Edoarda Crociani; Paul Foortse; BNP Paribas Jersey Trust Corporation Ltd; Appleby Trust (Mauritius) Ltd v Cristiana Crociani; A (by her Guardian ad Litem, Nicolas Delrieu); B (by her Guardian ad Litem, Nicolas Delrieu

Jurisdiction:	Jersey
Judge:	The Hon. Michael Beloff, Sir John Nutting, Bt., John V. Martin
Judgment Date:	07 April 2014
Neutral Citation:	[2014] JCA 89
Reported In:	[2014] JCA 89
Court:	Court of Appeal
Date:	07 April 2014

vLex Document Id: VLEX-794065217

Link: https://justis.vlex.com/vid/edoarda-crociani-paul-foortse-794065217

Text

[2014] JCA 89

COURT OF APPEAL

Before:

The Hon. Michael Beloff, **Q.C., President**; Sir John Nutting, Bt., **Q.C., and**; John V. Martin, **Q.C.**.

Between
(1) Edoarda Crociani
(2) Paul Foortse
(3) BNP Paribas Jersey Trust Corporation Limited
(4) Appleby Trust (Mauritius) Limited
Appellants

and
(1) Cristiana Crociani
(2) A (by her Guardian ad Litem, Nicolas Delrieu)
(3) B (by her Guardian ad Litem, Nicolas Delrieu
Respondents

Advocate R. J. MacRae **for the Appellants.**

Advocate A. D. Robinson **for the Respondents.**

Authorities

Crociani -v- Crociani [2013] JRC 194A .

Glazebrook -v- Housing Committee [2002] JLR Note 43 .

United Capital Corporation -v- Bender [2006] JLR 269 .

Cotterill v Ozanne (2) 2011–12 GLR 1 .

Warren -v- Attorney General [2012] (2) JLR 286 .

McNamara v Gauson 2009–10 GLR 387 .

Court of Appeal (Jersey) Law 1961.

Spiliada Maritime Corporation v Cansulex Limited ("The Spiliada") [1987] 1 AC 460.

Gheewala v Compendium Trust [2003] UKPC 77 .

Oakley v Osiris [2008] UKPC 2 .

Lewin on Trusts 18th ed.

Lutterman "Jurisdiction Clauses in Trust Instruments", Trusts and Trustees Vol 17 no 2.

Cloutte v Storey [1911] 1 Ch 18 .

Underhill on Trusts 18th Ed.

Pitt v Holt [2013] UKSC 26 .

Dicey Morris and Collins Conflict of Laws 15th ed.

Bols Distilleries BV v Superior Yacht Services [2007] 1 WLR 12 .

Konkola Copper Mines v Coromin [2006] 1 All ER (Comm) 432 .

Marley v Rawlings [2014] UKSC 2 .

Rainy Sky S.A. v Kookmin Bank [2011] UKSC 50 .

Chelleram v Chelleram 1985 Ch 409 .

In the Matter of the Shinorvic Trust [2012] JRC 081 .

What is a Trust Jurisdiction Clause? Professor Paul Matthews (2003) JGLR 2.

Practical Trusts Precedents, Withers.

Drafting Trusts and Will Trusts a Modern Approach Kessler and Sartin, 119 ed.

Drafting Trusts and Will Trusts in the Channel Islands Kessler and Matthams, 2nd ed.

Dymonds Death Duties 15 ed.

Chellaram v. Chellaram [1985] Ch 408 .

The Jersey Law of Trusts Matthews and Sowden, 3rd Ed.

Hague Trusts Convention.

Alsop Wilkinson v Neary [1996] 1 WLR 1220 .

Tolley Administration of Trusts.

Encyclopaedia of Forms and Precedents (1921 ed) Vol 20.

Re Wrightson (1908) 1 Ch. 789 .

Koonmen -v- Bender 2002/218 .

State of Qatar -v- Al Thani [1999] JLR 118 .

Harris The International Trust.

Encyclopaedia of Forms and Precedents 1991 ed Vol 40.

Green v Jernigan 2003 BCSC 1097 .

Helmsman Ltd v Bank of New York Trust Co. Ltd. 2009 C.I.L.R 490 .

Representation of AA in re the D Discretionary Trust [2010] JRC 164 .

Re A Trust [2012] SC (Bda) 72 .

Schmidt v [Rosewod] Trust (2003) 2 AC 709 .

Investec Trustees -v- BC et al. [2013] JRC 181 .

Trusts (Jersey) Law 1984.

Mauritius Trusts Act 2001.

Green -v- Jernigan (2003) BCSC 1097 .

Donahue v Armco [2002] 1 All ER 749 .

Bank of New York Mellon GV Films (2009) EWHC 2338 (Comm) .

EMM Capricorn Trustees Ltd -v- Compass Trustees [2001] JLR 205 .

Glasson the International Trust.

Trendtex Trading Corp -v- Credit Suisse (1982) AC 679 .

MacMillan Inc -v- Bishopsgate Investment Trust plc and Ors (No 3) [1996] 1 All ER 585 .

Pacific International Sports Clubs [2009] EWHC 1879 (Ch) .

Judgment Regulation (Council Regulation) (EC) 44/2001.

Re S [2011] JRC 117 ; 14 ITELR 663.

Carlyle Capital Corporation Ltd -v- Conway and Ors CA Guernsey 5 March, 2012.

In Re Wilson 1985 AC 750 .

Trust — application for leave to appeal the Royal Courts decision to refuse application to stay proceedings on the grounds of forum non conveniens.

Application for leave to appeal the Royal Courts decision to refuse application to stay proceedings on the grounds of forum non conveniens.

THE PRESIDENT:

INTRODUCTION

1 By notice dated 24 October, 2013 the Appellants (collectively “As”) have applied for permission to appeal against the decision of the Royal Court dated 2 October, 2013 (“the Decision”) to refuse As’ application to stay these proceedings on the ground of forum non conveniens.

2 On 24 September, 2013 this Court directed contingently that any appeal by As be heard simultaneously with the permission application and the matter has accordingly come before us as a rolled up hearing.

3 These proceedings emanate, as their title suggests, from a feud within a family about which

branch of the family should enjoy the fruits of substantial trusts. The family protagonists are, on the one hand, A1, and on the other hand, Cristiana (R1), one of two daughters of A1, the other being Camilla, and R1's two daughters Delia (R2) and Livia (R3), (collectively “Rs”).

4 The contest between the parties for present purposes is whether the substantive issues should be determined in Jersey, the forum preferred by Rs, or Mauritius, the forum preferred by As.

5 As assert that Clause Twelfth of a trust known as the Grand Trust, as activated, confers exclusive jurisdiction on the courts of Mauritius. The Royal Court upheld Rs' contrary contention that clause Twelfth does not on its true construction purport to dictate the locus for these proceedings but that, even if it did, there existed “good reason” and “exceptional circumstances” to refuse to stay the Jersey proceedings; and it would, if necessary, have exercised its discretion to do so on that alternative basis.

Background to Rs' claim

6 By a trust agreement dated 24 December 1987 made by A1, as settlor, and herself and two other former trustees (not party to the proceedings), as trustees a settlement (“The Grand Trust”) was created.

7 The preamble to the trust deed provided as follows:–

> *“The Settlor wishes to record that she intends by this Agreement to have set aside a separate trust for each of her children Camilla (aged sixteen (16) years as of the date of this Agreement) and [R1] (aged fourteen (14) years as of the date of this Agreement).* The Trustees shall receive as the initial Trust Fund the Secured Term Note (the “Note”) described in the annexed Schedule A. The Trustees shall retain the Note until its maturity or until its prior redemption, without regard to rules concerning diversification of investments or theories or principles of investment for fiduciaries. The Trustees shall collect the income from and proceeds of the Note when due, but shall not be required to institute litigation to enforce payment or to enforce any right which the Trustees may have as owner of the Note. The Trustees shall divide the property described in the annexed Schedule A into two (2) substantially equal (as to value) separate trusts, one of which shall be identified by the name of CAMILLA and one of which shall be identified by the name of [R1]. Each such separate trust shall be disposed of as hereafter directed in this Agreement.”

