Anne-Marie Heinrichs v Pantrust International SA

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Thomas
Judgment Date:	16 June 2016
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Text

[2016] JRC 106A

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Grime and Thomas

In the Matter of the Brazilian Trust

And in the Matter of ARTICLE 51 of the Trusts (Jersey) Law 1984

Between
Anne-Marie Heinrichs
First Representor

and

Werner Cornelius Heinrichs
Second Representor
and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley
Second Respondent

and

James Richard De Winton Wigley
Third Respondent

and

GB Trustees Limited
Fourth Respondent

Advocate S. M. Baker **for the Representors**.

Advocate N-L. M. Langlois **for the First to Third Respondents**.

Advocate M. L. Preston **for the Fourth Respondent**.

Authorities

Stock v Pantrust [2015] JRC 208 .

Stock v Pantrust [2016] JRC 053 .

Spiliada Maritime Corp v Cansulex Limited [1986] 3 All ER 843 .

Gheewala v Compendium Trust Co Ltd (Privy Council) , [2003] JLR 627.

Jaiswal v Jaiswal (C.A.) [2007] JLR 305 .

Konamaneni v Rolls-Royce Industrial Power India [2002] 1 All ER 979 .

Nautech Services Limited v CSS Limited and eight others [2014] (1) JLR 361 .

Service of Process Rules 1994.

Trusts (Jersey) Law 1984.

Crociani v Crociani [2014] UKPC 40 .

Crociani v Crociani [2014] JCA 089 .

Trust — application by the first to third respondents to set aside an order granting leave to the representors to serve out of the jurisdiction.

THE COMMISSIONER:

1 The first to third respondents apply to set aside the order of the Court granting leave to the representors to serve their representation on the first to third respondents out of the jurisdiction. The central issue in the case is whether the representors have discharged the burden upon them of proving that Jersey is clearly the most appropriate forum for the hearing of the representation.

2 The facts in this case are very similar to those in *Stock v Pantrust* [2015] JRC 208, which involves the same respondents. The representors in the two cases are related.

The Brazilian Trust

3 There are, it transpires, potentially two trusts that bear this name. The representation states that in the 1970s and 1980s the second representor settled assets into a discretionary trust known as the Brazilian Trust. At that time, he had a business relationship with Barclaytrust International Limited ("Barclaytrust") and in particular, with Howard Scholefield and the second respondent who worked for Barclaytrust.

4 The trust deed is dated 9 th December, 1977, and the nominal settlor was Alan Norman Kimble, with Barclaytrust as the first trustee; the economic settlor was the second representor. We will refer to this as "the 1977 deed". It is subject to the proper law of Jersey and in standard discretionary form. The beneficiaries are named as the second representor, his wife and their issue. The first representor is the daughter of the second representor and his wife. She has three children and they would therefore come within the discretionary class of beneficiaries.

5 In 1984, Barclaytrust resigned in favour of La Hougue Boete Société Fiduciaire avec responsabilité limitée ("La Hougue"), a Jersey registered company. The second respondent was a director of La Hougue.

6 There is only an undated and unsigned copy of the deed of appointment and retirement, but a copy letter from Barclaytrust to the second respondent dated 28 th June, 1984, would indicate that it was executed and there is evidence that trust assets were transferred by Barclaytrust to La Hougue.

7 There are letters of wishes and notes from the second representor in relation to the 1977 deed up until 1990.

8 Confusingly, there is a copy of a second trust deed, also called the Brazilian Trust, apparently declared by La Hougue on 15 th November, 1984, again subject to the proper law of Jersey and on very similar terms but listing two charities only as the beneficiaries. We will refer to this as “the 1984 deed”.

9 There is evidence suggesting that the Brazilian Trust created by the 1984 deed may have been executed as late as 1994 and back-dated. The Brazilian Trust created by the 1977 deed seems to disappear from view but the Brazillian trust created by the 1984 deed was subject to a number of subsequent deeds:-

(i) On 30 th June, 1997, La Hougue retired as trustee in favour of Faldouet Company Limited, which according to the second respondent is a private trust company owned by the second representor.

(ii) On 30 th November, 2007, Faldouet Company Limited retired as trustee in favour of the first respondent, a Panamanian company carrying on trust business in Panama, and the proper law was changed to that of Panama.

