexsa's assets would have been ratified by its members (as the Nominee Agreement was executed by the Vinexsa shareholders as "individuals" as well as in their capacity as directors of Vinexsa).

Preliminary Issues – backdating

112. Mr Corbett submitted that the effective "backdating" of the Nominee Agreement brought into question its validity.

113. The question of backdating is addressed in Mr Sands' evidence. He states that as between Vinexsa and the other parties to the Nominee Agreement, Bahamian law would generally not operate to prevent the Nominee Agreement from taking effect from 11 June 2003 where this was expressed to be the intention of the parties, even if the agreement was actually executed after that date. I would also say that the same result would be obtained under English law – assuming that there was no intention to deceive anyone as to the actual date of execution. As the Nominee Agreement was expressed to be dated "as of" 11 June 2003, I find that there was no such intention. Whether the Nominee Agreement would have effect as regards third parties from 11 June rather than the actual date of execution is of course another question.

Proper law of the trust

114. Chapter II of the Convention addresses the law governing the trust. Article 6 deals with circumstances where the settlor has chosen the law governing the trust. Articles 7 and 8 deal with the circumstances where the settlor has not chosen the law governing the trust.

115. As no express choice of law has been made in either the Declaration of Trust or the Nominee Agreement, consideration needs to be given as to whether an implied choice has been made. There is nothing on the face of the documents that would point to an implied choice. I note that the Vinexsa shareholders are all US citizens (and file US tax returns), Vinexsa is a company incorporated in the Bahamas, and that Sweet Revenge is a company incorporated in England. I find that there is nothing in the

circumstances of the making of the documents that would point to an implied choice. I therefore find that no express or implied choice of law was made to govern the Declaration of Trust or the Nominee Agreement.

116. Article 7 of the Convention applies when there is no choice of governing law:

> Article 7
>
> Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.
>
> In ascertaining the law with which a trust is most closely connected 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;
>
> d) the objects of the trust and the places where they are to be fulfilled.

117. Therefore, the law governing the Declaration of Trust and the Nominee Agreement will be the law most closely connected with the trust. In determining the close connection, regard must be had to the four factors listed in Article 7, and there is a certain implicit hierarchy to the list.

118. Taking each of these factors in turn:

(1) The place of administration of the trust designated by the settlor. No such designation was made in the Declaration of Trust nor the Nominee Agreement.

(2) The *situs* of the assets of the trust. The Declaration of Trust states that it relates to the shares in Sweet Revenge, whose *situs* is in England (the *situs* of registered shares is where the register of members is located). I note that in the Nominee Agreement, the assets of the trust are stated to extend to all the assets of Vinexsa, which would include the two flats at 12 Charles Street, whose situs is also in England. The Nominee Agreement also purports to extend the trust to the assets owned by Sweet Revenge, but for the reasons I have given, I find that this is ineffective. Therefore, the *situs* of the assets of the trust in each case is in England.

(3) The place of residence or business of the trustee. There was very limited evidence before me as to the place of residence of Vinexsa. The evidence of Mr Sands did not address "residence" as a matter of Bahamian law and I therefore assume that Bahamian law is the same as English law. As a matter of English law, a company is normally resident at the place where central management and control actually abides, irrespective of the jurisdiction in which the company is incorporated (*De Beers Consolidated Mines Limited v Howe* [1906] AC 455). Where central management and control of a company in substance and in practice is vested in its board of directors, residence will normally be where its board of directors meets. However, if central management and control is exercised independently of, and without regard to the board, then the company will be resident where central management and control is actually effected (see