8 The Note settled into the Grand Trust was issued to A1 by Croci International BV, under which it promises to pay 75 billion lire in full together with accrued interest on the 30th anniversary of the date of its issue. It still remains an asset of the Grand Trust and is due to be redeemed in 2017. Rs say that further substantial sums were settled upon the Grand

Trust by A1.

9 Under the principal trust provisions of the Grand Trust, the trustees have the power in respect of each fund that bears (as the case may be) the name of Camilla and R1 to pay income to each of Camilla and R1 respectively during their lifetimes, together with a company which Rs say is beneficially owned by A1 and known as Camillo Crociani Foundation Limited ("the Foundation"), and to pay capital to each daughter respectively during their lifetimes, with the remaining capital passing as they may appoint or failing appointment to their children on their respective deaths. In the event of both daughters dying without leaving living issue A1 is the default beneficiary and failing her, the Foundation.

10 R1's children (R2 and R3) are, Rs assert, but As do not concede, entitled to R1's Fund on her death. (This particular issue to be resolved at any trial appears to turn on the consequence of the marriage of R1 and Nicolas Delrieu, the father of R2 and R3, in 2012, and whether it legitimated the children.)

11 Rs assert, but As dispute, that the Grand Trust was not created with the purpose or intention of providing any benefit to A1 other than as a default beneficiary if her line of descendants through Camilla and R1 was extinguished. A1 asserts that it was always her intention to be able to benefit from the assets which she settled in to the Grand Trust, being assets which she had created.

12 Under Clause Eleventh (A) the trustees have the overriding power to transfer the whole or any part of the trust fund to other trusts:–

> *"Notwithstanding any of the trusts, powers and provisions herein contained the trustees shall have power at any time or times before the Distribution Date at the absolute discretion of the trustees to raise and pay or transfer the whole or any part of the Trust Fund freed and discharged from the trusts and powers and provisions of this instrument to the trustees of any other trust not infringing the rule against perpetuities applicable to these trusts and approved by the trustees and in favor or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries (other than the settlor) and whether or not the trustee or trustees of such other trust is or are resident within the jurisdiction applicable at the time to that trust and thereupon the property so paid or transferred shall be subject to the trusts, powers and provisions of the other trust and be governed by the proper law of that other trust whether or not such proper law is the proper law of this Agreement".*

13 Under Clause Twelfth, which falls primarily to be construed for the purposes of this application the trustees have the power to appoint new trustees outside the jurisdiction and to declare that the trusts shall be read and take effect according to the laws of the country of the residence or incorporation of the new trustees. I shall set out Clause Twelfth in full at

the appropriate juncture in this Judgment.

14 Under Clause Fifteenth the Grand Trust was expressed as being "governed by the law of the Commonwealth of The Bahamas which shall be the forum for the administration thereof."

15 Clause Fourth provides generally for the appointment and retirement of trustees. Clause Fourth (B) provides that there would be only one *"bank or trust company"* in office at any one time (I infer to carry out the actual administration of the trust), to act with not more than three individual trustees, who under Clause Seventh have no right to receive compensation for serving as a trustee.

16 When the Grand Trust was established the first trustees comprised two lay trustees, namely A1 and Girolamo Cartia, and a professional trust company, BankAmerica Trust and Banking Corporation (Bahamas) Limited. There have been thereafter a number of changes to the professional trustee and, in consequence, to the proper law of the Grand Trust.

17 On the 27th January, 1992, Chase Bank & Trust Company (C.I.) Limited was appointed as the professional trustee and the proper law changed to that of Jersey.

18 On the 9th April, 1999, Banque Paribas International Trustee (Guernsey) Limited was appointed as the professional trustee and the proper law changed to that of Guernsey.

19 On the 2nd October, 2007, A3 was appointed as the professional trustee and the proper law was changed back to that of Jersey.

20 On 8th September A1 created a settlement under the laws of Jersey ("the Fortunate Trust") of which A1 and A3 were trustees. It was revocable unilaterally by her for her own benefit.

21 Between 2007 and 2011 A1 and her fellow Grand Trustees (A2 — A3) distributed substantial sums from R's Fund to R1.

22 At A1's request, R1 immediately redirected these sums (amounting to £6,630,011 and USD $1,235,000) to A1.

23 By a deed of appointment dated 9 February, 2010 ("the 2010 Appointment") the trustees of the Grand Trust (A1-A3) appointed liquid assets, said by Rs to amount to over USD $100,000,000, from the Grand Trust to the Fortunate Trust.

24 By transfers dated 7 April, 2010 and 30 April, 2010 R1, also at A1's request, transferred her

own shares, which represented her interest in two Miami apartments worth at the time approximately USD $16 million, to the trustees of the Fortunate Trust (A1 and A3). The Miami Apartments were owned by two Florida companies which were in turn owned by a BVI company Crica Investments Limited ("Crica"). Prior to the transfers R1 held 49,900 shares in Crica. Camilla held the other 100.

25 Until April 2011 R1, Camilla, and their respective families shared a home in Monaco with A1.

26 In April 2011 R1 left the family home and her relationship with A1 and her sister Camilla has broken down completely. The cause of that breakdown is a matter of dispute between the parties. Rs assert, but As deny, that it resulted from the discovery by R1 of private plans to redirect trust assets away from her and to Camilla's branch of the family. As' position is that R1 misunderstood illegally obtained documents said to contain such plans and that her conduct since she left the family home has been *"bizarre and troubling"*.

27 Since then Rs assert (but As deny) that A1 has been trying to cut R1 off financially and to starve her of funds. As' position is that this scenario is a figment of R1's imagination.

28 On 30 June, 2011 A1 revoked the Fortunate Trust and withdrew all the assets for herself.

29 By a deed dated 10th February, 2012 ("the 2012 Retirement") A1–3 purported to retire as trustees of the Grand Trust in favour of A4 and to change the proper law to that of Mauritius.

30 By a deed dated 12th August, 2012 ("the Agate appointment") property subject to the 2010 Appointment was purportedly appointed to a new settlement, the Agate trust, created by A2 and A4 under Jersey law, under the terms of which the trustees were to hold the trust fund and its income for the Foundation if A1 survived for seven days, which she did.

3. The Substantive Issues in the Proceedings

31 By Order of Justice dated 18th January, 2013 Rs seek in summary:–

(i) to recover from A1 the distributions of £6,630,011 and USD $1,235,000, which were made by the Grand Trustees between 2007 and 2011 and received by A1 and/or to obtain compensation from the Grand Trustees (A1 — A3) for these breaches of trust; and on the basis that these distributions were void as a fraud on the trustees' power, being for the benefit of A1.

(ii) to set aside the 2010 Appointment (on the basis that it itself was a void breach of trust) and the transfer of over USD $100,000,000 to the Fortunate Trust and to recover the funds from A1 and/or to obtain compensation from the Grand Trustees (A1 — A3)

for this breach of trust; and

(iii) to recover from A1 and/or the trustees of the Fortunate Trust (A1 and A3) the shares in Crica which were transferred to the Fortunate Trust as part of these transactions.

(iv) to set aside the 2012 Retirement on the basis that it was also a fraud on the trustees' power.

(v) to set aside the Agate appointment.

(vi) various heads of relief consequential on these claims, including the appointment of new trustees of the Grand Trust.

32 On 14th June, 2013 As served an answer disputing that they had ever acted other than in good faith, with appropriate skill and care and upon expert legal advice. They assert that each of the Appointments was within their power as trustees of the Grand Trust and a proper exercise of those powers carried out for good reason. They accordingly deny that Rs are entitled to any of the relief sought.

33 It is, I repeat, not for the Court at this juncture to adjudicate upon the merits of each parties' contentions on the substantive issues but only to determine where they should be resolved.

4. Genesis of the Forum Dispute

34 By letter before action dated 3 July, 2012, ("LBA") sent to Ogier acting for As, Bedell Cristin, acting for Rs, outlined the claims in so far as they related to the 2010 Appointment and the 2012 Retirement. It was following the LBA that the Agate Appointment was made.

