United Capital Corporation - v Bender and Others

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	16 January 2006
Neutral Citation:	[2006] JRC 4A
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Court:	Royal Court
Date:	16 January 2006

Text

[2006] JRC 4A

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **sitting alone**.

United Capital Corporation Limited
Plaintiff
and
(1) John Felix Bender
(2) John Koonmen
(3) SGI Trust Jersey Limited (in liquidation)
(4) Johan Hendrik Laurentius Bartolomeus Wijsmuller
(5) Bluebird Limited
(6) Dovetail Limited
Defendants

and

(1) Kleinwort Benson (Channel Islands) Ltd
(2) UBS AG (Jersey)
(3) Standard Bank Jersey Limited
Parties Cited

Advocate S. J. Young **for the Plaintiff**.

Advocate J. P. Speck **for the First and Second Defendants**.

Advocate S. A. Franckel **for the Fourth Defendant**.

Advocate P. D. James **for the Fifth and Sixth Defendants**.

Authorities

Service of Process (Jersey) Rules 1994.

Koonmen -v- Bender [2002] JCA 218 .

Royal Court Rules.

Rules of the Supreme Court.

Re Pritchard [1963] 1 All ER 873 .

The Goldean Mariner [1990] 2 Lloyds LR 215 .

Supreme Court Practice (1999 Ed'n).

Bankers Trust -v- Shapiro [1980] 1 WLR 1274 .

Lewin on Trusts (17 th Ed'n) at para 9 – 72.

Dicey & Morris, Conflict of Laws para 11 – 220

Polly Peck International Plc -v- Nadir (the Independent September 2 1992) cited in Dicey & Morris, Knox.

The Spiliada (Spiliada Maritime Corporation -v- Canulex Limited [1987] AC 460 .

Deputy Bailiff

1 I have before me various summonses issued by the defendants. In broad outline they raise three issues:-

(i) The first defendant contends that the proceedings have not been validly served upon him;

(ii) the second, fifth and sixth defendants assert that the decision granting leave to the plaintiff to serve the proceedings upon them out of the jurisdiction should be set aside on the ground that the claims do not fall within any of the sub-paragraphs of Rule 7 of the Service of Process (Jersey) Rules 1994 ("the 1994 Rules").

(iii) all the defendants argue that the proceedings in Jersey should be set aside or stayed on the ground that Jersey is not the appropriate forum.

2 I will deal with the three issues in turn but it is necessary first to set out the factual background. I would emphasise in this respect that these are of course merely allegations made by the plaintiff and are disputed by the defendants although the structure of the various corporate entities and the movement of monies appear, for the most part, not to be substantially in dispute.

Factual background

3 The first defendant, ("Mr Bender") is a former resident of the United States and currently resides in Costa Rica. The second defendant ("Mr Koonmen") is resident in Japan. Both of them were securities traders. The third defendant ("SGI") is a trust company which carried on business in Jersey and was owned as to 60% by Mr Philip Sinel, a Jersey advocate and 40% by the fourth defendant Mr Wijsmuller. It is now in liquidation. The fourth defendant Mr Wijsmuller was the managing director of SGI as well as a 40% shareholder. He resides in Jersey. The fifth defendant (Bluebird) and the sixth defendant (Dovetail) are both companies incorporated in Anguilla but hold assets administered in Jersey.

4 The plaintiff alleges that in 1996 an oral agreement ("the Amber agreement") was made in New York between a Mr Joel Silverman and Mr Bender concerning the establishment of some hedge funds known as the Amber funds. In very broad terms Mr Bender was to be the investment manager whereas Mr Silverman was to be concerned with setting up the funds and using his contacts to obtain investors. There was to be a management fee of 2% per annum of the value of the Amber funds and a performance fee of 25% of the annual profits of the funds. I shall refer to those two types of fees as the 'Amber fees'. The Amber fees were to be split as to 75% to Mr Bender and 25% to Mr Silverman. Mr Silverman has assigned his rights under the Amber agreement to the plaintiff, a company incorporated in Gibraltar.

5 It is alleged that, pursuant to the Amber agreement, Mr Silverman procured investors to the extent of approximately US$280 million. A complicated corporate structure was established. The funds were set up in the Cayman Islands. They were formally managed by Amber Investment Advisers Limited ("AIA Cayman"), a company also incorporated in the Cayman Islands. The administration was carried out by Custom House Fund Management

Ltd in Ireland. Under the structure it was AIA Cayman which was contractually entitled to the Amber fees referred to above. Mr Bender had a service contract with AIA Cayman whereby, in exchange for certain comparatively modest fees, he would act as its trading manager.

6 The plaintiff claims that the Amber fees paid to AIA Cayman were held upon trust pursuant to the Amber agreement as to 75% for Mr Bender and 25% for Mr Silverman. Mr Silverman was in fact paid fees totalling approximately US$1.7 million for 1996 and 1997 but has received no fees since then.

7 It would appear that in March 1999 Mr Bender brought in Mr Koonmen to join him in managing the investments of the Amber funds. Mr Bender was to work from the US whereas Mr Koonmen would work from Tokyo. In the *Koonmen v Bender* action (to which I shall refer later) Mr Koonmen alleged that it was orally agreed between him and Mr Bender that they would share the Amber fees equally between them.

8 The Amber funds were extremely successful. In 2000, a second company, also called Amber Investment Advisers Limited was incorporated, this time in Anguilla ("AIA Anguilla"). This company replaced AIA Cayman as investment adviser and thereafter received the Amber fees. It is alleged by the plaintiff that this switch in investment adviser was undertaken in order to defeat Mr Silverman's claim.

9 In January 2000 the Amber Employee Benefit Trust ("AEBT") was established under the law of Anguilla. AIA Cayman was the settlor and Intertrust (Anguilla) Limited was the original trustee. Not long thereafter Sinel Trust Anguilla Limited ("STAL") became the trustee. STAL was also owned by Mr Sinel and Mr Wijsmuller in the same proportions as SGI and was closely associated with SGI. Not long after AEBT was established, AIA Cayman transferred the sum of US$23.6 million of Amber fees to AEBT. Subsequently further substantial sums were transferred to AEBT by AIA Cayman and, later, AIA Anguilla. All of this was unknown to Mr Silverman.

10 The Amber funds were liquidated in October 2000 and the proceeds returned to investors. They had been extremely successful. According to the plaintiff's order of justice the Amber fees (comprising management and performance fees) for the years 1998 to 2000 totalled some US$184 million with the result that Mr Silverman's 25% share came to some US$46 million.

11 Some time in 2000 Mr Bender left the United States and went to live in Costa Rica. In February 2001 Mr Silverman initiated an action against Mr Bender in the courts of New York claiming his 25% share of the Amber fees. However Mr Bender did not enter an appearance and, as he no longer had any assets in the United States, Mr Silverman did not proceed to obtain judgment in default. He was advised that he should commence proceedings in a jurisdiction where Mr Bender had some assets.

12 In 2001 a dispute arose between Mr Bender and Mr Koonmen. Mr Koonmen alleged that he had not received the 50% share of the Amber fees to which he was entitled. He began proceedings in Jersey against Mr Bender, STAL, Mr Wijsmuller, SGI, AIA Cayman, AIA Anguilla, Intertrust and others. It is not necessary to go into detail concerning his claim but I would mention the following points:-

(i) Mr Koonmen alleged that, regardless of which corporate entities received the Amber fees, they were held in equal shares for Mr Koonmen and Mr Bender and Mr Bender owed fiduciary duties towards Mr Koonmen in respect of Mr Koonmen's share of the fees. He also alleged that all the various companies were ultimately controlled by Mr Bender.