Wood v Holden [2006] STC 443 and *Laerstate BV v HMRC* [2009] UKFTT 209 (TC)). The minutes of board meetings of Vinexsa included in the document bundles do not state where the board meetings were held. But I note that of the four directors, three were resident in the United Kingdom at all relevant times – and there was no suggestion in Stephen Schechter's evidence that the three UK directors flew to the Bahamas (or anywhere else) for board meetings. The mere signing of documents on behalf of Vinexsa in the UK unlikely of itself to be sufficient to make Vinexsa resident in the UK. However, the decision by the directors to have the company dispose of all of its assets by settling them on trust for its shareholders would be an act of central management and control, and if that decision was made in the UK, it would evidence the residence of Vinexsa in the UK. There are no minutes of any board meeting in the bundle relating to the approval of the Nominee Agreement or the Declaration of Trust. But Stephen Schechter's evidence was that the Nominee Agreement was approved and signed by Lawrence, Shelly and himself while in the UK (and subsequently posted to his other son, Scott, in the USA). Stephen Schechter also confirmed in written submissions following the hearing that he had custody of Vinexsa's seal in London. I find that it is more likely than not that central management and control of Vinexsa was effected in the UK and that it is resident in the United Kingdom. As regards place of business, I note that Vinexsa's address in the correspondence and forms in the bundle is given as being at 12 Charles Street, which is the residential address of two of the directors, and of course, Flat B became Stephen Schechter's business office. The only exceptions in the bundle to 12 Charles Street being given as the address for Vinexsa are the Declaration of Trust, which is headed with the registered office address in the Bahamas, and in correspondence with Savills/Riviera Estates (but not the other agents instructed on the sale of 20 Chemin de Bellevue – and in the case of the Savills' correspondence, the mandate is expressed to have been signed in London). I note also that the Nominee Agreement was signed in London, and this is consistent with the place of business of Vinexsa being in London. I find that the place of business of the trustee (Vinexsa) is in England.

(4) The objects of the trust and the places where they are to be fulfilled. It is difficult to apply this factor to a bare nominee arrangement – such as set out in the Declaration of Trust and the Nominee Agreement. Possibly, as the assets of the trust are all located in England, it might be said that it is in England where the objects of the trust are to be fulfilled.

(5) Dicey, Morris and Collins suggests that the *situs* of trust assets will usually deserve little weight, as the typical assets of a trust are intangible investments, and the *situs* of intangibles is to some extent a fiction. But in this case, material intended assets of the trust are immovable, and so it is probably appropriate to place some weight on the location of those assets, being England.

(6) Dicey, Morris and Collins also says that little importance should be attached to the final factor – the objects of the trust; only if the objects indicate an objective factor relating to the trust (such as where assets should be invested or the trust administered) should this be important.

119. Weighing all of these factors, I find that the law most closely connected with the Declaration of Trust and the Nominee Agreement to be English law.

Validity of the Trust

120. Article 8 of the Hague Convention is as follows:

> Article 8
>
> The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.
>
> In particular that law shall govern -
>
> a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
>
> b) the rights and duties of trustees among themselves;
>
> c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
>
> d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
>
> e) the powers of investment of trustees;
>
> f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
>
> g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
>
> h) the variation or termination of the trust;
>
> i) the distribution of the trust assets;
>
> j) the duty of trustees to account for their administration.

121. I find that English law therefore governs the validity of the Nominee Agreement and the Declaration of Trust.

122. As a matter of English law three matters must be defined to constitute an express trust:

(a) the property subject to the trust;

(b) the persons or objects to be benefited; and

(c) the interests which they are to take.

123. Section 53(1)(b), Law of Property Act 1925 requires that a trust over English land must be evidenced in writing signed by some person who is able to declare such trust (I follow the authors of Dicey, Morris and Collins (at paragraph 29-038) in treating the requirements of s53(1)(b) as falling within the ambit of Article 8 rather than as a preliminary issue).

124. The Declaration of Trust is expressed to relate solely to the shares in Sweet Revenge. The Nominee Agreement is expressed to relate to all of the assets of

Vinexsa, including the shares in Sweet Revenge, and all of the assets of Sweet Revenge. I therefore find that the Declaration of Trust and the Nominee Agreement identify the property subject to the trusts.

125. Mr Corbett submitted that the trusts declared by the Declaration of Trust and the Nominee Agreement were not valid as they did not clearly state the proportions in which the Vinexsa shareholders were to benefit from the trusts, and the trusts therefore did not satisfy the requirements that they defined the persons to benefit from the trusts and their interests in the trusts.

126. I disagree with Mr Corbett's submission for the following reasons. The Declaration of Trust and the Nominee Agreement identify the Vinexsa shareholders as the beneficiaries of the trusts. However they do not identify the proportions in which the beneficiaries are entitled to share in the trusts' assets. Both the Declaration of Trust and the Nominee Agreement identify the number of shares in Vinexsa owned by each of the individuals, and therefore their proportionate ownership of Vinexsa (and indirectly their interest in the underlying assets owned by Sweet Revenge). It is implicit in the drafting of these instruments that the intention is that the Vinexsa shareholders' beneficial interest in the trusts' property must be pro rata to their shareholding in Vinexsa.