35 By letter dated 17 August, 2012, Mourant Ozannes, who had replaced Ogier as As' Jersey lawyers, wrote rejecting the claims of Rs and informing them of the Agate Appointment. They noted, inter alia:–

> *"36. All of the Grand Trustees, directors of corporate trustees, the individual professionals and Madame Crociani herself, were of one mind and entirely comfortable with the decision reached. They have made it clear that if litigation cannot be avoided, they are all willing and able to explain themselves to the Royal Court."*

At paragraph 37 of the letter, R1 was warned that if she persisted with the claims, she would be subpoenaed by As to attend before the Royal Court for cross-examination.

36 On the 13 January, 2013, the Order of Justice was served upon A3.

37 By email dated 31 January, 2013, Mourant Ozannes confirmed that they were instructed to accept service on behalf of the other As who were out of the jurisdiction (A1 residing in Monaco, A2 in the Netherlands and A4 in Mauritius) which they duly did.

38 By the same email, Mourant Ozannes sought an extension of time for the filing of an answer, on the grounds inter alia that the English counsel who had been assisting As was unavailable for the whole of February 2013.

39 On 1 February, 2013 the action was placed on the pending list by consent, as against A3 and on 8 February, 2013, as against A1, A2 and A4.

40 On 4 March, 2013 a consent order was issued granting As an extension of time for the filling of an answer to 29 March, 2013

41 Meanwhile, on 1st March, 2013, Carey Olsen gave Bedell Cristin notice that they had been instructed to act for As in place of Mourant Ozannes.

42 On 8 March, 2013, Carey Olsen issued a summons under Rule 6/7 of the Royal Court Rules 2004, disputing both the jurisdiction of the Court and the forum.

43 On 12 April, 2013 the summons was amended; As abandoned any challenge to the jurisdiction of the Court, but sought instead a stay of the proceedings on the grounds of forum non conveniens.

44 Meanwhile on 22 March, 2013, As applied ex parte to the Supreme Court of Mauritius, on the basis that, pursuant to the 2012 Retirement, the Grand Trust was now governed exclusively by the laws of Mauritius, for declarations inter alia that:–

> (i) by the 2010 Appointment, the assets the subject of that appointment were validly and effectively transferred to the Fortunate Trust.
>
> (ii) by the 2012 Retirement, A4 had been appointed as sole trustee in the place of the former trustees, and that the Grand Trust had become subject to and governed by the laws of Mauritius.
>
> (iii) In the event that the 2010 Appointment had not been effective, that by the Agate Appointment all the assets specified in that appointment were validly and effectively transferred to the Agate Trust.

45 On 10 May, 2013 the Royal Court ordered As to stay the proceedings in Mauritius pending its own determination of the forum non conveniens issue.

46 On 23 May, 2013 As appealed the Royal Court's interim order staying the Mauritian proceedings, pursuant to permission granted by Pleming JA on 17 May, 2013.

47 On the 28, 29 and 30 August, 2013 As application for a stay of the Jersey proceedings was heard in the Royal Court. The Court received affidavits principally from R1, A1, Mr Miles Le Cornu of A3, and from the parties' respective experts on the law of Mauritius.

48 On 27 September, 2013 the Court of Appeal declined to deal with As' outstanding appeal against the Royal Court's stay of the proceedings in Mauritius in the light of the Royal Court's imminent decision on the forum non conveniens issue, but made a fresh interim order of its own motion to hold the position pending the anticipated appeal against the Royal Court's decision. As' appeal against the Royal Court's interim stay of the Mauritian proceedings remains formally to be decided by this Court.

49 On 2 October, 2013, as noted above, the Royal Court refused to stay the Jersey proceedings.

5. Permission to Appeal/Appeal

50 In order to dissuade us from granting permission or (if need be) from allowing the appeal Rs relied on a well-known principle of Jersey jurisprudence, namely that:–

(i) in order to obtain permission to appeal As must show:–

(a) there is a clear case that something has gone wrong;

(b) a question of general principle falls to be decided for the first time; or

(c) there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage (see *Glazebrook -v- Housing Committee* [2002] JLR Note 43).

And that:–

(ii) In so far as the Royal Court was exercising discretion that the Court of Appeal will only interfere if:–

(a) It had misdirected itself as to the principles governing the exercise of its discretion;

(b) It had taken into account matters which it ought not to have done or had failed to take into account matters which it ought to have done; or

(c) Its decision was plainly wrong (see *United Capital Corporation -v- Bender* [2006] JLR 269, paragraph 25).

51 I myself consider that criterion (i)(a) for permission to appeal i.e. that there is a clear case that something has gone wrong requires revisiting, since it would appear as a matter of language to be a basis for allowing an appeal rather than merely granting permission (see my dicta in *Cotterill v Ozanne (2)* 2011–12 GLR 1 para 11 and *Warren v. Attorney General* [2012] (2) JLR 286 para 15) and I find illuminating and supportive the observations in (*McNamara v Gauson* 2009–10 GLR 387 at paras 21–32). While my doubts about criterion (i)(a) as currently formulated matter not since in this case criterion (i)(c) is obviously satisfied, nonetheless in my view the time has come to align the tests in each Bailiwick, there being no cultural or other reasons to distinguish them, and I propose, if my brethren concur, that henceforth the Royal Court and Court of Appeal in this jurisdiction should apply the criterion, in lieu of (i)(a) that the appeal ***"has a real prospect of success"*** when considering whether or not to grant permission under the Court of Appeal (Jersey) Law 1961 Article 13(i)(e).

52 In the context of forum disputes this Court has repeatedly endorsed the following words of Lord Templeman in *Spiliada Maritime Corporation v Cansulex Limited* ("The Spiliada") [1987] 1 AC 460 at 465F:–

> ***"In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge….*** An appeal should be rare and the appellate court should be slow to interfere."

(See e.g. *Wright -v- Rockway* [1994] JLR 32; *Leeds United FC v Western and Levi* [2012] JCA 083 para 3).

53 The admonition has sometimes been more honoured in the breach than in the observance [Lord Walker of Gestingthorpe, in *Gheewala v Compendium Trust* [2003] UKPC 77] [para 1] but in any event can only sensibly apply to matters of discretion or evaluation when there may be a spectrum of reasonable answers, and not to pure questions of law, which admit of only one answer.

6. Issues in the Appeal

(i) Could the purported application of Clause Twelfth in the Retirement Appointment be ignored as itself a fraud on the power? ("bypass").

(ii) If not, what is the proper construction of Clause 12 of the Grand Trust? ("construction").

(iii) If, on its proper construction, Clause Twelfth confers exclusive jurisdiction on the Courts of Mauritius, is that decisive of the outcome of the appeal? ("effect").

(iv) If that is not decisive, what is the proper test for displacing any presumption to which Clause Twelfth gives rise in favour of the courts of Mauritius? ("displacement test").

(v) On whatever is the displacement test, which factors tell in favour of Jersey and which in favour of Mauritius as the appropriate forum ("factors").

(vi) Did the Royal Court's evaluation of those factors against the displacement test disclose an impeachable error in exercise of its discretion? ("appealability").

55 I have identified the issues in that order because, in my view, it is logical to consider first whether or not the Grand Trust itself makes express provision for the appropriate forum. Only if it does will it be necessary to consider whether such express provision can be overridden and, if so, on what basis. Only if it does not will it be necessary to consider as a further and free standing issue the matter of appropriate forum.

7. Bypass

56 It is accepted by the parties that the power to change the proper law and the forum for administration is a fiduciary power which must be exercised for the benefit of the beneficiaries. *Oakley v Osiris* [2008] UKPC 2 per Lord Scott at [44]; Lewin on Trusts [18th ed] para 11–12. ***"A self serving change of judicial forum designed to hinder a personal claim by beneficiaries against trustees will fail"***. See to this effect Lutterman "Jurisdiction Clauses in Trust Instruments", Trusts and Trustees Vol 17 no 2 p. 293 at p. 299.