(ii) Mr Koonmen alleged that Mr Wijsmuller had been the main adviser to Mr Bender and had been actively involved with Mr Bender in organising the replacement of AIA Cayman by AIA Anguilla with a view to protecting the Amber fees from Mr Bender's creditors (including Mr Silverman) and subsequently in organising the transfer of funds from AIA Cayman and AIA Anguilla to AEBT. Mr Koonmen accepted that he had been told by Mr Bender in late 1999 of Mr Silverman's claim but said that Mr Bender had asserted that the claim was his problem and not any concern of Mr Koonmen's.

(iii) According to Mr Koonmen, although Intertrust and then STAL was the trustee of AEBT, control lay at all times with Mr Wijsmuller in Jersey who was the key player in managing and administering the various offshore structures. He organised matters subject to Mr Bender's ultimate control.

(iv) According to Mr Koonmen, the Amber fees totalled some US$143 million and most of this was paid into AEBT by AIA Cayman and AIA Anguilla.

13 There were various procedural hearings in the *Koonmen v Bender* [2002] JCA 218 action which resulted ultimately in the Court of Appeal holding that Anguilla, rather than Jersey, was the appropriate forum. Accordingly the Jersey proceedings were stayed. Subsequently a settlement was reached between Mr Koonmen and Mr Bender and in due course a written settlement agreement involving all those who had been party to the *Koonmen v Bender* action (and other persons) was executed on 12 th August 2003. The settlement agreement is very complex but it would seem that approximately US$62 million was paid out of AEBT to the Gemstone A Trust for the benefit of Mr Koonmen, some US$10 million was paid by AIA Anguilla to the Gemstone B Trust for the benefit of a Mr Philips and certain other colleagues of Mr Koonmen in Japan and the balance was retained in AEBT for Mr Bender. STAL remained the trustee of AEBT and the Gemstone A and B Trusts, although it appears that most of the administration was carried out on behalf of STAL by SGI in Jersey. Subsequently a dispute arose between Advocate Sinel and Mr Wijsmuller over SGI and STAL which resulted in proceedings between them. STAL purported to resign as trustee of the Gemstone A and B Trusts and appoint another Anguillan company, Barwys, as trustee in its place. Barwys is a company wholly owned by Mr Wijsmuller. There is a dispute as to

whether that change in trusteeship was effective and, following application by Mr Koonmen and Mr Philips, the Anguillan High Court has appointed a Mr David Sargeant as receiver of these two trusts. Mr Sargeant is an employee of the firm of lawyers instructed by Mr Koonmen in Anguilla. Dovetail is a nominee company, incorporated in Anguilla, which holds the assets of the Gemstone A Trust and Bluebird, also incorporated in Anguilla, is a nominee company holding the assets of the Gemstone B Trust. The assets of these companies comprise substantially of bank deposits. The deposits appear to be largely with Swiss banks but they have in turn placed the funds on fiduciary deposits with UBS in Jersey. These funds have been injuncted in the present proceedings. The Court does not at present have any information as to the nature or whereabouts of Mr Bender's assets or those of AEBT because disclosure orders made in support of the Mareva injunction have been stayed pending the outcome of this summons.

14 Under the settlement agreement Mr Bender and Mr Koonmen (and the various entities on their behalf) specifically agreed that they would share equally any liability to Mr Silverman and would indemnify each other accordingly.

15 In short, it is said that Mr. Silverman's share of the Amber fees was largely paid by AIA Caymen and AIA Anguilla into AEBT from which a substantial proportion was then transferred under the settlement agreement to the Gemstone A Trust. The Gemstone B Trust was funded directly from AIA Anguilla with Amber fees which belonged in part to Mr. Silverman. Pending discovery, the plaintiff does not at this stage know what has happened to the balance of AEBT or to any Amber fees retained by AIA Cayman or AIA Anguilla.

The nature of the claims

16 The order of justice is a complex document which raises a number of claims. It is not necessary to rehearse them in detail; for present purposes it is necessary only to summarise the broad nature of the claims. In essence, underlying all the claims (except some of those against Mr Bender) is an assertion that AIA Cayman and subsequently AIA Anguilla held Mr Silverman's share of the Amber fees upon trust for him and that Mr Bender owed Mr Silverman fiduciary duties in respect of those Amber fees. From this follow two different types of claim.

17 First Mr Silverman (and therefore the plaintiff) asserts that he is entitled to trace his share of the Amber fees into property presently representing the same and he therefore has a proprietary claim against such property. The plaintiff brings claims against all of the defendants under this heading on the basis that Mr Silverman's share of the Amber fees is now held by them or by others on their behalf.

18 Secondly the plaintiff claims against those defendants who have given dishonest assistance to Mr Bender's breach of trust or who have had knowing receipt of assets held on trust for Mr Silverman. The way these claims are put against the various defendants can be summarised as follows:-

(i) The plaintiff alleges breach of contract, breach of fiduciary duty and breach of trust against Mr Bender by reason of his failure to account for Mr Silverman's share of the Amber fees and his dishonest arrangement to divert the fees from Mr Silverman and keep them for himself and Mr Koonmen. The matters relied upon in support are the replacement of AIA Cayman by AIA Anguilla to receive the Amber fees; the setting up of AEBT and the transfer of the Amber fees to that trust; the entering into of the settlement agreement whereby the Amber fees (including Mr Silverman's share) and the proceeds of re-investment thereof, were divided up between Mr Bender and Mr Koonmen; and the causing or permitting of the subsequent dealings with the assets allocated to Mr Bender under the settlement agreement.

(ii) The plaintiff alleges that Mr Koonmen is liable as constructive trustee in that he dishonestly assisted Mr Bender in the first two matters referred to under (i) above; entered into the settlement agreement whereby the Amber fees were divided up between himself and Mr Bender knowing that these included Mr Silverman's share; and thereafter caused or permitted the assets allocated to him under the settlement agreement to be managed knowing that they included Mr Silverman's share of the Amber fees and the proceeds of re-investment thereof. The plaintiff also alleges that Mr Koonmen is liable on the ground of knowing receipt having received or having permitted entities which he controls to receive Mr Silverman's share of the Amber fees with the requisite knowledge.

(iii) The plaintiff alleges that Mr Wijsmuller is liable as constructive trustee on the grounds that he dishonestly assisted Mr Bender in his breach of trust as set out above. It is alleged that Mr Wijsmuller is also liable for knowing receipt in respect of the sum of £500,000 loaned to him and secured on two properties in Jersey.

(iv) It is alleged that Mr Wijsmuller's knowledge can be imputed to SGI as he was its managing director. Accordingly SGI is liable for dishonest assistance in the same manner as Mr Wijsmuller. It is also liable on the ground of knowing receipt in respect of trust assets which it has received or which are controlled and administered by it.

19 The plaintiff claims that the fees should have been re-invested in the Amber funds and that, allowing also for interest, the total loss is some US$97 million. It therefore claims that sum plus continuing interest.

20 With that introduction I turn to consider the three issues raised before me.

(i) Mr Bender's claim that he has not been validly served

21 Mr Speck submits that Mr Bender has never been validly served. Accordingly it is necessary to set out the procedural history of the proceedings to date.