(iii) Pantrust got into difficulties with the Panamanian regulator, as described in paragraphs 24–25 of *Stock v Pantrust*, and we were told by Advocate Langlois that, as happened in that case, in or around May 2015 the first respondent retired as trustee in favour of the second and third respondents and the proper law changed to that of England. The deed of appointment and retirement was not produced by the first to third respondents.

Representation

10 In their representation, the representors maintain that the 1977 and 1984 deeds have always been treated by the trustees and beneficiaries as the same trust, the Brazilian Trust, and they sought the following relief:-

(i) The removal of the first to third respondents as trustees of the Brazilian Trust and the appointment of the fourth respondent, a Jersey regulated trust company, in their place;

(ii) A declaration that the deeds of appointment and retirement executed in 2007 and 2015 were ineffective to change the proper law;

(iii) A declaration that the proper law of the Brazilian Trust is and always has been the law of Jersey;

(iv) An order that the first to third respondents account for their administration of the

Brazilian Trust; and

(v) A declaration as to the validity and enforceability of certain loans purportedly owed to the first respondent and/or La Hougue by the Brazilian Trust.

Sham

11 The case of the first to third respondents, denied by the representors, is that there are no valid trusts over which the Court should accept jurisdiction. Quoting from the first affidavit of the second respondent at paragraphs 12–14:-

> " *12 By a unilateral Declaration of Trust dated 12 November 1984, La Hougue Boete (acting on Mr Heinrichs' instructions) declared a second trust also known as the "Brazilian Trust" (the "Brazilian Trust").* Although the 1984 Declaration purports, on its face, to have been established for the benefit of two charities, namely Cancer Research Campaign and the British Heart Foundation, in reality it was never intended to be anything other than a bare Trust for the benefit of Mr Heinrichs. To the extent that assets were subsequently transferred to La Hougue Boete purportedly in its capacity as Trustee of the Brazilian Trust, the reality was that La Hougue Boete merely held those assets as nominee for Mr Heinrichs. To the best of my knowledge, as soon as the Brazilian Trust was established the instrument creating the 1977 Trust was put away and never referred to again.
>
> *13 Over the years that I have known him Mr Heinrichs has gone to great lengths to shield his assets from creditors.* Insofar as concerned the assets held in the Brazilian Trust, he personally controlled the affairs and assets of that Trust at all times.
>
> *14 The Brazilian Trust has therefore been a sham from the date it was established.* At no time did either the Trustee, or Mr Heinrichs, pay any regard to the provisions of the instrument by which the Brazilian Trust was purportedly created. It was understood by everyone concerned that the assets in it belonged to Mr Heinrichs absolutely. Accordingly, his instructions concerning those assets were always followed to the letter."

Trust assets

12 There are no accounts of the Brazilian Trust whether under the 1977 deed or the 1984 deed but it would appear that there are assets (including a company called Galty BV, incorporated in Holland, which owned a property in Ontario where the representors live) which, according to the representors, are assets of the Brazilian Trust created by the 1977 deed and which, according to the first to third respondents, are held on bare trust for the second representor. None of the assets are within this jurisdiction and no administration is carried on from this jurisdiction, save that the fourth respondent has been appointed a

director of Galty BV. The Ontario property owned by Galty BV has been sold and the proceeds injuncted in the hands of a Toronto law firm in proceedings which we describe below.

13 The first to third respondents have offered to transfer these assets (save for certain insurance policies which are secured in favour of La Hougue) to the fourth respondent, without prejudice to either side's claim as to whether there is a valid trust or not. Indeed, the first to third respondents have executed a deed of appointment and retirement in favour of the fourth respondent, albeit in relation to the trust created by the 1984 deed, which has not been executed by the fourth respondent.

14 The representors will only agree to the fourth respondent accepting the transfer of these assets if the first to third respondents withdraw their allegation of sham, which they are not prepared to do.

15 We find the position of the representors difficult to understand in this respect, in that the transfer of these assets into the name of the fourth respondent is one of the principal reliefs that they are seeking in the representation and it would seem that this relief has been substantially offered to them, without the need of any intervention by the Court.