57 Rs assault the 2012 Retirement on the ground that it is itself a fraud on the power. To this As respond

(i) First the better view is that, contrary to the conclusion of Neville J and the Court of Appeal in *Cloutte v Storey* [1911] 1 Ch. 18 at pp. 25, 29 and 31 respectively [Underhill 18th ed para 57. 22 p.911] the consequence would be that the Deed would be voidable, not void. As relied on the observation of Lord Walker of Gestingthorpe in *Pitt v Holt* [2013] UKSC 26 who described *Cloutte v Storey* as ***"a difficult case"*** para 93 [without, however, overruling it].

(ii) Second, that even if the Deed was void not voidable, it would be necessary for Rs to have the better of the argument that the 2012 Retirement was a fraud on the power.

For this submission As rely:–

(a) on Dicey Morris and Collins Conflict of Laws 15th ed para 12 — 114:–

> ***"…where an English court is called on to exercise jurisdiction in circumstances in which the material jurisdictional facts are not agreed, the party who wishes to invoke the jurisdiction will be required to have the better of the argument that the facts which support its invocation of the jurisdiction are satisfied.*** It is likely

that the same principle applies in mirror image when a party challenges the exercise of jurisdiction by pointing to an agreement providing for the jurisdiction of the courts in a foreign country. If the court is required to decide who, on the material before it, has the better of the ***argument on the facts and matters relevant to the existence and exercise of jurisdiction, the question of who has the burden of proof will be the ordinary one, that the party who seeks to establish a fact bears the burden of establishing it".***

(b) by way of analogy on *Bols Distilleries BV v Superior Yacht Services* [2007] 1 WLR 12 ("Bols"), where the plaintiff, a Gibraltar company, brought proceedings in Gibraltar against two defendant companies who were domiciled in the Netherlands and Poland respectively, in reliance on a clause in a draft contract that the agreement would be governed by the laws of Gibraltar and the parties would submit to the jurisdiction of the courts of Gibraltar. The defendants denied that any contract including that clause had ever been concluded. The Privy Council held that the plaintiff in those circumstances had to show that it had ***"a much better argument than the defendants, "on the material available, at present "… and that it can be established clearly and precisely that the clause conferring jurisdiction on the [Gibraltarian] court was the subject of consensus between the parties."*** (para 28)

(iii) Third, Rs do not have the better of the argument. As have provided sworn affidavits, including from a lawyer, to the effect that the purposes for which the 2012 Retirement was drafted were entirely legitimate. Rs cannot accordingly tilt the scales in their favour.

58 It is unnecessary to enter into the debate as to whether *Cloutte v Storey* is dead, moribund or vigorously alive since I accept that the ***"better of the argument"*** test is relevant where it is necessary to identify whether the Court can ignore as void or, indeed, voidable the exercise of an exclusive jurisdiction clause whose propriety is challenged. While *Bols* and indeed the passage in Dicey Morris and Collins are concerned with contract, not trust, for reasons set out below I do not consider that to be material. [Non sequitur that the existence of a non-demurrable challenge to the propriety of such a clause is not a factor to be taken into account in an assessment of circumstances to meet whatever is the displacement test]. Furthermore I do not consider Rs can satisfy that test on the present state of the evidence, whatever may be position if the deponents of affidavits were to be cross examined. I trust that I have avoided in articulating my conclusion in this way any pre-judgment of the kind warned against by Rix LJ in *Konkola Copper Mines v Coromin* [2006] 1 All ER (Comm) 432 (para 96).

8. Construction

59 Rs assert (but As dispute) that the Royal Court was right to conclude at paragraph 58 of its judgment, that:–

> ***"notwithstanding the apparently wide terms of [Clause Twelfth], we conclude that it has no application to the claims brought by Rs in respect of the impugned transactions.*** They were and remain governed by Jersey law and they are not subject to the exclusive jurisdiction of the courts of Mauritius"

Applicable principles of construction

60 I start with a reference to what was a measure of common ground. The decision of the Supreme Court in *Marley v Rawlings* [2014] UKSC 2 (specifically concerned with the construction of wills) rejected the proposition that their construction differed from ***"other documents"***, which would include trust deeds (para 17). ***"The aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context"*** (para 20). The fact that the document is made by a single party e.g. a settlor ***"is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned"*** (para 21). ***"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."*** (para 19)

61 It follows that whilst the starting point in construction of a document is always the language used, it is not the finishing line for, in a tie-break, purpose trumps phraseology. In *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, Lord Clarke SCJ stated at paragraph 21 that:–

> ***"If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."***

62 Inadmissible, however, is evidence as to the subjective intention of the draftsman (*Marley -v- Rawlings* [2014] UKSC 2 para 19 (*Chelleram v Chelleram* [1985] Ch. 409 at p 425.) For that reason we declined a belated attempt by As to introduce such evidence.

63 From that terra firma this Court found itself embarking on relatively uncharted seas. It is, of course, axiomatic that any document or provision must be construed by reference to the interpretation principles set out above in the light of its own terms. We were furnished with cases not only from Jersey, [both of this Court and of the Royal Court], but also from British Columbia, the Cayman Islands, and Bermuda. The decisions of none of these courts was binding on us. The clauses under consideration were not identical to Clause Twelfth. Commentary, when it did not merely aggregate the jurisprudence in footnotes, was sparse and inconclusive. The melancholy observation in *Lewin* ***"Jurisdiction clauses are not always clearly drafted"*** (Lewin on Trusts: 18 ed: ch.11 Section 2) seems to me to be well

founded.

Clause Twelfth

64 Clause Twelfth provides as follows:–

> *"Notwithstanding any of the trusts, powers and provisions herein contained the Trustees shall have power at any time or times and from time to time before the Distribution Date and without infringing the rule against perpetuities at the absolute discretion of the Trustees by any irrevocable deed or deeds to resign as Trustees and to appoint a new trustee or new trustees outside the jurisdiction at that time applicable to the trusts hereunder as Trustees hereof and to declare that the trusts hereof shall be read and take effect according to the laws of the country of the residence or incorporation of such new Trustee or Trustees and upon such appointment being made the then Trustee or Trustees shall immediately stand possessed of the Trust Fund upon trust for the new Trustee or Trustees as soon as possible so that the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder" (emphasis supplied).* but so that nonetheless the then Trustee or Trustees or the new Trustee or Trustees may by deed declare that the trusts hereof shall continue to be read and take effect according to the laws of the said Commonwealth of The Bahamas as provided by Clause FIFTEENTH hereof) and Clause FIFTEENTH hereof shall take effect and be subject to the provisions hereinbefore declared by this Clause

Construction Issues

65 The main issues which divide the parties are these:–

> (i) does the reference to ***"exclusive jurisdiction"*** make the courts of Mauritius the only locus in which disputes [between R1 and A1-4] from the time of appointment of A4 as trustee can be resolved?
>
> As contend that it does, Rs contend that it does not, but rather refers to the ubiquity of the governing law.
>
> (ii) does the reference to ***"the forum of administration of the trust hereunder"*** also make the courts of Mauritius from that time the only locus in which such disputes can be resolved?
>
> As contend that it does, Rs contend that it does not, but rather refers to the place

where the trust is to be administered.

Exclusive Jurisdiction?

66 I consider that Rs analysis is to be preferred for the following reasons:–

(i) ***"exclusive jurisdiction"*** in context confirms that a single system of law will apply to the rights of all persons under the trust, since both the phrases ***"exclusive jurisdiction"*** and ***"construed only according to"*** attach to the phrase ***"the law of the said country"***. As' contrary reading requires at least the insertion of commas after the words ***"exclusive jurisdiction of"*** and before the words ***"the said country"*** which are absent, albeit commas are deployed elsewhere in the Grand Trust deed e.g. in the first line of Clause Twelfth.

(ii) the concept of ***"exclusive jurisdiction"*** of a country is an intrinsically awkward one: conventionally jurisdiction, when used to denote a locus for dispute resolution, would refer to the courts of a country.