22 On 16 th May 2005 I signed the original order of justice issued by the plaintiff. It contained

ex parte Mareva injunctions. I gave leave to serve the proceedings outside the jurisdiction. The identity of the defendants was somewhat different at that stage. Because a question has arisen as to the correct interpretation of the order for service on Mr Bender I set out paragraph 7 of the prayer of the original order of justice:-

> *"7. Substituted service and service out of the jurisdiction*
>
> *Leave is hereby given to the Plaintiff to serve this Order of Justice personally on the following Defendants outside the jurisdiction being:-*
>
> *Amber Investment Advisers Limited (a company incorporated under the laws of the Cayman Islands) at their registered office being PO Box 265 GT, Grand Cayman, Cayman Islands;*
>
> *Amber Investment Advisers Limited (a company incorporated under the laws of the British Virgin Islands) at their registered office being in Roadtown, Tortola, BVI;*
>
> *Amber Investment Advisers Limited (a company incorporated under the laws of Anguilla) at their registered office being Sinel Chambers, PO Box 1269, the Valley, Anguilla, BWI;*
>
> *Sinel Trust Anguilla Limited as trustee at their registered office being Sinel Trust Anguilla Limited, Sinel Chambers, PO Box 1269, The Valley, Anguilla, BWI;*
>
> *Intertrust (Anguilla) Limited (a company incorporated under the laws of Anguilla) as trustee at their registered office being Sinel Chambers, PO Box 1269, The Valley, Anguilla, BWI.*
>
> *Leave to serve the first defendant by leaving this order of justice at his residence being Finca Bender, La Florida, Tinamastes, Perez Zeladon, Costa Rica; and*
>
> *substituted service upon*
>
> *The second defendant via the sixth defendant –*
>
> *requiring their attendance before the Royal Court on 27 th May 2005."*

23 An affidavit in support of the application by Mr Ian Hogg asserted that he believed that it would be impossible to serve Mr Bender as, on a previous occasion, Mr Hogg had attended by arrangement at Mr Bender's property in Costa Rica but was met by armed guards who informed him that Mr Bender no longer wanted to see him and he was threatened with physical harm if he did not leave. It did not prove possible to serve all the defendants in time for the original return date of 27 th May and an order was subsequently made on 28 th June extending the return date to 22 nd July.

24 According to affidavits sworn by Mr Arturo Merino, a Public Notary in Costa Rica and by Mr

Paul Austin, both of these gentlemen were present when, on 9 th July 2005, Mr Merino left the order of justice and the accompanying papers at Mr Bender's residence as required by the order. According to Mr Austin's affidavit the documents were left at the address shown in the order of justice; according to Mr Merino's affidavit the documents were left at the gatehouse to the entrance of a property known as 'The Stonehouse'. He also purported to exhibit photographs which showed the property in question. Mr Merino had previously served the papers at the same address on 28 th May at a time when the return date had been 27 th May.

25 On 22 nd July the matter came before the Royal Court on the first return date. Messrs Bailhache Labesse appeared for Mr Bender. Apparently they had noted his name on the court list and, because they acted for him at the time, they attended on his behalf. They apparently asserted before the Court that Mr Bender had not been served with the documents. They also made it clear that he wished to contest the jurisdiction. The matter was therefore placed on the pending list in accordance with the relevant Rule of Court. Mr Young referred the Court to the fact that he had affidavits of service from Mr Merino and Mr Austin but appears to have decided to make doubly sure. He invited the Court there and then to make an order for substituted service on Mr Bender by serving the proceedings on Messrs Bailhache Labesse with the request that they be transmitted to Mr Bender. The Court, presided over by the Lieutenant Bailiff, acceded to that request and made an order for substituted service. Advocate Young sent the Order of Justice to Bailhache Labesse by post on 25 th July but they insisted that it be served by the Viscount. On 5 th August the Viscount duly served the original order of justice upon Messrs Bailhache Labesse pursuant to the order for substituted service.

26 In the meantime, Mr Koonmen had issued a summons seeking the same relief as is sought in the 2 nd and 3 rd issues raised today, namely that leave to serve the proceedings outside the jurisdiction should be set aside, failing which the proceedings should be stayed on the grounds of *forum non conveniens.* The summons came before the Court (over which I was presiding) on 28 th July. The Court considered that the order of justice did not make the basis of the plaintiff's claim at all clear. The Court did not wish to determine important questions of jurisdiction and forum on the basis of an inadequate pleading. Accordingly it adjourned Mr Koonmen's summons and ordered that the plaintiff file an amended order of justice setting out its claim properly.

27 On 5 th August I signed an amended order of justice which not only set out the plaintiff's claim in an amended form but also brought in certain new defendants and discontinued the proceedings against some of the original defendants. It would seem that the plaintiff's advisers were in some doubt as to whether the amended order of justice needed to be served on Mr Bender in the same manner as the original order of justice or in accordance with the order for substituted service made by the Court on 28 th July. They therefore determined to serve by both methods. The Viscount served the amended order of justice on Bailhache Labesse on 11 th August with a return date of 26 th August.

28 Service at Mr Bender's address proved somewhat more complicated. The Court has received detailed affidavits but I propose to summarise the position only very briefly. Mr Hogg and a Mr Andrew Wordsworth, a partner in the firm of Grayson Pender Wordsworth acting for the plaintiff, state that they served the amended order of justice at the gatehouse to Mr Bender's property on 13 th August 2005 in accordance with the order for service outside the jurisdiction. The relevant paragraph of Mr Hogg's affidavit says as follows –

> *"Mr Bender's property is very remote.* It is a five hour drive from the capital, San José, and very distant from civilization. It occupies the top of a mountain and is only accessible by dirt roads. It is effectively a fortress. We arrived at Mr Bender's property at approximately 4.15 in the afternoon, local time on Saturday 13 th August 2005. We were met by a guard, who at first denied Mr Bender lived there, but eventually took the papers together with business cards of myself and Mr Wordsworth. The encounter was quite good-humoured. We then left the property".

29 They assert, that, by arrangement made on the telephone through Mr Wijsmuller, they returned to the property on 15 th August with a view to meeting Mr Bender in order to discuss the possibility of settling the whole matter. They believed they were attending at the property by arrangement. On arrival at the property which they had attended on 13 th August, they were let in but, once the car was stopped, they were surrounded by six guards who were armed with shotguns and pistols. It later transpired that some of these individuals were plain clothes police officers. All the guns were trained on them and they were told to get out of the car and put their hands on top of the car and spread-eagle themselves. They were then searched. They were extremely frightened. There was then substantial radio communication in Spanish. They remained spread-eagled against the car for approximately fifty minutes. Eventually a police car arrived and they were taken to the local police station where they arrived at about 5.30. On the way, according to Mr Hogg, he was told by the policeman riding with him that the police had been notified by Mr Bender that Mr Hogg was an international assassin, that there was a warrant for his arrest from Interpol together with a substantial reward for his capture, and that Mr Bender was afraid of him. They were detained at the police station but eventually released about 8.30 p.m. some four and a half hours after they were first detained.

30 These events form the basis of a separate representation issued against Mr Bender alleging contempt of court on his part by seeking to intimidate. It is important to note that Mr Bender strongly denies these allegations. He asserts that in April 2001 he was abducted from his car at gun point at the instance of Mr Silverman. When Mr Bender and his wife heard of the visit of Mr Hogg and Mr Wordsworth to the wardens on 13 th August, they were fearful. They contacted their lawyer and he made contact with the local police. Mr Bender and his wife were advised not to attend a meeting with Mr Hogg and to remain in their house. This is what they did and accordingly they saw nothing of the events when the police arrested Mr Hogg and Mr Wordsworth. It was not done at Mr Bender's request but was done by the police under their own initiative.