Loans

16 As in *Stock v Pantrust*, the first to third respondents allege that substantial loans (of which some CAD$16M is alleged to be outstanding) have been made available, in this case to the second representor or entities associated with him. In his first affidavit, the second respondent explains that these loans were made by his company, Oxford Financial Services Limited (“Oxford”), in its capacity as agent for third party trusts in which the second representor has no interest. He says the representors are fully aware of the extent of the second representor's liability under these loans, but are now questioning the existence of the same and are intent on evading liability under them. He sees this application in Jersey as a means on the part of the representors of furthering that aim.

17 The first to third respondents have declined to provide any documentation evidencing the existence of loans, nor, to the best of our knowledge, has any formal demand been made for their repayment, but it is clear that if demand is made, it will be made against the second representor personally in Ontario where he resides or against entities owned by him there.

18 The first representor has undertaken a detailed examination of some 300 cardboard boxes of documents found in the squash courts at St John's Manor and now held by the Jersey police, and in her first affidavit, she exhibits a number of documents which she says she has unearthed relating to these alleged loans. Advocate Baker spent some time taking us through them. Certainly they give rise to a number of questions that appear to show, inter alia a pattern of inter-trust dealing by which, taking loan 23 as an example:-

(i) La Hougue loans CA$ 234,000 to Quartz International Finance Limited ("Quartz"), a company which the first to third respondents say was beneficially owned by the second representor, at an interest rate of 6.75% per annum.

(ii) On the same day, Quartz lends the same sum to Oxford at an interest rate of 10% per annum.

(iii) On the same day Oxford lends the same sum back to La Hougue at an interest rate of 12% per annum.

19 A separate document headed *"Direction to pay"*, signed on the same day, indicates that La Hougue was initially acting in its capacity as trustee and ultimately received the monies back to itself in its capacity as agent. The identity of the trust and the identity of the principal are not stated. If genuine these documents show the interest rate almost doubling from the initial loan made by La Hougue as trustee for an unidentified third party trust, to the loan it received back as agent for an unidentified principal, with handsome turns being made on the way by both Quartz and Oxford.

20 We say if these documents are genuine, because in his third affidavit the second respondent says this at paragraph 6:-

> " *6 I also wish to make clear that, in seeking to recover the Heinrichs Loans, the lender companies will not be relying on the loan documentation exhibited to Ms Heinrichs' affidavit at AMHI/4 (the "Documentation").* The reason for this is that, although all of the loans referred to in the Documentation were genuinely made *(and, if necessary, this will [be] proved in proceedings before the Courts of Ontario) the Documentation itself is a fiction, and was executed with the knowledge and approval of Mr Heinrichs for the sole purpose of disguising the true identity of both the lender and the borrower."*

21 He also says at paragraph 5 of that affidavit that his statement in his first affidavit that the loans were made by his company Oxford was untrue. The actual lenders were, he says, La Hougue, La Hougue Financial Management Services Limited and the first respondent respectively with monies obtained from third parties. We also note in this context that in the *Stock v Pantrust* litigation it was revealed that much of the loan documentation in that case had been manufactured after the event (see paragraph 27 and 28 of the judgment dated 4 th March, 2016, *Stock v Pantrust* [2016] JRC 053).

22 Advocate Langlois acknowledged the problems these admissions in relation to the loan documentation would make for the first to third respondents in trying to pursue repayment of these loans in Ontario against the second representor and that evidence would have to be obtained of actual money transfers made from the relevant bank accounts of the lender to the relevant borrower. What she did make clear was that no claim was being made against the Brazilian Trust, whether that created under the 1977 deed or that created under the

1984 deed.

Ontario proceedings

23 An example of one of these third party loans arises in proceedings which were brought last year in Ontario by the current trustees of a trust called the Avenue Road Trust, who allege that funds were advanced to La Hougue for it to invest on behalf of the Avenue Road Trust. The Claim alleges that La Hougue then lent these funds to Galty BV, secured by a mortgage over property it owned in Ontario and secured by a guarantee from the second representor, described in the pleading as the beneficial owner of Galty BV. The mortgage was discharged without repayment to the Avenue Road Trust. The claim is against Galty BV, La Hougue, the first to third respondents and others for fraudulent breach of trust and negligence in the operation of the Avenue Road Trust. There is no reference in the Claim to any liability on the part of the Brazilian Trust—the pleading makes no reference to that trust at all. We can see references in the supporting affidavits to *"Heinrich Trusts"* but no specific reference to the Brazilian Trust. Indeed, the Claim describes the second representor as the beneficial owner of Galty BV, not any trust of his.