127. The Declaration of Trust states that Vinexsa holds the shares in Sweet Revenge as bare nominee and trustee for the Vinexsa shareholders, and the Nominee Agreement states that it holds its assets as nominee for the Vinexsa shareholders.

128. I therefore find that the trusts created by the Declaration of Trust and the Nominee Agreement are bare trusts, under which Vinexsa holds its assets as bare trustee for the Vinexsa shareholders pro rata to their shareholdings in Vinexsa on 11 June 2003.

129. As regards the flats at 12 Charles Street, I note that both the Declaration of Trust and the Nominee Agreement are in writing.

130. The execution of documents by companies incorporated outside Great Britain were at the relevant time governed by the Foreign Companies (Execution of Documents) Regulations 1994 (SI 1994/950). These regulations adapted section 36A Companies Act 1985 to apply to the execution of documents (in accordance with the law of England and Wales) by companies incorporated outside Great Britain. Section 36A, as adapted by the regulations, read as follows:

> 36A Execution of documents: England and Wales.
>
> (1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.
>
> (2) A document is executed by a company by the affixing of its common seal or if it is executed in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company.

> (3) A company need not have a common seal, however, and the following subsections apply whether it does or not.
>
> (4) A document which—
>
> (a) is signed by a person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of that company, and
>
> (b) is expressed (in whatever form of words) to be executed by the company,
>
> has the same effect in relation to that company as it would have in relation to a company incorporated in England and Wales if executed under the common seal of a company so incorporated.
>
> (5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.
>
> (6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a "a person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of that company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed. A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

131. Sub-section (6) does not apply in this case, as the Vinexsa shareholders are not "purchasers". The evidence of Mr Sands does not address the manner of execution of documents by Bahamian companies, nor does he address which persons act under the authority of a Bahamian company. Applying English law, I find that directors have power to act on behalf of a company.

132. As the Nominee Agreement was signed by all of the directors of Vinexsa and the Vinexsa's seal has been embossed upon it, I find that the Nominee Agreement takes effect as if as it would have in relation to a company incorporated in England and Wales if executed under the common seal of a company so incorporated.

133. The Declaration of Trust was signed only by Lawrence Schechter, and the seal of Vinexsa was not embossed on it. However Lawrence Schechter is and was a director of Vinexsa, and as he had power to act on behalf of the company, and the Declaration of Trust was expressed to be executed by Vinexsa, I find that it takes effect as if as it would have in relation to a company incorporated in England and Wales if executed under the common seal of a company so incorporated.

134. I therefore find that the trusts declared by the Declaration of Trust and the Nominee Agreement comply with the requirements of s53(1)(b), Law of Property Act 1925 in relation to the flats at 12 Charles Street.

Conclusions as the legal effect of the Declaration of Trust and the Nominee Agreement

135. I therefore find that the trusts declared by Vinexsa in the Declaration of Trust and the Nominee Agreement over its own assets are (subject to the other issues considered in this decision) valid as a matter of English law.

Sham

136. HMRC submitted that there was no evidence that actual effect was given to the Nominee Agreement and Declaration of Trust – at all material times, Sweet Revenge continued to submit returns and accounts to HMRC on the basis that it was the owner of the property at 20 Chemin de Bellevue, and that at no time did the Vinexsa shareholders make any returns of the income that would have accrued to them had the Nominee Agreement and Declaration of Trust been respected. In other words, the Nominee Agreement and the Declaration of Trust were shams.

137. The classic statement of what is meant by a sham was given by Diplock LJ:

> "if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create." (*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at page 802.)

138. If the trusts declared by the Declaration of Trust and the Nominee Agreement are shams, then they are void, and beneficial ownership of the assets will have remained in Vinexsa and Sweet Revenge.

139. An allegation of sham is a serious matter. As Neuberger J said:

> "there is a very strong presumption indeed that parties intend to be bound by the provisions of agreements into which they enter, and, even more, intend the agreements they enter into to take effect." (*National Westminster Bank plc v James* [2000] BPIR 1092, at paragraph 59.)

140. The standard of proof when considering whether the trusts are a sham is the normal civil standard of the balance of probabilities. But, because a degree of dishonesty is involved in a sham, it follows (per Neuberger J, again at paragraph 59) that

> "there is a strong and natural presumption against holding a provision or a document a sham."