31 Despite requests having been made earlier by Mr Bender's advocates for sight of the photographs referred to by Mr Merino in his affidavits of service, these were not supplied by the plaintiff until 12 th October. With the assistance of these photographs Mr Bender has asserted in his third affidavit that Mr Merino in fact served the papers on a neighbouring property. That has now been accepted by the plaintiff, which asserts that Mr Merino and Mr Austin simply made a mistake.

32 As to the alleged service on 13 th August, Mr Bender asserts that this was effected on one of the wardens near the warden's house which does not form part of his property. Mr Wordsworth, on the other hand, asserts that service was validly effected on a guard who was blocking his path into the property a further twenty yards up the track from the warden's house.

33 Mr Speck, on behalf of Mr Bender, submits that there has been no valid service of the proceedings on Mr Bender and that I should make a declaration to that effect. I would summarize his submissions as follows -

(i) Correctly interpreted, the order of justice provides for personal service on Mr Bender. That cannot be effected by leaving the papers at Mr Bender's residence and the order was therefore self-contradictory and made without jurisdiction. It ought therefore to be set aside.

(ii) Even if the order of justice did not provide for personal service, it should have done. There is a strong presumption that proceedings by order of justice should be served personally, especially where an ex parte injunction is included.

(iii) Even if the order contained in the order of justice was a valid order for ordinary service, the fact remained that service had not been effected in accordance with the order. The documents had been served at the incorrect address both on 28 th May and 9 th July. The amended order of justice had also been served at the incorrect address on 13 th August.

(iv) The order for substituted service made by the Royal Court on 22 nd July was made in excess of jurisdiction and should be set aside. Rule 5/10(1) provides that substituted service may be ordered where the Court finds that it is ‘impracticable’ to serve the documents personally. Rule 5/10(2) provides that an application for any order for substituted service must be supported by affidavit stating the facts upon which the application is founded. On this occasion there was no affidavit before the Court and no evidence that it was impracticable to achieve personal service.

(v) If the order for substituted service was wrongly made, the service on Bailhache Labesse of the original order of justice on 5 th August and the amended order of justice on 11 th August was equally invalid and of no effect.

34 My decision in respect of Mr Speck's submissions is as follows –

(i) I accept that the wording of paragraph 7 of the *ex parte* order contained in the order of justice is not well drafted. Primary responsibility for this rests with the plaintiff but I must also accept my share of responsibility for not having spotted this and insisted upon clearer wording. Nevertheless, it is in my judgment clear that the correct interpretation of the order is that it was not an order for personal service on Mr Bender. Personal service requires the document to be handed to the person to be served, or, if he will not accept it, that it be left with or near him. Delivering a document to a person's residence is clearly not personal service. It is a form of ordinary service. It would be nonsensical and meaningless to order personal service but then provide that this can be achieved simply by leaving the document at the address of the person to be served. Furthermore, as can be seen in paragraph 22 above, the wording of sub-paragraph (6) of paragraph 7 of the order is different from sub-paragraphs (1)-(5) and sub-paragraph (6) does not really follow on from the introductory words of paragraph 7. For that matter, neither does sub-paragraph (7) (which provides for substituted service on Mr Koonmen) even though it is apparently also governed by the introductory words of paragraph 7, which refer to 'personal service'. The position here was that, as set out in Advocate Young's affidavit, the plaintiff applied for substituted service on Mr Bender. I declined to agree to this but concluded that, in view of the alleged difficulties that there might be in serving Mr Bender personally, there could be an order to serve him by leaving the papers at his place of residence. That is a decision which was open to me under Rule 10 of the Service of Process (Jersey) Rules which make it clear that the Court has a discretion as to whether or not to order personal service when granting leave to serve out of the jurisdiction. I accept that, particularly where there is an injunction, personal service will generally be ordered, but the Court has a discretion to order some other form of service when satisfied that this would be appropriate. I hold that, on a proper construction of paragraph 7 of the order contained in the order of justice, there was a valid order for ordinary service upon Mr Bender by leaving the order of justice at his place of residence.

(ii) As to whether service pursuant to that has been effected, Mr Young now concedes that the purported service on 28 th May and 9 th July was made at the wrong address. He asserts however that the amended order of justice was properly served in accordance with the order on 13 th August. I am not satisfied that this is so. The papers would appear to have been served on a warden/guard near a property described as the warden's home. Contrary to paragraph 5 of Advocate Young's affidavit of 11 th October 2005, the order did not refer to the 'Guard House' of Finca Bender. It referred to Mr Bender's residence. It seems to me that the burden must lie on the plaintiff to satisfy the Court that service has been duly effected in accordance with the order. In view of the confusion which has arisen, the plaintiff has not satisfied me on the evidence that the warden's home is part of Mr Bender's residence for the purposes of the order.

(iii) Given that the order of 16 th May was not an order for personal service, Mr

Young's application for an order for substituted service on 22 nd July was misconceived. In any event, he did not place any evidence before the Court by way of affidavit that personal service was impracticable, nor does he appear to have drawn the Court's attention to the requirements of Rule 5/10 in this respect.

35 The question then arises as to the consequences of the above failures. In their original submissions neither Advocate Speck nor Advocate Young referred me to Rule 10/6 of the Royal Court Rules which provides –

> ***"Subject to Rule10/7, non-compliance with Rules of Court, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court so directs, but the proceeding may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and on such terms as the Court thinks fit".***

At the resumed hearing, counsel addressed me at my request on the effect of this Rule and its application to the circumstances of this case.

36 The wording mirrors that which existed in Order 70 of the Rules of the Supreme Court until 1964, when it was replaced by what is now Order 2/1. The old wording was very restrictively interpreted by the English Court of Appeal in *Re Pritchard* [1963] 1 All ER 873 which held by a majority that, despite the apparently discretionary form of words, there were certain categories of error which had to lead to the proceedings being treated as a nullity. There was a trenchant dissent from Lord Denning MR who would have applied Order 70 to cure the defect in that case, namely the issue of proceedings out of a district registry rather than the Central Office as required by the Rules. The case was much criticised and was the catalyst for the introduction of Order 2/1 in 1964 although Lloyd LJ in the subsequent case of *The Goldean Mariner* [1990] 2 Lloyds LR 215 was of the view that there did not appear to be much change of substance in the wording.

37 In my judgment, the views of Lord Denning are to be preferred to those of the other two judges in *Pritchard*. The natural meaning of Rule 10/6 is that it confers a general discretion on the Court. Where there is non compliance with the Rules, the Court has at least three options. It may treat the proceedings as being void, (i.e. a nullity); it may find an irregularity and set them aside, either wholly or in part; or despite an irregularity it may amend or otherwise deal with the proceedings in such manner as it thinks fit. Furthermore, there are strong policy grounds for interpreting the Rule widely. The days when proceedings were routinely defeated by technicalities are long since gone. The Court nowadays is much more interested in looking to the substance and justice of the matter. In my judgment, Rule 10/6 gives just as wide a power to this Court as is conferred upon the High Court by Order 2/1 and the English cases on the application of that Order will therefore be of assistance to this Court.