24 The representors assert that the sums claimed in the Ontario proceedings may constitute a potential liability of the Brazilian Trust, in that it may transpire that the Avenue Road Trust funds were lent to the Brazilian Trust, as opposed to Galty BV direct, and that potential liability might therefore be part of the account which they are seeking in the Jersey proceedings. The first representor in her investigations has found loan documentation which appears to relate to the loan made by the Avenue Road Trust, although as can be seen above the capacity in which La Hougue was acting as lender and ultimate borrower was not specified.

The law

25 There is no dispute as to the law to be applied in the matter, as it was summarised in *Stock v Pantrust* at paragraphs 30–35. For ease of reading, we set the law out again. In *Spiliada Maritime Corp v Cansulex Limited* [1986] 3 All ER 843, Lord Goff, at 858c identified the key differences between cases in which a defendant was served as of right and cases in which a defendant was convened to proceedings by service out of the jurisdiction:-

> " ***These, as I see it, are threefold.*** The first is that, as Lord Wilberforce indicated, in the [service out] cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the [service out] cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant out of the jurisdiction…. Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the *Amin Rasheed* case [1983] 2 All ER 884 at 891, [1983] AC 50 and 65 that the jurisdiction exercised

under Ord 11 [service out] may be 'exorbitant.' This has long been the law. In*Société Générale de Paris v Dreyfus Bros* [1885] 29 Ch DS 239***at 242–243 Pearson J said:-***

' ***…it becomes a very serious question … whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction***.'

That statement was subsequently approved on many occasions, notably by Farwell LJ in *The Hagen* [1908] P 189 ***at 201*** , [1908–10] All ER Rep 21***at 26 and by Lord Simmonds in your Lordships' House in****Tyne Improvement Comrs v Armement Anversois SA, The Brabo* [1949] 11 All ER 294***at 305***, [1949] AC 326***at 350.*** The effect is not merely that the burden of proof rests on the plaintiff to persuade the court that England is the most appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other***words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."***

26 This distinction in which a defendant is served as of right and cases in which the plaintiff requires leave to serve out have long been part of Jersey law:—see *Gheewala v Compendium Trust Co Ltd* (Privy Council), 2003 JLR 627, per Lord Walker at paragraph 28 and *Jaiswal v Jaiswal (C.A.)* [2007] JLR 305 per Beloff JA at paragraphs 70–73.

27 In this case the representors sought leave to serve proceedings out of the jurisdiction on the first to third respondents and they therefore bear the burden of proving that Jersey is *"clearly"* the most appropriate forum for the hearing of their representation. We accept that if the representors cannot discharge that burden, then leave to serve out of the jurisdiction should be set aside and jurisdiction declined. It is not open to the representors to contend that even if there is a clearly more appropriate forum elsewhere, justice requires the courts of Jersey to assume jurisdiction. In *Konamaneni v Rolls-Royce Industrial Power India* [2002] 1 All ER 979, Lawrence Collins J stated at paragraph 175:-

"In a case involving service out of the jurisdiction under CPR6.20 the burden is on the claimants to show that England is clearly the more appropriate forum, and if they do not discharge that burden, that is the end of the matter and there is no room (as there is in the case of staying of actions) for the English court to retain jurisdiction if the claimant shows that it would be unjust for him to be deprived of a remedy on the ground that, in the words of Lord Goff in *Connelly v RTZ Corp Plc* [1997] 4 All ER 335 ***at 345*** , [1998] AC 854***at 873, 'substantial justice cannot be done in the appropriate forum.***'"

28 In *Nautech Services Limited v CSS Limited and eight others*, [2014] (1) JLR 361, Bailhache, Deputy Bailiff, summarised the test to be applied in order to justify an order for

service out of the jurisdiction at paragraph 39 in this way:-

> " ***(i) There is a threshold to be passed before the court has jurisdiction to order service out of the jurisdiction.*** That threshold is that the plaintiff must establish a good arguable case that his claim falls under one or more of the paragraphs in r.7 of the Service of Process Rules.
>
> ***(ii) Once satisfied that the case does fall within one or more of those paragraphs, the court should consider whether it is appropriate to bring before it a non-resident who owes no allegiance in this jurisdiction.*** This involves an ***assessment of whether there is a serious issue to be tried as against the non-resident defendant.*** However, if the jurisdiction is established under r.7, then, adopting what Lord Goff said in *Seaconsar (5)* [1994] 1 AC at 456 ***we think there is no good reason why we should require any particular degree of cogency to be applied in relation to the merits of the plaintiff's claim not least because it is inappropriate to have a trial on the merits conducted by affidavit at the outset of the proceedings*** .
>
> ***(iii) …***
>
> ***(iv) The court should finally consider whether Jersey is the forum conveniens for the hearing of the action.*** No party asserts that it is not the forum conveniens in this case."