(iii) the declaration which it is envisaged the ex-Trustees should make is concerned only with a change in the proper law and the consequences of such declaration then spelt out should logically reflect the envisaged declaration.

I interpolate that Rs pointed to an error in the 2012 Retirement; whilst in the preamble it records that the parties *"wish to declare"* that the Grand Trust shall be governed by Mauritius law, there is no actual declaration to that effect in the operative part of the instrument. However, as the intention of the parties was clear, in my view the courts should to give effect to that intention, applying the principles set out in, *In the Matter of the Shinorvic Trust* [2012] JRC 081 at paras 36–37.

(iv) *"The rights of all persons and the construction of each and every provision"* of the Trust must, to be faithful to the structure of the relevant Clause, become *"subject to the 'exclusive jurisdiction' and construed only according to the law of the said country"* at one and the same time.

As sought to suggest that whereas from the time of appointment of A4, any claim made by R1 had to be adjudicated in Mauritius, whether arising out of events which occurred before or after that time, the law which would govern claims arising out of events which occurred before that time would continue to be the law of Jersey being the proper law of the Grand Trust at the time of occurrence of such events. However, such a construction, which might appear more attractive than one which purported to change the proper law with retroactive effect, is not consistent with the language actually used. **"Thereafter"**, i.e. from the time of appointment, governs all that follows. Chronological dissection of the two is not contemplated. This tells against interpreting the words "exclusive jurisdiction" as referring to the locus for resolution of disputes.

(v) As construction of the phrase *"exclusive jurisdiction"* as referring to the locus for resolution of disputes, would require transfer of proceedings already existing at the

time of appointment, which is unlikely to have been intended, and is not contended for by As.

(vi) If As were correct in their construction of both phrases ***"exclusive jurisdiction"*** and ***"forum for the administration"***, one or other would be otiose. R's construction avoids such duplication: each phrase has a distinct role i.e. ***"Exclusive jurisdiction"*** means that the proper law of the Trustee's country of residence or incorporation applies to all aspects of the Trust: ***"Forum for the Administration"*** means that the Trust will be administered in that country and the Courts of that country will exercise their supervisory jurisdiction over it.

(vii) That the concept of ***"exclusive jurisdiction"*** can apply to the reach of a particular system of law rather than the place where disputes under such law must be resolved is vouched for by the observations of Professor Matthews, in his article in the Jersey Law Review October 2003 " What is a Trust Jurisdiction Clause? "when he stated:–

> ***"Clauses using the wording found in clause 1 have been used by trusts draftsmen, for many years, to indicate the law to which reference is to be made — and exclusively to be made — to ascertain the effects of the trust and the rights of the parties involved.*** The "jurisdiction" referred to is not (as a litigation or arbitration lawyer might think) the jurisdiction or competence of the forum, but instead (as a non contentious trusts draftsman would have considered) the jurisdiction, meaning "scope" or "province of application", of the law itself. It answers the question, Which law governs what aspects of the trust? And the answer given here is, all aspects of this trust, including the rights of the parties, are subject to the law identified as the proper law. If the judges of the Court of Appeal had had any serious acquaintance with the drafting of trust instruments, they must have known this. (para 20)

It appeared unlikely that a trust lawyer of his experience would simply mistake, still less misrepresent a matter of fact, and we were shown forms drafted by the well-known law firm, Withers, " Practical Trusts Precedents" which confirmed, at least, that the concept of ***"exclusivity"*** can be attached to substantive law rather than forum.

(viii) In one of the cases drawn to our attention *Koonmen v Bender* to which I shall refer later, ***"exclusive jurisdiction"*** was clearly in my view used in that sense. [The relevant form in that case was ***"commonly used in offshore trusts"***. Kessler and Sartin in Drafting Trusts and Will Trusts a Modern Approach 119 ed para 28.6 p.33].

(ix) I draw attention to the contrast between Clause Fifteenth (under which the original forum for administration was Bahamas, with no reference to exclusive jurisdiction of anything) and clause Twelfth. It seems improbable that the draftsman intended the courts of the new jurisdiction expressly to have exclusive jurisdiction over disputes when he had not thought fit to say the same for Bahamas.

Forum for Administration

67 In Drafting Trusts and Will Trusts in the Channel Islands 2nd ed Kessler and Matthams, the authors wrote ***"The expression "forum for administration" is often used where it is unclear whether the meaning is (i) courts with jurisdiction over administration (ii) the law governing administration or (iii) the place where administration is carried out"*** (para 19.5 fn 43). They note by reference to Dymonds Death Duties 15 ed 1973 p.1229 that in older cases the term was used to denote what is now called the governing law. They wisely advise ***"This lack of clarity is a reason to avoid the expression"***.

68 In my view the concept of ***"forum for the administration of the trust"*** as a matter of language more obviously refers to the locus of internal administration which can if necessary engage the supervisory jurisdiction of the Court: (*Chellaram v. Chellaram* [1985] Ch 408 at p.43 1–2); Matthews and Sowden The Jersey Law of Trusts 3rd ed. Para 4.18. cf: The Hague Trusts Convention Article 8 (1)), rather than of resolution of hostile litigation between beneficiaries and trustees, a fortiori between beneficiaries and ex-trustees.

69 In *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, at p.12234–1224C Lightman J drew a distinction between various forms of trust litigation:–

> ***"Trustees may be involved in three kinds of dispute.*** (1) The first (which I shall call "a trust dispute" is a dispute as to the trusts on which they hold the subject matter of the settlement. This may be "friendly" litigation involving e.g. the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or "hostile" litigation e.g. a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement. The line between friendly and hostile litigation, which is relevant as to the incidence of costs, is not always easy to draw: see In re Buckton; *Buckton v. Buckton* [1907] 2 Ch. 406. (2) ***The second (which I shall call "a beneficiaries dispute") is a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future.*** This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and/or damages for breach of trust. (3) The third (which I shall call "a third party dispute) is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities e.g. in contract or tort assumed by the trustees as such in the course of administration of the trust.

70 The concept of a place of administration (and powers connected therewith) is well recognised in practitioners' handbooks: for example, Tolley: Administration of Trusts devotes a separate section C3 and C1. It appears to be used in that particular sense in the Encyclopaedia of Forms and Precedents (1971 ed) Vol 20, (para 392).

71 ***"The forum for the administration of the trust"*** being the country of residence or incorporation of a new trustee makes perfect sense if ***"administration of the trust"*** is given a conventional meaning of the ***"day to day running of the trust"*** — i.e. internal administration. Any new trustee would naturally wish to make use of the courts of its country of residence or incorporation for directions as to how it should exercise its powers as trustee.

72 It is notable that, while the jurisprudence which I review later is inconsistent, "more recently the courts have adopted a narrower interpretation of the expression so that it does not include breaches of trust or other hostile proceedings against former trustees." Kessler and Sartin op. Cit para 28. 6 f.33.

73 Professor Paul Matthews wrote this in the article already referred to:–

> ***"The "forum for administration" of a trust is a quite different concept from an exclusive jurisdiction for the resolution of disputes (whether arising from trusts or otherwise.)*** The administration referred to here is not intended to include contentious breach of trust litigation. On the contrary, it is concerned with aspects of the administration of the trust which, for one reason or another, require the assistance of the court. These might well include trustees seeking to clarify the true construction of the trust terms (for example whether they might invest in such and such an investment), or trustees seeking a direction as to whether they might safely distribute assets when there are contingent claims from third parties still in the air, whether they should disclose trust documents or information to beneficiaries, or whether they should take or defend legal action against third parties (so called "Beddoe" applications). Indeed, it might even involve an application to remove a trustee from office and appoint another. This is the "domestic jurisdiction" of the Chancery Court, which under the old Rules of the Supreme Court 1965 in England was represented by the provisions of Order 85. The predecessor of that Order itself was introduced in order to avoid the need in every case to have a full action to administer the trust — a so-called "administration action". This jurisdiction — usually, but not invariably, invoked by the trustees — continues today in England. A similar jurisdiction exists in Jersey and, for that matter, in Guernsey. (para 21)
>
> ***Hence the phrase "forum for administration" referred directly back to the nineteenth century (and earlier) idea of the court which would take on the administration of the trust if need be.*** The most usual forum for that, of course, was the forum of the proper law. So strictly there was no need to state the forum for administration. And it is doubtful that selecting a different forum from that of the proper law could require the trustees to seek directions only from the nominated court. But such an administration action was in effect procedural rather than substantive. It was a means of dealing with matters of administration and construction. It was not — could not be — used to deal with breach of trust issues, characteristic of the kind of hostile trust litigation for which an exclusive