141. Although the Declaration of Trust and the Nominee Agreement purportedly transfer beneficial and equitable ownership of the assets owned by Vinexsa and Sweet Revenge to the Vinexsa Shareholders, in practice both companies continued to act as if the legal and beneficial ownership of their assets continued to be vested in them. In particular, although the December 2009 Coutts loan facility does not include any express warranty that Vinexsa and Sweet Revenge are the beneficial owners of the

flats at 12 Charles Street and the property at 20 Chemin de Bellevue respectively, the agreement is clearly drafted on the presumption that Vinexsa and Sweet Revenge are their beneficial owners. For example, the facility agreement includes a requirement that the bank receives a legal opinion confirming that Vinexsa has power to grant security over its assets – which can only be a reference to the London flats and the shares in Sweet Revenge.

142. Vinexsa is also required to provide to Coutts copies of its annual audited accounts and copies of interim financial statements for itself and Sweet Revenge. Since 2003 the accounts of Sweet Revenge have shown 20 Chemin de Bellevue as a fixed asset in its accounts, and Sweet Revenge filed corporation tax returns on the basis that it was the legal and beneficial owner of 20 Chemin de Bellevue (although the corporation tax returns were not included in the bundle, Stephen Schechter was questioned about the corporation tax returns when giving evidence and confirmed that this was the case). The accounts of Vinexsa for the year ended 31 December 2012 (which were included in the bundle) show the flats at 12 Charles Street being held as investment properties and the shares in Sweet Revenge being held as fixed asset investments. If these assets were in fact held by the companies as nominees on bare trust for the Vinexsa shareholders, these assets would not appear on the balance sheets of the companies. When questioned on this point at the hearing, Stephen Schechter said that this had been a mistake, and was in the course of being corrected – but the Appellants produced no documentary evidence to support his oral evidence.

143. Stephen Schechter said no one had ever told him that the basis on which the accounts had been prepared was incorrect. This is rather to put the cart before the horse, since it is he (as a director) who is ultimately responsible for the preparation and approval of the accounts. But even if that is true, the error (if error it was) was apparent on the face of the accounts, which as a director he would have had to review and approve. Given that Stephen Schechter is an investment banker, who has an MBA degree, whose career has been concerned with arranging borrowings on the security of land and buildings, and who is well versed in reading and understanding company accounts, he has the skills and experience needed to be able to spot the issue himself. And of course the inconsistency had been pointed out by HMRC in October 2013.

144. I also note that Sweet Revenge has submitted corporation tax returns to HMRC each year, on which it declares rental income from the property at 20 Chemin de Bellevue.

145. When I raised the issue at the case management hearing in January 2016, the Appellants' representative said that the Appellants would take steps to correct the accounts in due course. In written submissions made after the hearing, the Appellant's representative stated that instructions to correct the accounts of Sweet Revenge had in fact been given to its accountants before the case management hearing, and were effected when the 2015 accounts were submitted to Companies House in September 2016, but I have to say that I find it strange that the Appellants' representative did not say this when I raised the point at the case management hearing In any event, this submission is not supported by any evidence. I also note that the

Appellants' representative made no statement as to whether any corrective action was being taken in relation to the accounts of Vinexsa.

146. I infer that the only reason Stephen Schechter did not question the inclusion of 20 Chemin de Bellevue as a fixed asset (indeed the only asset) in Sweet Revenge's balance sheet, and the flats at 12 Charles St as investment properties and the shares in Sweet Revenge as fixed asset investments in Vinexsa's balance sheet was because that accorded with his understanding of the reality of the circumstances – and in other words the Declaration of Trust and the Nominee Agreement were never intended to have substantive effect, and in particular to extend to the assets of Sweet Revenge.

147. Although the sham point was raised by HMRC in their submissions, no allegation of a sham was pleaded in HMRC's statement of case, and HMRC's case is not dependent upon showing that the trusts purportedly declared by Vinexsa are shams. However, the creditability of the Appellants' evidence as to the validity of the trusts purportedly created by the Declaration of Trust and the Nominee Agreement have always been in issue in this appeal. I am therefore able to draw inferences from the evidence, notwithstanding the absence of any pleadings to this effect.