Decision

29 Taking the first of these, the representors' case is that these claims come within Article 7(j) of the Service of Process Rules 1994, which provides as follows:-

> ***"Service out of the jurisdiction of a summons may be allowed by the Court whenever:-***
>
> ***(j) the claim or application is brought within the terms of Article 5 of the Trusts (Jersey) Law 1984."***

30 Article 5 of the Trusts (Jersey) Law 1984 provides as follows:-

> " ***5 Jurisdiction of court***
>
> ***The court has jurisdiction where –***
>
> ***(a) the trust is a Jersey trust;***
>
> ***(b) a trustee of a foreign trust is resident in Jersey;***
>
> ***(c) any trust property of a foreign trust is situated in Jersey; or***

(d) administration of any trust property of a foreign trust is carried on in Jersey."

31 The first to third respondents are not resident in Jersey and there is no trust property situated in Jersey. We do not think that the fourth respondent becoming a director of Galty BV constitutes the administration of trust property in Jersey. The evidence indicates that Galty BV is administered in Holland. The issue, therefore, is whether we are dealing with a Jersey trust.

32 This presents no difficulty in relation to the trust created by the 1977 deed. That is subject to the proper law of Jersey and there is no evidence that the proper law was ever changed. To the extent that it still exists, it is therefore a Jersey trust.

33 The trust created by the 1984 deed was also created under Jersey law. Clause 2 of the deed is in these terms:-

> " *2 THIS Declaration of Trust is established under the Laws of the Island of Jersey and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law of this Declaration of Trust and to any change in the law of interpretation of this Declaration of Trust duly made according to the powers and provisions hereinafter declared the Proper Law of this Declaration of Trust shall be the Law of the Island of Jersey which said Island shall be the forum for the administration hereof."*

34 The proper law of that trust was purported to be changed to Panama in 2007 and England in 2015. Advocate Langlois did not seek to argue that either was effective to change the proper law and indeed accepted that if the trust created by the 1984 deed was valid, then it is still governed by Jersey law.

35 Taking the purported change to Panama in 2007, the same issue arose in *Stock v Pantrust*, where the Court said this at paragraphs 70 and 71:-

> " ***70 When moving the proper law to Panama, it was incumbent on La Hougue (which exercised the relevant power) to ensure that the Trusts would be as valid and effective under Panamanian law as they were under Jersey law.*** This is particularly the case when the Trusts were being moved to a civil law jurisdiction whose trusts law is based upon contractual principles. Clause 12(a) of the trust deeds make express provision for the making of***consequential alterations or additions to ensure such validity and effectiveness.*** The only consequential amendment made in the 2007 DORAS was to the definition of adopted persons in the trust deeds (clause 5). The findings of the regulator, following a lengthy inspection, indicate that no alterations or additions were made subsequently to ensure validity under Panamanian law.

71 On the basis of the evidence now before us (and the first director has not yet addressed the issue), the advice given by Hatstone and the findings of the regulator, we think that the representor has the better of the argument (see *Crociani v Crociani (C.A.)* [2014] (1) JLR 426 ***at pages 442 – 443) as to whether the 2007 DORAS were effective in changing the proper law to Panama.*** Article 12 of the Panamanian Trust Law does make reference to the nullity of one or more clauses of the trust instrument not leaving the trust without effect, unless as a result of that nullity, its compliance becomes impossible, but as matters stand the Trusts would not appear to be valid under Panamanian law."

36 In *Stock v Pantrust*, the Court had the benefit of advice from the Panamanian firm of Hatstone Abogados, dated 5 th November, 2015. The representors had obtained a further opinion from another firm of Panamanian lawyers, known as Mizrachi, Davarro & Urriola ("MD&U") which reinforces the advice given by Hatstone. The underlying point is that Panamanian trusts are contractual in nature and very substantial formal changes would have to be made to the 1984 deed in order for it to be valid and effective under Panamanian law.