38 The commentary on Order 2/1 at para 2/3 of the Supreme Court Practice (1999 edition) states as follows –

> ***"Defective service of proceedings, however gross the defect, and even a total failure to serve, where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the Court under the exercise of discretion under O. 2, r.1."***

The case relied upon in support of that proposition is *The Goldean Mariner*. In that case, there were a number of defendants against whom identical claims were made as re-insurers and who were purportedly served out of the jurisdiction. There were a number of procedural defects but in the case of the tenth defendants, the writ itself was not served. The defendants only received an acknowledgement of service which showed them as defendants but no more. The Court of Appeal held by a majority that, on the particular facts of that case, there was no prejudice to the defendants by this error, that they were in no doubt that the plaintiff intended to sue them, and they were aware of the general nature of the proceedings. Accordingly the Court exercised its discretion against setting service aside despite the irregularities.

39 In the present case, whatever the defects in relation to the service of the proceedings in Costa Rica, the fact remains that Mr Bender has received full notice of the nature and content of the claims against him from the advocates who were then acting for him and who, pursuant to an order of this Court, were formally served with the original order of justice on 5 th August and the amended order of justice on 11 th August. I can see no prejudice to him in the Court acknowledging this reality and treating him as having been effectively served on those respective dates. Mr Speck submitted that a better course would be for the proceedings to be re-served on his firm, which now had instructions from Mr Bender to accept service, and this could be treated as having been done on the opening day of the hearing of the summons before me. But I see no point in such a charade when it is the case that Mr Bender had previously been served through his then advocates and where he was clearly fully aware of the exact nature of the proceedings so as to be able to mount detailed arguments on the nature of the claims against him, on whether leave to serve outside this jurisdiction should be granted and on *forum conveniens.*

40 I decline therefore to set aside service on Mr Bender and I order that the case should proceed on the basis that he was validly served with the original order of justice on 5 th August and the amended order of justice on 11 th August. However, it is the case that these various difficulties arose entirely because of errors on the part of the plaintiff. Thus, the order for service was poorly drafted, the papers were left at the wrong address on 28 th May and 9 th July, inadequate evidence was presented as to where the papers were served on 13 th August and inadequate assistance was given to the Lieutenant Bailiff on 22 nd July. I therefore order that Mr Bender's costs of and in connection with this part of his summons are to be paid by the plaintiff on the standard basis.

(ii) Should leave to serve out of the jurisdiction be set aside?

41 The non-resident defendants apply for the order giving leave to serve them outside the

jurisdiction to be set aside on the ground that the claims do not fall within Rule 7 of the 1994 Rules.

42 The parties were agreed on the applicable test, which is conveniently set out in the White Book (1999 edition) at 11/1/9 – 11/1/12. The Court must first consider whether the plaintiff has shown a good arguable case that the case falls within one of the paragraphs of Rule 7, which lists the circumstances where leave to serve out of the jurisdiction may be given. If the Court is satisfied that it has jurisdiction under one or more of these paragraphs, it must then consider whether there is a serious issue to be tried on the merits. Sometimes the merits will have to be considered at the higher level of a good arguable case in order to decide whether there is jurisdiction under any of the paragraphs of Rule 7; in that event the exercise does not of course have to be repeated at the lower level of 'serious issue to be tried'.

43 Although the plaintiff has shown some inconsistency of approach, Mr Young ultimately relied on only three paragraphs of Rule 7, namely paragraphs (c), (j) and (q). These provide as follows –

> ***"7. Service out of the jurisdiction of a summons may be allowed by the Court whenever:-***
>
> ***(c) The claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto; ……***
>
> ***(j) The claim or application is brought within the terms of Article 5 of the Trust (Jersey) Law 1984; …….***
>
> ***(q) the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed whether by the defendant or otherwise within the jurisdiction; …."***

44 This is a case where the merits of the claims and the issue of whether the case falls within any of the sub-paragraphs of Rule 7 are closely interlinked and Mr Speck concentrated much of his fire on the submission that there is not a serious issue to be tried on the merits. It is convenient to deal with that aspect first although, because of the interlinking referred to, I propose to consider the merits at the higher level of a good arguable case. He submitted that all of the plaintiff's claims (other than the personal claim against Mr Bender) depended upon Mr Silverman having a proprietary interest in the Amber fees paid to AIA Cayman and subsequently AIA Anguilla. He argued that there was no basis for asserting that Mr Silverman had such an interest. AIA Cayman had simply entered into a contract with the Amber funds whereby, in return for the provision of investment management services, it was entitled to the Amber fees. These fees belonged to AIA Cayman. AIA Cayman's only obligation to Mr Bender was through the service contract which it had entered into with him for the provision of investment trader services and he was entitled to the modest

remuneration provided for under that contract. There were no grounds for saying that AIA Cayman held the Amber fees on trust for Mr Bender or for Mr Silverman. To so find would be entirely to ignore the corporate structure set up, according to the plaintiff, by Mr Silverman himself and to impute to the directors of AIA Cayman (who did not include Mr Koonmen or Mr Bender) a knowledge of the Amber agreement between Mr Bender and Mr Silverman. Identical arguments applied in the case of those fees paid to AIA Anguilla when it took over from AIA Cayman. If the Amber fees belonged to AIA Cayman (or AIA Anguilla) and were not held by it upon trust for Mr Silverman, the claims against all of the defendants except Mr Bender were untenable because Mr Silverman had no proprietary interest in any of the funds with which they dealt and no trust was impressed upon such funds.

45 Mr Speck was supported in his argument by Mr James on behalf of Bluebird and Dovetail. Mr James pointed out that the only claim against his clients was a proprietary claim and this would in turn depend entirely on whether, applying the appropriate tracing rules, the plaintiff could trace into assets now held by Bluebird and Dovetail. Mr James argued that there could be no arguable claim until the plaintiff had carried out a tracing exercise, if necessary by issuing *Bankers Trust v Shapiro* [1980] 1 WLR 1274 proceedings in order to find out exactly which funds had gone where in order to see whether the tracing rules would support a proprietary claim against any of the assets held by Bluebird or Dovetail. Furthermore, he submitted that the order for service out should be set aside on the grounds of a failure to provide full and frank disclosure, at any rate at the time of the amended Order of Justice. This arose out of affidavits sworn by Mr Wordsworth and Mr Hogg in which it was asserted that Mr Bender (and Mr Koonmen) were interested in the Gemstone B Trust. In fact, the settlement agreement makes it clear that Mr Koonmen and Mr Bender are defined as ‘excluded persons’ in relation to the Gemstone B Trust. This was therefore a material misleading of the Court.

46 It is convenient to deal with Mr James' two additional points at this stage.

(i) I do not consider it necessary for the plaintiff to have undertaken a detailed tracing exercise at this stage in order to bring a claim. The plaintiff has provided *prima facie* evidence that funds moved from AIA Cayman and AIA Anguilla to AEBT and hence to the Gemstone A and B Trusts. It may of course be the case that, even if a proprietary claim is made out, a tracing exercise will result in only some of the assets of the Gemstone Trusts being attributable to funds originally held on trust for Mr Silverman. But that is a matter of subsequent detail. I think it would place unreasonably onerous obligations on a person in the plaintiff's position to have to carry out a full tracing exercise before being entitled to bring a claim which includes measures to protect against disposal of assets pending resolution of the claim. I therefore reject Mr James' argument in this respect.

(ii) When Mr James brought the apparent inaccuracy of the statements in the affidavits of Mr Wordsworth and Mr Hogg concerning the Gemstone B Trust to my attention, I ordered them to swear further affidavits to explain this apparent misleading of the Court. They duly swore their seventh and fifth affidavits respectively. Suffice it to say

that, for the reasons set out in those affidavits, I acquit them of any intention to mislead the Court. I am satisfied that they simply had not noticed this particular point of information. In fairness to them, it can be pointed out that it was contained in an extremely long and complex settlement agreement. I do not think that, in the overall context, it is a sufficiently material error to justify setting aside the order on that ground. I do however propose that, in the event of my making any order for costs in favour of the plaintiff in respect of this summons, such costs should not include time spent in preparing and filing the seventh and fifth affidavits of Mr Hogg and Mr Wordsworth, as such work was only required because of their error in the first place.