148. On the balance of the probabilities, I find that Vinexsa's declaration of a trust over its assets was a sham.

149. Given that the Nominee Agreement could not extend to the assets of Sweet Revenge in any case (because of the effect of the corporate veil under English company law), it would perhaps be wrong to describe the purported trust over these assets as a "sham", but the evidence of the terms of the 2009 loan facility agreement and the treatment of 20 Chemin de Bellevue in Sweet Revenge's accounts supports the analysis that any trust arrangement did not extend to 20 Chemin de Bellevue.

Trading Stock

150. Stephen and Lawrence Schechter are only entitled to a deduction for trading losses in respect of their ownership interests in 12 Charles Street and 20 Chemin de Bellevue if (a) they are the beneficial owners of an interest in those assets, and (b) those assets are held as trading stock for the purposes of a trade or an adventure in the nature of a trade.

151. There is no statutory definition of "trade" or "adventure in the nature of a trade", and whether an activity amounts to "trading" is determined on the basis of case law. The "badges of trade" (six were originally identified by the Royal Commission on the Taxation of Profits and Income in 1955) form a helpful basis in the determination of whether an activity amounts to trading. HMRC currently identify nine badges in their Business Tax manual (BIM20205) as follows:

1	Profit-seeking motive	An intention to make a profit supports trading, but by itself is not conclusive.

2	The number of transactions	Systematic and repeated transactions will support 'trade'.
3	The nature of the asset	Is the asset of such a type or amount that it can only be turned to advantage by a sale? Or did it yield an income or give ‘pride of possession’, for example, a picture for personal enjoyment?
4	Existence of similar trading transactions or interests	Transactions that are similar to those of an existing trade may themselves be trading.
5	Changes to the asset	Was the asset modified or improved, or broken down into smaller lots to make it more easily saleable or saleable at a greater profit?
6	The way the sale was carried out	Was the asset sold in a way that was typical of trading organisations? Alternatively, did it have to be sold to raise cash for an emergency?
7	The source of finance	Was money borrowed to buy the asset? Could the funds only be repaid by selling the asset?
8	Interval of time between purchase and sale	Assets that are the subject of trade will normally, but not always, be sold quickly. Therefore, an intention to resell an asset shortly after purchase will support trading. However, an asset, which is to be held indefinitely, is much less likely to be a subject of trade.
9	Method of acquisition	An asset that is acquired by inheritance, or as a gift, is less likely to be the subject of trade.

152. In the case of the two flats at 12 Charles Street, there is little doubt that both flats were held by Vinexsa as capital assets and not as trading stock, and I so find. The flats were acquired in a single transaction to provide a home for Stephen and Sherry Schechter in London, and not as trading stock for a property dealing trade. Although title to the property was split on enfranchisement of the freehold, there is no

evidence that this was done with the intention of appropriating Flat B to trading stock – to the contrary the flat continued to be used to store Stephen Schechter's files, and then to be rented to Stephen Schechter's company to be used as its office. As Mr Corbett stated in his submissions, the circumstances are no different from those of the owner of a house who sells part of his back garden to a neighbour or to a property developer. The mere fact, for example, that the owner advertises part of the garden for sale does not have the effect of appropriating the garden to trading stock.

153. I also find that the purported vesting of the beneficial ownership of the flats under the Nominee Agreement in the hands of the Vinexsa shareholders did not have the effect of appropriating those flats to trading stock in the hands of the shareholders. There is nothing in the Nominee Agreement that would suggest that there was any intention that the agreement was intended to effect an appropriation to trading stock in the hands of the shareholders.

154. The position of 20 Chemin de Bellevue is not as straightforward. I am satisfied that the property was acquired with a view to constructing a substantial mansion on it with a view to realising a profit after the development was completed. Ordinarily this would be sufficient to demonstrate that Sweet Revenge owned the property as trading stock. The badges of profit motive, the nature of the asset, the changes to the asset, (and others) would have been sufficient to determine that the property is held as trading stock. Given the deterioration in the French property market, the fact that the property was not sold quickly – and was rented out in the meantime pending sale – would not have had the effect of appropriating the property to capital.