37 Clause 11(a) of the 1984 deed dealing with the power to change the proper law is in these terms:-

" *POWER TO CHANGE PROPER LAW*

11(a) The Trustees may at any time or times and from time to time during the Trust Period declare that this Declaration of Trust shall from the date of such declaration take effect in accordance with the law of some other state or territory in any part of the world, not being any place under the laws of which:-

(i) any of the trusts powers and provisions herein declared and contained would not be enforceable or capable of being exercised and so capable of taking effect, or

*(ii) this Declaration of Trust would not be irrevocable and that the forum for the administration thereof shall henceforth by the Courts of that state or territory AND as from the date of such declaration the law of the state or territory named therein shall be the law applicable to this Declaration of Trust and the Courts thereof shall be the forum for the administration thereof but subject to the power conferred by this Clause and until any further declaration be made hereunder PROVIDED ALWAYS that so often as any such declaration as aforesaid shall be made the Trustees shall be at liberty to make such consequential alterations or additions in or to the trusts powers and provisions of this Declaration of Trust as the Trustees may consider necessary or desirable to ensure that the trusts powers and provisions of this Declaration of Trust shall (mutatis mutandis) be as valid and effective as they are under the law of the Island of Jersey."

38 The power can only be exercised in favour of a jurisdiction in which the trust would be enforceable. There is no evidence of any consequential alterations or additions being made and the advice from both legal firms is that the 1984 deed, as currently worded, is not enforceable under Panamanian law. Not only do the representors have the better of the argument on this issue, but it is effectively conceded that the power was not validly exercised and the proper law remained that of Jersey. The subsequent change from Panamanian law to English law would inevitably fail as well.

39 Accordingly, we find that both the 1977 and 1984 deeds constitute Jersey trusts over which this Court has jurisdiction under Article 5 of the Trusts (Jersey) Law 1984. The majority of the relief sought by the representors invokes the Courts supervisory jurisdiction over trusts and therefore, and to that extent, the claims do fall under Article 7(j) of the Service of Process Rules.

40 Taking the second test, it was not argued that there was no serious issue to be tried, principally the removal of the current trustees and appointment of new trustees, an issue of fundamental importance to any trust.

41 The final issue is whether the representors have demonstrated that Jersey is *"clearly the most appropriate forum"* for the hearing of the representation.

42 Advocate Langlois submitted that they had not discharged that burden. In her view, the courts of Ontario were the most appropriate forum in that most of the trust assets (on her case assets of a bare trust in favour of the second representor) were located there, as were the representors. She did not suggest that Panama, where the first to third respondents are based, was an appropriate jurisdiction.

43 We can appreciate that any litigation over the loans purportedly made by the first respondent and/or La Hougue to the second representor or his entities would be brought before the Ontario courts, in that this is where the second representor and his entities reside and where any judgment can be enforced against them, but the jurisdiction that the Ontario court is currently exercising and may in the future be asked to exercise, if the loan claims are brought before it, is quite different to the jurisdiction this Court is being asked to exercise, namely a supervisory jurisdiction over Jersey trusts.

44 It is significant, in our view, that Clause 2 of the 1984 deed provides that Jersey is the forum for the administration of the trust. Whilst such a forum stipulation would not be strong enough to confer exclusive jurisdiction upon the Jersey courts (see the Privy Council decision in *Crociani v Crociani* [2014] UKPC 40 at paragraph 22), it is the jurisdiction which would be expected to deal with domestic or internal trust issues, such as the appointment and removal of trustees (see the Court of Appeal decision in *Crociani v Crociani* [2014] JCA 089 at paragraphs 73 and 74).

45 We accept that the Ontario Courts may well be able to exercise jurisdiction over a Jersey trust where, for example, there are assets of the Jersey trust in Ontario, in the same way that this Court can exercise jurisdiction over a foreign trust, where there are assets here, but in general terms when it comes to engaging a supervisory jurisdiction over the Jersey trust created by the 1984 deed, this jurisdiction is clearly the most appropriate, as Clause 2 of the 1984 deed itself stipulates.