47 I am satisfied, essentially for the reasons put forward by Mr Young, that the plaintiff has a good arguable case on the merits. Because that is all that I have to be satisfied of at this stage I propose to summarise my reasons only very briefly:-

> ***"Joint venture arrangements***
>
> ***Where two parties enter into a joint venture arrangement whereby it is contemplated that one of them will acquire property, and that if he does so the other will obtain an interest in the property, and pursuant to the arrangement the property is acquired, whether by the acquiring party himself or by a company owned by him, then even though the arrangement does not amount to a contract capable of specific performance because its terms are insufficiently certain or because it is not intended to be a contract, the acquiring party will hold the property or shares in the company which makes the acquisition on a constructive trust as to anappropriate share (which may be but will not necessarily be a half share) in the property, or shares in the company concerned, in favour of the non-acquiring party if the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement on which the non-acquiring party has acted; and it will be inequitable for the acquiring party to retain the property for himself if (1) the non-acquiring party, in reliance on the arrangement does or omits to do something which confers an advantage on the acquiring party in relation to the acquisition of the property, or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms and (2) the acquiring party has not informed the non-acquiring party before the acquisition (or at least before it is too late for the parties to be restored to a position of no advantage/no disadvantage) that he no longer intends to honour the arrangement."***

The affidavit of Pamela Philipps, a New York attorney, would suggest that the law of New York (by which the Amber agreement was governed) applies similar principles.

(i) As to the existence of the Amber agreement, it is of note that Mr Silverman has produced a copy of a letter dated 20 th November 1997 from him to Custom House Fund Management Limited, the administrator of the Amber funds, which refers to his

share of all fees as being 25% as against Mr Bender's share of 75%. It appears that the letter has been initialled as approved by Mr Bender.

(ii) I was referred to Lewin on Trusts (17 th Edition) at para 9 – 72 A where the following is stated:-

(iii) The plaintiff's case is essentially that this was a form of joint venture between Mr Bender and Mr Silverman whereby the Amber fees would be shared between them in the agreed proportion regardless of the particular corporate entity which might nominally receive the fees. The defendants, including Mr Koonmen, rely strongly upon the corporate structure which was established and argue that the Amber fees belonged outright to AIA Cayman and then AIA Anguilla such that Mr Silverman (even if one were to accept the existence of the Amber agreement) did not have any proprietary interest therein but merely a personal claim against Mr Bender.

(iv) However it is of note that Mr Koonmen's position in the present proceedings is the very reverse of that which he took at the time of his own claim against Mr Bender. In the *Koonmen v Bender* action his claim was in many ways extremely similar to that of Mr Silverman. He said that he had reached an oral agreement with Mr Bender whereby they would share the Amber fees equally despite the fact that, like Mr Bender, Mr Koonmen's only apparent entitlement was to fairly modest fees pursuant to the contract which he entered into with AIA Cayman and then AIA Anguilla. He asserted at that time that all the various corporate entities were under the ultimate control of Mr Bender and that the Amber fees were destined to be shared equally between him and Mr Bender regardless of the entities which received them. He further asserted at that time that the transfer from AIA Cayman to AIA Anguilla was done for the purpose of protection against Mr Bender's existing creditors (which would appear to be a reference primarily to Mr Silverman). It is of further note that that transfer took place after Mr Koonmen had been informed of Mr Silverman's claim in 1999 and after (according to Mr Silverman) he had personally told Mr Koonmen that he (Mr Silverman) was entitled to 25% of the Amber fees.

(v) The way in which the monies in this case have actually been dealt with also gives support to what the plaintiff is saying in this case and to what Mr Koonmen was saying at the time of his action against Mr Bender. Thus, despite the absence of any apparent obligation or reason for doing so, AIA Cayman and AIA Anguilla transferred almost all of the Amber fees into AEBT. Following the *Koonmen v Bender* action, the sums in AEBT were, apart from the payment of £10million into the Gemstone B Trust, broadly divided equally between a trust for Mr Bender's benefit and a trust for Mr Koonmen's benefit. The recital to the settlement agreement suggests that the decision to settle the matter and bring all the litigation to an end was that of Mr Bender and Mr Koonmen. Consistently with that, the settlement agreement specifically said that Mr Bender and Mr Koonmen agreed and confirmed that there would be no audit or review of the costs, expenses etc of any of the entities including AIA Cayman, AIA Anguilla, AEBT and Mr Wijsmuller. That could be said to be supportive of the contention that, regardless of the various entities, true beneficial ownership of all the Amber fees lay with Mr Bender and Mr Koonmen.

(vi) There is evidence to suggest that Mr Wijsmuller was at the heart of these various transfers of funds and was acting as Mr Bender's right-hand man. He was the managing director and controlling influence of SGI. It is reasonable to assume that Mr Wijsmuller was likely to have been aware of Mr Silverman's claim before all these various transfers took place, as was Mr Koonmen.

(vii) These are of course all matters which will have to be the subject of full investigation in due course but I am quite satisfied that, on the material before me, there is a good arguable case against all six defendants in respect of the various claims summarised in paragraphs 17 and 18 above.

48 I must next consider whether the plaintiff has made out a good arguable case for saying that the claims fall within Rule 7. Mr Young relies first on Rule 7(c) to the effect that "the claim is brought against a person duly served within…… the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto". The submission by the plaintiff is that Mr Wijsmuller and SGI are persons properly served within the jurisdiction and that the other defendants are necessary parties to the claims brought against them. The defendants, on the other hand, argue that it is wrong to take a minor player who happens to be resident in this jurisdiction and use this as a lever to bring in the major players who are all out of the jurisdiction. I accept that the Court must be careful only to use Rule 7(c) where it is appropriate. In my judgment the material before me suggests that this is not a case where it would be inappropriate to rely on Rule 7(c) on the grounds that Mr Wijsmuller and SGI are only minor players. There is material before me which supports the plaintiff's suggestion that Mr Wijsmuller and SGI were at the heart of the steps taken to remove monies from AIA Cayman and AIA Anguilla and to attempt to defeat Mr Silverman's claim. Thus it is said that Mr Wijsmuller was actively involved with Mr Bender in replacing AIA Cayman by AIA Anguilla with a view to defeating Mr Silverman's claim and subsequently in organising the transfer of funds from AIA Cayman and AIA Anguilla to AEBT. It is of note that, in the *Koonmen v Bender* action, through the affidavit of his solicitor Mr Wheeler sworn on his behalf, Mr Koonmen was asserting that STAL, although nominally managed in Anguilla, was in fact controlled from Jersey by Mr Wijsmuller and that Mr Brice, the local director of STAL in Anguilla acted in accordance with Mr Wijsmuller's instructions. Indeed it appears that the major part of the administration of AEBT was carried out for STAL in Jersey by SGI under the control of Mr Wijsmuller. In this connection it is of interest that the receiver of the Gemstone trusts has had difficulty in establishing the full position from the records kept in Anguilla. It appears that he needs to gain access to the records kept in Jersey in order to understand the position fully. That is consistent with the evidence of Mr Sinel that all relevant records were kept in Jersey. In my judgment, this is not a case where, on the plaintiff's evidence, Mr Wijsmuller was on the fringe of things. He was the main advisor to Mr Bender in connection with the establishment of the various Anguillan entities and the transfer of funds to them. His knowledge is *prima facie* attributable to SGI and I therefore consider that it is appropriate to join Mr Bender, Mr Koonmen and the other defendants to these proceedings on the basis that they are necessary and proper parties to the action brought against Mr Wijsmuller and SGI. They are proper parties because Mr Bender was the principal for whom Mr Wijsmuller was carrying out his activities and Mr Koonmen became a second principal and was the other key party involved. Dovetail and Bluebird are proper parties because they hold assets into which the plaintiff is said to be entitled to trace.