155. However, the oral evidence of Stephen Schechter was that there was no intention that Sweet Revenge would ever sell 20 Chemin de Bellevue, as this would allow SAFER to exercise its pre-emption rights, and would give rise to French registration taxes and notarial costs. Instead, the intention was that Sweet Revenge would continue to own the property, and Vinexsa would sell the shares in that company to a purchaser. After the hearing, in his written submissions, Mr Schechter modified his evidence by saying that the ownership structure gave flexibility to allow either a sale of the Sweet Revenge shares by Vinexsa, or a sale of the property itself by Sweet Revenge. Mr Schechter provided a copy of a flowchart prepared by Withers Bergman with his written submissions – but I can see nothing in that flow chart that is inconsistent with his original oral evidence, that the intention always was for Vinexsa to sell the shares in Sweet Revenge. This intention is also supported by the documentary evidence of the mandates given to Nice Properties, to Sarl L&F, and to Savills/Riviera Properties as selling agents, which were given by Vinexsa to sell 100% of the shares in Sweet Revenge. This suggests to me that if any asset was held as trading stock, it would be the shares in Sweet Revenge owned by Vinexsa, and not the underlying real estate at 20 Chemin de Bellevue owned by Sweet Revenge.

156. I do not find that the tenor of the financing arrangements advanced by Coutts (being the source of finance of 20 Chemin de Bellevue) provides any assistance in determining the trading nature of the property. The original loan facility granted in 2000 was "on demand" with the expectation that it would be fully repaid by 2015. The replacement facility granted in 2009 provided for repayment in full in 2010. It is

not possible to discern either a trading or an investment motive for Sweet Revenge from the terms of these facilities.

157. I find that Sweet Revenge did not hold the property at 20 Chemin de Bellevue as trading stock.

Bahamian Trust Companies

158. Mr Corbett submitted that as a Bahamian company, it was illegal for Vinexsa to act as a trustee without a licence granted by the Bahamian government authorising it to carry on trust business. Mr Corbett referred me to researches he had undertaken on the internet. Although Mr Sands' evidence was poor and untested, in his witness statement he stated expressly that the Nominee Agreement and the Declaration of Trust, and the transactions purportedly effected and described in those documents, were not contrary to applicable Bahamian law. The same conclusion would apply if I assumed that Bahamian law was identical to English law. Given that Mr Corbett is not an expert on Bahamian law, and the inherent unreliability of uninformed internet research, I do not find that it was illegal for Vinexsa to act as a trustee.

Conclusions

159. The Declaration of Trust and the Nominee Agreement are both liable to fixed stamp duty as declarations of trust. Neither instrument was impressed with any stamp duty, and accordingly, neither instrument is admissible in evidence.

160. As the Appellants' case is wholly dependent upon the transfer of the beneficial interests in 20 Chemin de Bellevue and the flats at 12 Charles Street to the Vinexsa shareholders having been effected by these two instruments, it follows that their case must fail, and I therefore dismiss their appeal.

161. However, as they can submit these two instruments to HMRC for stamping at any time in the future (subject to payment of interest and penalties), and as the issues were aired before me, I have considered whether the appeal would have succeeded if these instruments had been stamped.

162. In summary I would have found that neither the Nominee Agreement nor the Declaration of Trust were effective to vest in the Vinexsa shareholders the beneficial and equitable ownership of Flats 10 and B, 12 Charles Street, London or the property at 20 Chemin de Bellevue because:

(1) in the case of the flats at 12 Charles Street, the purported bare trust was a sham and was never respected by Vinexsa or its shareholders; and

(2) in the case of the property at 20 Chemin de Bellevue, neither the Nominee Agreement nor the Declaration of Trust could extend to assets not owned by Vinexsa itself (such as assets owned by its subsidiary Sweet Revenge). Even if they could, the transfer of the beneficial interest in 20 Chemin de Bellevue to the Vinexsa shareholders would have been ineffective, as it would have

represented an unlawful return of capital, which is *ultra vires* and is incapable of ratification.

163. I also would have found that neither Flat B, 12 Charles Street nor 20 Chemin de Bellevue were owned as trading stock by their respective owners.

164. In view of my findings as to the beneficial and equitable ownership of the properties, and the status of those properties as capital investments, I do not need to consider whether any losses arising in respect of the properties are available to be set against the taxable income of the Appellants.

165. I therefore hold that HMRC were correct to deny Stephen and Lawrence Schechter a deduction for trading losses against their other income in relation to their income for 2008/9.

Outcome

166. The appeals are dismissed

167. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 2 MARCH 2017

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 15 March 2017 and 6 April 2017