46 Clause 2 of the 1977 deed similarly provides that Jersey should be the forum for the administration of the trust created by that deed and we therefore conclude that Jersey is clearly the most appropriate forum for the exercise of a supervisory jurisdiction over both these Jersey trusts and to deal with the trust issues that have been raised in the representation.

47 However, the first to third respondents contend that there are no valid trusts in existence whether under the 1977 or 1984 deeds. The only trusts in existence, they say, are bare trusts as between them and the second representor, which trusts have no connection with Jersey. In contrast to the case in *Stock v Pantrust*, there is evidence here, they say, of the 1984 deed being executed in 1994, which supports the contention that it is a sham. In this respect, Advocate Langlois says the first to third respondents have the better of the argument. Although the second respondent does not appear to accept the 1984 deed was back dated, he still maintains that it was a sham from the outset.

48 Advocate Langlois submitted that the Court should decline jurisdiction, as these bare trusts are not Jersey bare trusts. There are no assets in the jurisdiction and no administration is carried on here – indeed, she says there is no connection at all with Jersey other than for the fourth respondent being a director of Galty BV.

49 We do not think it right to proceed on the basis that the first to third respondents have the better of the argument on sham for these reasons:-

> (i) The first to third respondents have a tendency to blow hot and cold on the issue of sham, seemingly being prepared, for example, to execute formal deeds in 2007 and 2015 on the basis that the 1984 deed is valid. In his letter to the second representor of 19 th May, 2015, dealing with the proposed retirement of the first to third respondents as trustees, the second respondent says "…the trust is possibly not in substance an actual or real trust but is possibly a bare trust for some sort of nominee or other arrangement for your personal benefit." (our emphasis).
>
> (ii) If there are trust deeds purporting to show the creation of a valid trust subject to Jersey law, which has been followed by two further deeds all apparently executed on the basis that the trust is valid, then, in the absence of the clearest evidence, we feel we should proceed on the basis that the trust is valid until such time as we can properly determine otherwise, and we are not in a position to make that determination at this stage.

50 The representors have had some difficulty in trying to rationalise the existence of two Brazilian trusts, but at this very preliminary stage, we will proceed on the basis that there are two trusts in existence, both subject to Jersey law over which we should exercise our supervisory jurisdiction. How the position will be rationalised in the future remains to be seen.

51 That raises the point made by Advocate Langlois that the representors are not named as beneficiaries under the 1984 deed and they therefore have no *locus* to be making an application under Article 51 of the Trusts (Jersey) Law 1984 ("the Trusts Law") in respect of that trust.

52 The evidence we have seen indicates to us that the 1984 deed was not intended to benefit the two named charities in any material way. In all likelihood, it is what would be called a *"blind trust"* intended to keep the identity of the true beneficiaries confidential. There is sufficient evidence to indicate that the representors are within the class of persons that were intended to benefit and we therefore give the representors leave to bring the representation in relation to the 1984 deed pursuant to Article 51(3) of the Trusts Law.

Loan claims

53 The supervisory jurisdiction which we accept extends to what might be described as the trust issues, namely the removal of the trustees, the transfer of trust assets, declarations as to the proper law and an account of the trusteeship of the first to third respondents. These are all what might be described as domestic trust matters, which come within the supervisory jurisdiction of the Court over trusts.

54 In his affidavit of 5 th November, 2015, sworn in support of the application for leave to serve out of the jurisdiction, James Michael Sheedy made it clear that the removal of the first to third respondents as trustees was the substantive relief being sought in the representation and indeed, the section of his affidavit dealing with the *"good arguable case"*, as required by Article 9 of the Service of Process Rules 1994, is devoted entirely to that issue. There is no reference in his affidavit to the loan claims.

55 However, the relief being sought extends beyond these trust matters to "….a declaration as to the validity and enforceability of the loans purportedly owed to [the first respondent] and/or La Hougue by the Brazilian Trust".

56 At the hearing, the representors sought leave to amend that prayer as follows:-

> " *h. ….. a declaration as to the existence validity and enforceability of loans purportedly owed to Pantrust and/or La Hougue and/or Richard Wigley and/or James Wigley or any company controlled by them including those in*

paragraphs 75, in particular:

(i) a declaration as to whom they are owed to and by; and

(ii) a declaration whether such loans are enforceable against the property of the Brazilian Trust."