It is clearly appropriate that one court should resolve the claims against all these various defendants rather than having proceedings against Mr Wijsmuller and SGI in this jurisdiction and proceedings against the other defendants in other jurisdictions. The claims against them all arise out of the same underlying circumstances, and common issues of fact and law will arise. A good arguable case that the claims against the non-resident defendants fall within Rule 7(c) is made out.

49 I turn next to Rule 7(q) which allows service out where "……. the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed whether by the defendant or otherwise within the jurisdiction; ……..". In my judgment there is a good arguable case that the claims against the various defendants as constructive trustee arise out of acts committed within the jurisdiction. According to *Dicey & Morris, Conflict of Laws* para 11 – 220, there appears to be some inconsistency of approach as to whether, in connection with the equivalent Rule in England, all the acts necessary to impose liability must be committed within the jurisdiction or whether it is sufficient if some are. In *Polly Peck International Plc v Nadir* (the Independent September 2 1992) cited in Dicey & Morris, Knox J favoured the latter view and I agree with his observation to the effect that a construction which required all the acts constituting the alleged constructive trust to have been committed within the jurisdiction would empty the Rule of nearly all its practical utility. This would particularly be so in Jersey with the very international nature of its finance business. I therefore hold that it is sufficient if the acts which give rise to the claim are to a material extent committed in Jersey.

50 The acts complained of include the replacement of AIA Cayman by AIA Anquilla, the establishment of AEBT and the transfer of funds to it, the distribution of funds pursuant to the settlement agreement and the management and administration of funds allocated to the various parties pursuant to the settlement agreement. There is evidence to suggest that Mr Wijsmuller was at the heart of these various matters. He was the professional who was organising and arranging matters on behalf of the two principals, Mr Bender and Mr Koonmen. He is based in Jersey and, in the *Koonmen v Bender* action, Mr Koonmen asserted that Mr Wijsmuller controlled matters from Jersey notwithstanding that many of the entities involved were Anguillan entities. Furthermore SGI carried on much of the administration of the assets nominally under the control of STAL. As already mentioned, the Receiver has found that he cannot gain the full picture from the records in Anguilla and needs to have access to the records in Jersey. I am satisfied that there is a good arguable case that the acts giving rise to the constructive trusteeship were committed in Jersey and accordingly the claims fall within Rule 7(q).

51 Given my findings that the claims fall within paragraphs (c) and (q) of Rule 7, I do not propose to consider whether they also fall within Rule 7(j) on the basis that Article 5 of the 1984 Law includes constructive trusts as well as express trusts.

(iii) Forum conveniens

52 Rule 9 of the 1994 Rules, like the equivalent provision in England, states that no leave to serve out of the jurisdiction shall be granted unless the Court is satisfied that a sufficient case has been made out that it is proper to do so. Accordingly, having concluded that the claims fall within Rule 7 – so that there is power to give leave to service outside the jurisdiction – I must next consider whether Jersey is the appropriate forum. In relation to the non-resident defendants, the test has been clearly laid down by the Court of Appeal in *Koonmen v Bender*. The burden lies on the plaintiff to establish that Jersey is clearly the appropriate forum and the matter should be approached in accordance with the judgment of Lord Goff in *The Spiliada (Spiliada Maritime Corporation v Canulex Limited* [1987] AC 460. Thus the Court has to decide where the case may be tried most suitably for the interests of all the parties and the ends of justice. The Court is looking for the most natural forum, namely that with which the action has the most real and substantial connection. The Court has to consider that in relation to each of the defendants separately.

53 This is a particularly international case. Parties and entities are scattered around the globe. But the plaintiff must be entitled to bring his claim in some jurisdiction. Although it is not incumbent upon the defendants to suggest an alternative more convenient jurisdiction, the Court has in reality to consider whether there is some other convenient forum such that Jersey cannot be shown clearly to be the most appropriate forum. The only alternative which has been put forward in this case is that of Anguilla. My task is to consider whether the plaintiff has succeeded in showing that Jersey is clearly the most appropriate forum.

54 Clearly an important issue in any forum dispute is that of the governing law. In the *Koonmen v Bender* action the Court of Appeal decided that Anguilla was the more appropriate forum. This was because not only was the proper law of AEBT the law of Anguilla but there was also a jurisdiction clause which conferred exclusive jurisdiction upon the courts of Anguilla in relation to AEBT. Mr Speck placed much reliance on that decision but in my judgment the Court of Appeal was there dealing with a very different sort of claim. In that case Mr Koonmen placed his claim upon the true nature and interpretation of AEBT. The Court of Appeal held that such matters were governed by the proper law of AEBT (i.e. the law of Anguilla) and that the exclusive jurisdiction clause should be given great weight. The plaintiff's claim in this case is wholly unrelated to the terms and meaning of AEBT. The plaintiff alleges simply that Mr Silverman's assets have wrongly ended up in AEBT. The fact that AEBT is governed by the law of Anguilla and that the beneficiaries of AEBT must conduct any dispute about it in the courts of Anguilla is irrelevant.

55 I must consider what is the system of law which governs the claims brought by the plaintiff. I have to say that this is not straightforward. The question of what is the governing law of the different types of claim which may be brought under the Rubrick ‘constructive trust’ is not easy. Mr Speck argues that the matter is governed either by the law of New York (as the law of the original agreement) or by the law of Anguilla (on the basis that the wrongful acts complained of consist of movements between Anguillan entities save for AIA Cayman). Thus AIA Anguilla, STAL and Intertrust (as trustees of AEBT and as trustee of the Gemstone A & B trusts) are Anguillan entities and both AEBT and the Gemstone trusts are governed by the law of Anguilla. Mr Young, on the other hand, refers to Rule 200(1)(c) of

Dicey and Morris as well as para 34 —032 of the 4 th supplement to that work. He submits that, to the extent that the claim is a receipt based claim, it is akin to one in unjust enrichment and accordingly, in accordance with Rule 200(1)(c), it is governed by the law of the place where the enrichment occurs. He submits that is Jersey because the assets ended up under the control of SGI and Mr Wijsmuller in Jersey. Alternatively, to the extent that the claim is an equitable claim based on misconduct (e.g. dishonest assistance) one must look to law of the place where the acts giving rise to the liability occurred. For the reasons set out earlier, he submits that this is Jersey.

56 As already mentioned, this is an uncertain and developing area. Furthermore I have heard no detailed argument on the point. But in general I find that Mr Young has the better of the argument. Apart from the fact that funds have passed through entities incorporated in Anguilla, I see little connection with the law of Anguilla. The agreement underlying the whole arrangement is governed by the law of New York. I can therefore see an argument for saying that the law of New York might be relevant to the various subsequent fiduciary breaches; but that does not point in favour of Anguilla as against Jersey. Alternatively one looks at what has in reality occurred (according to the plaintiff) and this is that Mr Wijsmuller, who is based in Jersey, has orchestrated, on behalf of Mr Bender and Mr Koonmen, the various transfers of funds between various entities, which funds have ended up under his (Mr Wijsmuller's) control in Jersey. Whether looked at as a question of enrichment or as acts giving rise to a constructive trusteeship, I consider, on the basis of the limited evidence and legal submissions made to me, that it is much more likely that these various claims are governed by the law of Jersey than that they are governed by the law of Anguilla. I therefore take this into account when deciding whether Jersey is clearly the most appropriate forum.