jurisdiction clause might be needed. So there could not be any suggestion that this "forum for administration" was automatically intended ***also to be the exclusive jurisdiction for the resolution of contentious disputes involving beneficiaries.*** As the leading cases in England show, that was an entirely different question, resolved — in the days before the adoption of forum non conveniens as a part of English law — by a straightforward application of the ordinary rules of national jurisdiction. In England and other common law countries this depended initially on where the defendants were to be physically found, and a similar rule was originally applied in Jersey. Thus it mattered who the defendants were. They might or might not have been the trustees, but the important point to notice is that it is the plaintiffs who would have had to make that decision, and they would probably not have been trustees. Accordingly, the use of the phrase "forum for administration" could not, with respect, support the interpretation placed on clause 1 by the Court of Appeal." (para 22)

74 We were shown authority that demonstrated that the procedural dividing line may not have been as stark as Professor Matthews suggests, e.g. *Re Wrightson* (1908) 1 Ch. 789 when Warrington J held that in an administration action (in its strict sense) the Court has jurisdiction at any time during the proceedings (even absent an appropriate pleading) to remove trustees, if it considers such removal necessary for the preservation of the trust estate or the welfare of the cestuis que trust, but the substantive dividing line drawn in that article seems cogent.

75 I now turn to the most relevant case law.

By way of prologue it is worth noting the following points on the cited cases:–

(i) All the cited cases on trust forum clauses were decided long after the Grand Trust was executed in 1987. Therefore the draftsman of the Grand Trust could not have had the terms of any such case law in mind.

(ii) In none of the cited cases on trust forum clauses was there any consideration or need to consider how the clause operated where the proper law of the trust and its forum of administration had changed after the relevant breach of trust had occurred.

(iii) Therefore none of the cited cases is directly relevant in relation to the issues in the present case.

76 As rely primarily upon the decision of this court in *Koonmen -v- Bender* [2002] JCA 218, a trust dispute when issues both of service out and of stay arose (so giving rise to different burdens), the contest of forum lay between Jersey and Anguilla and consideration was required of clauses said to confer exclusive jurisdiction on the courts of the latter. Obviously as a decision of this court it demands considerable respect but there is no authority to say that is actually binding on us: (see as to precedent in Jersey *State of Qatar -v- Al Thani* [1999] JLR 118 (a decision of the Royal Court). [***"The doctrine of stare decisis as***

expounded by the English Courts is not part of the Laws of Jersey" p.124).

77 In *Koonmen -v- Bender* the relevant clauses provided in material part as follows:–

> ***"Clause 1: THE INTERPRETATION CLAUSE***
>
> ***(i)(k)"The Proper law" means the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this settlement shall from time to time be subject and by which such rights construction and effect shall be construed and regulated".***
>
> ***Clause 2: PROPER LAW***
>
> ***ii) This settlement is established under the laws of Anguilla and subject and without prejudice to any transfer of the administration of the trusts hereof and to any change in the proper law or in the law of interpretation of this settlement duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of Anguilla which said Island shall be the forum for the administration hereof.***
>
> ***Clause 14: POWER TO CHANGE THE PROPER LAW***
>
> ***(i) The Trustees may at any time during the Trust Period by deed declare that:***
>
> > ***(a)This Settlement 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 (being a place under the law of which trusts are recognised and enforced): and***
> >
> > ***(b) The forum for the administration thereof shall thenceforth be the courts of that state or territory.***
>
> ***(ii) As from the date of any such declaration the law of the state or territory named therein shall be the law applicable to the Settlement and the courts thereof shall be the forum for the administration thereof…"***

78 It can firstly be said that "the drafting is a muddle. Clause 1 purports to be a definition of proper law but is actually a substantive provision"Kessler and Sartin: Cit.Sup para: 2.8 fn 33.

79 In my view, as a substantive provision, Clause 1 states what the proper law, not what the locus of dispute resolution, is to be. I agree that the phrase in Clause 1 was "clearly a reference to the exclusive subjection of the trust to the chosen law and not to the courts of the State whose law was chosen". (Harris: *The International Trust*: para 1.298)

80 Therefore in my respectful view the Court of Appeal's analysis is at odds with the (objectively construed) intention of the draftsman. Its somewhat dismissive dictum (“the concept of a reference to the exclusive jurisdiction of a system of law is obscure” (para 46)) does not adequately dispose of the thrust of the clause. Nor does the associated comment “if this was not intended to be a reference to the jurisdiction of the relevant forum or court it would be redundant” (ditto). Nor, contrary to the last sentence in the same paragraph, is the “interpretation confirmed when one considers clause 2 which, although headed ‘proper law’, clearly includes a reference to the forum for the administration of the trust” because that begs the question as to what is meant by forum for administration.

81 Thus in *Koonmen -v- Bender* the Court construed the reference to ‘forum for administration’ in clause 2 — “shall be the forum for the administration of the settlement” (see also clause 14) — as conferring jurisdiction on the courts for contentious disputes. Rokison JA giving the leading judgment said “I conclude that, looking, as one must at the deed as whole, and construing Clause 2 in the light of Clause 1 (i)(k) and Clause 14, the clear presumed intention of the draftsman was that, unless and until the Trustees decide to change the proper law under clause 14, (which there is no suggestion they ever did in this case) the forum charged with the administration of the AEBT and so the resolution of any disputes in relation thereto was to be the court of Anguilla” (para 47).

82 However the forum for administration of a trust and the forum for the resolution of disputes relating to it need not be the same: and, in my view, were not in that, and are not in this, case. In *Koonmen* had the draftsman intended to alter the forum for hostile trust litigation and not just for matters of administration, he could simply, and would surely, have done so. See for example the Encyclopaedia of Forms and Precedents 1991 ed Vol 40(1) [5087].

83 I again prefer the analysis that “This appeared to be a reference to the place where the day to day running of the trust would take place” (Harris: *The International Trust* 1.298) to that of Kessler and Sartin para 28.6 fm 33 that “the court rightly held ….that the correct construction was that this is an exclusive jurisdiction clause”. *Koonmen -v- Bender* was described as ***“well (sic) criticised”*** in the Matthews article in the most recent [18th] edition of *Underhill on Trusts* (para 100.227 fn 5) — a compliment whose force is however somewhat diminished by recognition that Professor Matthews was a co-editor of that edition.

84 In *Green v Jernigan* 2003 BCSC 1097 Groberman J in the Supreme Court of British Columbia took the same approach as this Court in *Koonmen -v- Bender* to the phrase “exclusive jurisdiction … of the laws of the Island of Nevis” and references to the Island as ***“the forum for the administration”*** of the trust. But, as has been observed, this conclusion was reached with ***“very little explanation”***, that ***“two wrongs do not make a right”*** and that “it is very questionable whether the inferences drawn in Koonmen and in Green as to the choice of a forum with exclusive jurisdictional competence were correct”. (Harris op-cit-1–301)

85 On the other side of the jurisprudential balance sheet are e.g. In *Helmsman Ltd v Bank of New York Trust Co. Ltd.* 2009 C.I.L.R 490 where Henderson J in the Grand Court of the Cayman Islands said, albeit obiter "there is much to be said, however, for the view of Professor Matthews".