57 As Advocate Langlois submitted, this constitutes what is in effect a reverse debt claim, by which this Court is being invited to make declarations that affect the rights of third party lenders, namely La Hougue, which is not a party to this representation, and *"any company controlled by"* the second and third respondents, such companies being wholly unidentified.

58 Not only that but the picture painted in this case, as in that of *Stock v Pantrust*, is of funds being lent by numerous third party trusts (wholly unidentified). The sums involved are very substantial and we have no indication as to who the current trustees may be.

59 In addition to that, the position of the first to third respondents has been consistent throughout, namely that loans are due by the principal clients concerned personally, in this case by the second representor, and/or against entities owned and controlled by them. Understandably, they are not making claims against trusts which they have always maintained are shams. If pursued, then repayment of the loans would be sought against the second representor and/or his entities in Ontario, because that is where they reside and where any judgment can be enforced.

60 In Advocate Langlois' submission, the representation before the Jersey Court is a stalking horse intended to conceal the representors' real intention, which is to try and get the potential loan litigation before the Jersey Court, where the second representor has no assets and where no judgment can be enforced. Furthermore, she says the Jersey Court accepting jurisdiction will be used by the second representor to seek a stay of any proceedings that might be brought against him or entities controlled by him in Ontario. Indeed, there has already been an application to stay the existing Ontario proceedings on account of this representation and that hearing is apparently due to take place on 9 th June, 2016.

61 Advocate Baker says that these declarations, affecting as they will the rights of third parties, are all part and parcel of the accounting process; the new trustee needs to know what obligations are owed and enforceable against it. Such declarations are, he said, necessary for the ongoing administration of the Brazilian Trust.

62 In our view, there is a clear distinction between seeking an account, which is a domestic trust matter, and seeking declarations against numerous third parties which affect their rights.

63 We have scant knowledge about these loans, when they were actually made, between which entities and under what law. It would be an exorbitant use of this Court's jurisdiction to seek to take ownership of these issues, which, on the face of it, have no connection with Jersey (certainly now). The only claim which we are on notice may be brought, will be brought by Panamanian entities, who deny the existence of any valid Jersey trust, against an individual and/or entities based in Ontario.

64 Nor do we accept that making such declarations against third parties forms part of an accounting. Under an accounting, the former trustee would be required to give an account of its stewardship of the trust assets ordinarily, we suggest, by the production of accounts which will show, *inter alia*, the current assets and liabilities – such a process does not extend to actually litigating any liabilities disclosed by those accounts. In any event in this case, it is clear that whatever account is given by the first to third respondents, it will not disclose a liability on the part of the Brazilian Trust for any loans due to the first respondent or/or La Hougue. They are very clear that there is no such liability.

65 It is of concern to this Court that the representation brought in this jurisdiction is already being used to seek to justify a stay of the existing proceedings before the Ontario court, which we respectfully suggest is clearly the most appropriate forum for proceedings which have at its heart the allegedly wrongful discharge of a mortgage over real property situated in Ontario.

66 These reverse debt claims should have been flagged by the representors as a separate claim in the application for leave to serve out of the jurisdiction and a good arguable case put forward in that respect. If that had been done, then in our view, leave to that extent would have been refused. In any event, we decline to accept jurisdiction in respect of this part of the relief. It will therefore be struck out of the representation.

67 Advocate Langlois had a number of other criticisms of the other amendments sought to the representation, which we have not set out here, but we will allow those amendments to be made and her concerns can be addressed in the ordinary way going forward.

New trustee

68 As in *Stock v Pantrust*, this Court in its supervisory capacity over trusts would regard the issue of the removal of a trustee as being urgent. Ordinarily, the Court would wish to deal with it as a *cause de brièveté* but in this case, the first to third respondents have agreed to retire, without prejudice to their claims as to validity, and to transfer the trust assets to the fourth respondent without indemnities. We therefore expect this to be completed in early course, without the cost of a contested hearing.

Conclusion

69 In summary:-

(i) We refuse the application to set aside the orders of the Court granting leave to the representors to serve the representation out of the jurisdiction on the first to third respondents.

(ii) We decline to accept jurisdiction over the relief sought in paragraph 5(h) of the representation which we strike out.

(iii) We grant leave for the amendments sought by the representor to the representation other than in respect of paragraph 5(h).