57 Counsel touched upon but did not consider in any detail the question of the proper law of tracing i.e. if the case were held in Jersey, would the Jersey rules of tracing apply? My preliminary view is that the applicable rules of tracing would be those of the *lex fori*. The point is therefore neutral when considering the appropriate forum.

58 As to witnesses, Mr Bender resides in Costa Rica, Mr Koonmen in Japan and Mr Silverman in New York. Other witnesses might come from Ireland (employees of Custom House) and Anguilla (Mr Brice). What is clearly the case is that Mr Wijsmuller will be a key witness having been, on the available evidence, the orchestrator of the various movements and transactions on behalf of Mr Koonmen and Mr Bender. Mr Sinel will also, it is said, be a material witness. On balance this would seem to tip in favour of Jersey in that Mr Brice's part is said to be small and very much under the control and direction of Mr Wijsmuller.

59 The location of assets in this case is not free from doubt. However what is clear is that there is no evidence before me that any assets either are or have at any stage been situated in Anguilla. There is no evidence before me as to the location of Mr Bender's share of the Amber fees allocated to him pursuant to the settlement agreement. There is evidence as to Mr Koonmen's share (in the form of the Gemstone A trust). According to the disclosure

made by SGI pursuant to the Mareva injunction granted in this case, there is approximately US$60 million under the control of 'Sinels'. As already mentioned that would appear to comprise substantially of deposits with banks in Switzerland but where the funds have been transferred on in fiduciary deposits with UBS in Jersey. Thus the underlying assets would appear to be in Jersey and have certainly been caught by the Mareva injunction in this case. I have been referred to a selection of bank statements. For the most part the account holder would appear to be STAL or Dovetail but in each the address given for the account is at SGI in Jersey. It would appear that, presumably pursuant to the administration agreement, the assets are under the control of SGI in Jersey albeit that they ultimately belong either to STAL as trustee of the Gemstone A trust or to Dovetail or Bluebird as nominees of STAL as trustee of the relevant Gemstone trust. Certainly, because all the assets which have so far been identified are either in Jersey or under the control of SGI in Jersey, questions of enforcement of any judgment would appear to point in favour of Jersey as the appropriate location.

60 The books and records of the various transactions are, according to the affidavit of Mr Sinel, in Jersey. These appear to be substantial. Furthermore, Mr Sinel states that, in anticipation of the Silverman claim, he arranged for an employee of his to visit Custom House in Ireland in order to obtain relevant documents and these too are now in Jersey. Conversely, the records available in Anguilla would appear to be comparatively sparse. I accept of course that records can easily be copied and made available in other jurisdictions but the fact that all the records are located here is a factor which points in favour of Jersey and also emphasises the point that these transactions were more closely concerned in reality with Jersey than with Anguilla.

61 As to the parties, the place of residence of Mr Bender, Mr Koonmen, the plaintiff and Mr Silverman is neutral as between Jersey and Anguilla. These parties would have to travel to either jurisdiction. Mr Wijsmuller and SGI are in Jersey whereas Dovetail and Bluebird are in Anguilla. The receiver of the Gemstone Trusts (which own Dovetail and Bluebird and for which those companies are nominees) is also resident in Anguilla. However, as already mentioned, I consider on the material available to me that there is strong evidence that Mr Wijsmuller and SGI were at the heart of the claim whereas Dovetail and Bluebird are merely nominees for STAL as the current holder of the assets. Furthermore, until recently, these two entities have been under the control of Mr Wijsmuller. Mr Speck points out that the original order of justice included as defendants AIA Cayman, AIA Anguilla, AIA BVI, Intertrust and STAL, all of whom are non resident. He suggests that the fact that they have been removed as defendants in the amended order of justice and that Mr Wijsmuller has been introduced is very suspicious and suggests that it may have been done in order to increase the profile of Jersey resident parties. It is true that, during the hearing, I expressed surprise at the removal of STAL as a defendant. All of the assets of the Gemstone trusts are ultimately held to the order of STAL and one would expect any claim against trust assets to be brought against the trustee of those assets i.e. STAL. It might also be prudent to bring in some of the other key players such as AIA Cayman and AIA Anguilla so they are bound by any judgment but that is a matter for the plaintiff. However, I conclude that, even if they were all to be re-introduced, it would not make any difference. Although it would increase the number of non resident defendants, the fact remains that they are all entities which, on the

plaintiff's case, were under the control of Mr Wijsmuller acting for the benefit of Mr Koonmen and Mr Bender. There would therefore be no real change in substance to the position of the various parties.

62 Mr Speck submitted that Anguilla was the more appropriate forum on the basis that:-

For the reasons I have already given, I do not accept that (iii) is relevant to the plaintiff's claim. As to (i) and (ii) I accept that these are facts which might point towards Anguilla as the appropriate forum in some cases but I am satisfied that, in this case, the plaintiff has good grounds for arguing that AIA Anguilla and STAL are merely puppets dancing to the tune of Mr Wijsmuller, who was pulling the strings in Jersey, so that it is in fact Jersey with which the transactions have the closest connection. Furthermore, it is of interest that, in the *Koonmen v Bender* action, although Mr Bender was taking a stance which is consistent with that which he is taking in the present proceedings, Mr Koonmen argued strongly that Jersey was the appropriate forum because, *inter alia*, all the various transactions and distributions were made by corporate entities or trusts that were in reality wholly under the control of Mr Wijsmuller on Mr Bender's behalf. His stance in the present proceedings (which is the complete reverse) could be said to support Mr Young's submission that this is a tactical ploy designed simply to make life as difficult as possible for the plaintiff.

(i) The majority of Amber fees generated from 1999 to 2000 were paid to AIA Anguilla;

(ii) Substantially all of those fees were then paid to AEBT, a trust of which STAL, an Anguillan company, was the trustee;

(iii) AEBT is governed by the law of Anguilla and it is therefore appropriate for the Anguillan court to decide whether and to what extent the claim of the plaintiff would override the terms of AEBT.

63 In short, there is no material connection with Anguilla apart from the fact a number of the entities used in the course of the alleged scheme to divert Mr Silverman's share of the Amber fees were incorporated in Anguilla (although they were controlled in Jersey). Unlike in the *Koonmen v Bender* action there is no question of Mr Silverman having agreed to set up anything in Anguilla.

64 Balancing all the various factors described above, I am satisfied that Jersey is clearly the most appropriate forum for the resolution of these various claims against each of the non resident defendants. I therefore decline to set aside service out of the jurisdiction on those defendants.

65 Mr Wijsmuller and SGI have applied for a stay of the proceedings against them on the grounds that Anguilla is a more appropriate forum *(forum non conveniens)*. In their case the burden rests on them to show that there is an alternative forum which is clearly and distinctly the more convenient forum for the resolution of the dispute than Jersey. For the reasons which I have set out in relation to the non resident defendants, the Jersey

defendants have failed to satisfy me that Anguilla is clearly and distinctly a more appropriate forum than Jersey for the resolution of the plaintiff's claims. I therefore also dismiss their applications.