86 In *Representation of AA in re the D Discretionary Trust* [2010] JRC 164 (2) the Royal Court seemed to view Helmsman cited at para 28 as a welcome judgment, (Harris op.cit.1.302), and held that the phrase 'forum for administration' did not extend to contentious trust proceedings. It distinguished *Koonmen -v- Bender* on the basis of the presence in that case of the phase ***"exclusive jurisdiction"*** which was absent from clause 3 of the Trust then under consideration. [para 31] [See the analysis in the Jersey Law of Trusts 4th ed. Harriet Brown para 18.16 — 18.17]

87 In *Re A Trust* [2012] SC (Bda) 72 Kawaley CJ had to interpret the following jurisdiction clause:–.

> ***"18.1…… This Trust shall be governed by the laws of Bermuda and the forum for the administration of this Trust shall be the courts of Bermuda."*** (para 47)

88 Finding that this constituted an exclusive jurisdiction clause in respect of applications that involved the ***"administration of the trust"***, he said :–

> ***"The express choice of a governing law for a trust must accordingly be an exclusive one as it signifies the domicile of the relevant trust.*** A trust can only have one domicile. It follows that the combination of a Bermuda governing law clause and a Bermuda forum for administrative (sic) clause points towards the draftsman's intent that the courts of Bermuda should exclusively determine matters relating to the administration of the trust. This is probably why Rokison JA in *Koonmen -v- Bender* , ***also analysing a clause selecting a single governing law and administration forum for a trust, rightly considered that the absence of the word "exclusive" (or indeed the inclusion of the phrase "exclusive jurisdiction" in the definition of "Governing Law") did not matter.*** The choice of Bermuda law as the governing law of the trust combined with the designation of Bermuda law as the forum for the administration of a trust will ordinarily signify both (a) the exclusive selection of Bermuda as the domicile of the trust, and (b) the exclusive selection of Bermuda as the forum the courts of which will supervise the administration of the trust". [para 64]

89 After considering particular ***"unusual features"*** of the establishment of the Trust in that case [para 65] which led him to conclude that Clause 18.1 ***"constitutes an exclusive jurisdiction clause in respect of applications involving the administration of the Trust"*** (para 66). He referred to:–

> ***"the possibility that a variety of claims might not caught by such a clause.***

> Obvious examples of potential claims not caught by the clause include claims brought by trustees against strangers to the trust or beneficiaries to recover trust property, claims relating to the administration of the trust asserted abroad in ancillary proceedings and/or any other claims which clearly have no connection with the administration of the trust." [para 67]

90 Kawaley CJ also said:–

> ***"The better view is that a modern draftsman using the terms "administration" in a trust forum clause does not have in mind now rare administration actions but, rather, is merely seeking to signify the administration of a trust in a general sense by the domiciliary courts of the trust."***

referring to Lord Walker's description of the Court's powers in this context in *Schmidt v Rosewood Trust* [2003] 2 AC 709 (para 66). [para 69].

91 Rs essential response to A's construction is that in trust law practice there is a well-known distinction between matters of administration, on the one hand, and hostile trust litigation, on the other, see Lightman J in *Alsop Neary* (cit sup) (and *Investec Trustees -v- BC et al*. [2013] JRC 181 para 21 drawing the same distinction between administrative and adversarial proceeding).

92 I accept that the boundary between matters of administration and hostile claims may not always be easy to draw but this does not mean that it is non-existent. In my view in construing the phrase ***"the forum for the administration of the trusts"*** it is appropriate to recognize that this broad distinction has long existed.

93 I note further at the time of the execution of the Grand Trust in the 1980s, not only in England but also in Commonwealth jurisdictions such as Hong Kong, the Bahamas, Bermuda and Cayman, non-contentious matters concerning trust administration tended to be initiated by originating summons, (now CPR Part 6) whereas hostile claims for breach of trust were initiated by writ (now CPR Part 7). See the article of Professor Matthews; in Jersey the former by representation, the latter by order of justice.

94 Therefore while, of course, the term ***"forum"*** may sometimes have a meaning associated with a court, it is clear that does not always have that meaning. It may simply refer to the ***"place"*** where the trusts are administered. In my view it does so here.

95 In my view in short the purpose of Clause Twelfth is to make it clear that where a foreign trustee is appointed and the proper law changed to the jurisdiction of that new trustee, then from that point onwards the domicile of the trust moves from the old to the new jurisdiction, which then becomes the forum for its administration and specifically the ***"rights of all persons"*** under the deed which were governed by Jersey Law and in particular by the

Trusts (Jersey) Law 1984 under the old domicile will now change to be governed by Mauritius law and in particular by the Mauritius Trusts Act 2001 under the new domicile.

96 However Clause Twelfth does not and is not intended to affect transactions entered into under the old domicile; in particular it is not intended to place restrictions on the right of beneficiaries to claim against former trustees (who are effectively now strangers to the trust) for the recovery of assets allegedly improperly paid away.

97 If, as As submit, the 2012 Deed of Retirement led to the replacement of A1 — A3 as the Grand Trustees by Appleby Mauritius (D4), then R1's present claims are primarily against the former trustees and A1 personally as recipient. R1's claims are not claims directed against A4, as the present trustee, in relation to its administration of the remaining trust property in A4's hands.

98 Although I was impressed by the submission that draftsmen in Jersey (and doubtless Guernsey too) may have been drafting clauses conferring jurisdiction on particular courts (which are in fact somewhat unusual in the context of Trust deeds) on the basis that this Court's interpretation of the phrases ***"exclusive jurisdiction"*** and the ***"Forum of administration"*** in *Koonmen -v- Bender* was correct, for my part I cannot regard that as a sufficient basis for endorsing a conclusion that I find to be unsound. I console myself with the reflection that at any rate since Professor Matthews' article was published the counter case was (or should have been) well known (and it would not have been difficult to draft clauses which removed the ambiguities which have troubled the Court).

99 At the end of the day it is a question of construing the particular document before the Court but, notwithstanding the apparently wide terms of the Exclusive Jurisdiction Clause, I conclude that it has no application to the claims brought by Rs in respect of the impugned transactions. They were and remain governed by Jersey law and they are not subject to the exclusive jurisdiction of the courts of Mauritius.

The Agate Appointment

100 I do not consider that there is any basis for treating the Agate Appointment in any different way.

101 The Agate Appointment did take place after the 2012 Retirement, in direct response to the letter before action sent by Bedell Cristin. The claim by Rs in relation to the Agate Appointment again constitutes an action by them as beneficiaries to recover assets for the benefit of the Grand Trust from all of As and for the same reasons given above does not come within the provisions of Clause Twelfth.

102 Moreover, assuming the validity of the 2012 Retirement, where A4 is now the sole trustee

of the Grand Trust and can presumably expect to be sued in its own jurisdiction, I note again that although Rs' order of justice seeks remedies against all of As in respect of the claims made, A4 became involved for the first time when the 2012 Retirement was executed; even then it would seem clear from Clause Twelfth that it was A1 — 3 as the then current trustees who exercised the power both to appoint A4 and to change the proper law. A4 can have no possible liability for the claims made in relation to the impugned distributions and the 2010 Appointment.

103 So while in my view A4 is a necessary party to the principal claims of Rs against A1 — 3 in order to be bound by and take the benefit of any subsequent judgment, it is a substantive defendant only in relation to the Agate Appointment; but this, per se, cannot entitle As to argue that all of the claims should be heard in Mauritius.

104 Rs argue that the Agate Appointment (which is silent as to its governing law) is subject to Jersey Law because inter alia the Agate Trust is itself governed by Jersey law. As say that the Agate Appointment is subject to Mauritius law. Whichever is right, when standing back and looking at the substance of what is alleged in Rs' order of justice, I am driven to the conclusion Jersey is clearly the most appropriate forum for the resolution of these issues.

105 The connecting factors lead away from Mauritius since, on Rs' case:–

and the fact that the transactions are governed by Jersey Law leads decisively towards Jersey.

(i) the wrongful recipient of the capital of the Grand Trust was ultimately A1, who is resident in Monaco;

(ii) the defaulting Grand Trustees, who were responsible for the breaches of trust, were at all material times, and still are, resident in Monaco (A1), Holland (A2) and Jersey (A3) respectively;

(iii) none of the wrongfully distributed property is in Mauritius.

8. Effect

106 It was common ground that:–

(i) even if Clause Twelfth was an exclusive jurisdiction clause seeking to make Mauritius the only forum for resolution of disputes between Rs and As (whenever the events giving rise to such disputes arose) it would not prevent the court from considering whether it should be overridden.

(ii) the burden of establishing whether it should be overridden lay on Rs. It is trite that, he who asserts must prove.

107 In the case of *Green -v- Jernigan* (2003) BCSC 1097, Groberman J, said:–

> ***"I do not, of course, know why Rs have chosen to do so, but it would be surprising if they did not have cogent reasons for wishing to place their significant assets in a secretive offshore trust.*** I have no hesitation in finding that having expressly chosen such a vehicle for their investments, Rs are stuck with dealing with those investments under the laws of Nevis and in its courts, even though they may now see those laws as disadvantageous or distasteful." para 48

This might on one reading suggest that such a claim could never be overridden, but As did not put their case that high: and indeed at para 49 Groberman J himself said that he could depart from the jurisdiction clause if there was a strong cause to do so.

108 The contentious issue was what was the appropriate test to displace the presumption that the (on this hypothesis) exclusive jurisdiction clause should be given effect to. To this I now turn.

Displacement Test

109 Various alternatives were canvassed as to the basis on which the presumption should be displaced:–

> (i) ***"exceptional circumstances"*** — *Koonmen -v- Bender* para 49 itself derived from the ***"strong reasons"*** test applicable in contract cases: *Donahue v Armco* [2002] 1 All ER 749 para 45. See too *Representation of AA* [2010] JRC 164 para 34 and *Bank of New York Mellon GV Films* (2009) EWHC 2338 (Comm).
>
> (ii) ***"strong cause"*** — *Green v Jernigan* (2003) BCSC 1097 para 49
>
> (iii) ***"good reason"***, which has its origins in *EMM Capricorn Trustees Ltd -v- Compass Trustees* [2001] JLR 205 para 19(c) but was itself referred to with apparent approval in *Koonman-v -Bender* [para 61] although seemingly less powerful than the test the same court initially preferred.
>
> (iv) Lewin on Trusts 18th ed ***"a factor of substantial weight"*** [para 11–11(2)]
>
> (v) A pure *Spiliada* test in which the exclusive jurisdiction clauses was relegated to no more than a factor, albeit a powerful one, in assessing where the case could be tried ***"more suitably for the interests of each of the parties and the ends of justice"***. See *Spiliada Maritime Corporation v Consulex Limited* [1987] AC 460 at p. 476 C-D.

There is a measure of overlap between the tests and as is often the case in the law,

application of a differently phrased test can lead to the same result,

110 On this issue I consider that As have the better of the argument. The test in a contract case is clear (i.e. strong reasons) and the only issue is as to whether there is reason, as Rs contend to apply a different case when beneficiaries claim against Trustees (present or former).

111 In *EMM Capricorn Traders Ltd -v- Compass Trustees Ltd* [2001] JLR 205 the Royal Court held that an exclusive jurisdiction clause in a trust deed should not be given the same weight as one in a contract.

112 Birt, then Deputy Bailiff, said:–

> ***"[Counsel] argued that an exclusive jurisdiction clause in a trust deed should be given the same weight as in a contract.*** But that is to ignore the difference between the two documents. If A and B agree in a contract that they will refer any dispute to the courts of a particular country, one can well understand why they should generally be held to their bargain. They have agreed it; why should one of them then be allowed to go back on what has been freely agreed? But the position is very different in relation to a trust. The exclusive jurisdiction provision of a trust deed will have been agreed only between the settlor and the original trustee. Actions in relation to the trust may be brought by beneficiaries who were never parties to the trust deed; indeed they may not even have been alive at the time of its execution. The policy considerations which lead to a party to a contract being held to his choice of exclusive jurisdiction cannot apply to a beneficiary who played no part in the choice of exclusive jurisdiction made in the trust deed." para 16

113 Birt DB went on to summarise the principles to be applied as follows:–

> ***"In our judgment, the correct approach for trusts is that established for exclusive jurisdiction clauses in relation to contracts but with the burden upon the plaintiff being less onerous than in contract cases.*** We would therefore summarize the principles to be applied as follows:
>
> > ***(a) Where plaintiffs sue in Jersey in breach of a provision in a trust deed which states that disputes should be referred to the exclusive jurisdiction of a foreign court, and the defendants apply for a stay, the Jersey court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.***
> >
> > ***(b) The court should start from the position that exclusive jurisdiction clauses mean what they say and a stay should therefore normally be granted unless good reason is shown for not doing so.***

(c) The burden of showing that there is good reason not to grant a stay is on the plaintiffs.

(d) In exercising its discretion, the court should take into account all the circumstances of the particular case.

(e) In particular, but without prejudice to (d), the following matters, where they arise, may properly be regarded:

> ***(i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Jersey and foreign courts;***
>
> ***(ii) whether the law of the foreign court applies and, if so, whether it differs from Jersey law in any material respects;***
>
> ***(iii) with what country either party is connected, and how closely;***
>
> ***(iv) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; and***
>
> ***(v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (a) be deprived of security for their claim; (b) be unable to enforce any judgment obtained; (c) be faced with a time-bar not applicable in Jersey; or (d) for political, racial, religious or other reasons be unlikely to get a fair trial."*** (para 19)

114 Whilst I accept the then Deputy Bailiff's premise in para 16, I respectfully disagree that the frist sentence of para 19 is either consequential upon it or correct. True it is that beneficiaries are not contracting parties but in this context I consider that the distinction is one without a difference.

115 The following passage, in a chapter authored by J Harris in *Glasson The International Trust*, seems germane. ***"Successor Trustees agree to be bound by the terms of the Trust instrument. Beneficiaries take the benefit of an interest under the trust and it is arguable that they should equally take the burden of being bound by the terms of the trust including an exclusive jurisdiction clause. This would then suggest that the weight to be given to a forum jurisdiction clause should be as strong when contained in a trust instrument as when contained in a contract"*** (1.8.5). I would, for my part, endorse that passage shorn of its academic reservations: if beneficiaries are to take the benefit of the settlor's bounty, they must accept the burden (if such it is) of an exclusive jurisdiction clause as one of the incidentals of their status.

116 Furthermore, to make beneficiaries generally bound to accept the jurisdiction clause of trust deeds "does have the attractive result of respecting the autonomy of the settlor and meaning that the jurisdiction clause is applicable to all aspects of the trust relationship". (Harris Op. cit 1.14)

117 This Court in *Koonmen -v- Bender* started by referring to the *Spiliada* test:–

> ***"for this reason I turn at this stage to consider whether the Plaintiff has satisfied the burden laid down in the recent House of Lords authorities and in particular The Spiliada*** (*Spiliada Maritime Corporation v Canulex Ltd* [1987] AC 460) ***and Amin Rasheed*** (*Amin Rasheed Shipping Corporation -v- Kuwait Insurance* [1984] 1 AC 50) ***in the speeches of Lord Goff of Chievely and Lords Wilberforce and Diplock respectively, the relevant parts of which are helpfully quoted in the judgment of the Royal Court."*** [para 33]

118 From that starting point the court came to consider the effect of an exclusive jurisdiction clause such as it had already found to exist:–

> ***"Unlike an arbitration clause which now by statute must in most cases be respected, the courts still retain a discretion to override an express choice of forum in a contract or trust deed.*** But prima facie, the court's function is to interpret and apply the agreement of the parties or the expressed intention of those creating the trust deed, and as a general rule the courts will give effect to a choice of forum. The court will override an agreed choice of forum only in exceptional circumstances. The rule is clearly stated in Dicey and Morris in Rule 32(2) and in the following text and the cases thereafter cited. Although it may be argued that the presumption in favour of applying the express provisions of a trust deed may not be as strong as that in favour of holding parties to a contract to the terms of their agreement, I see no reason why the presumption should not be just as strong as between the Settlor and those claiming to have been "standing behind" the Settlor, as Mr Koonmen and Mr Bender were in this case, and the Trustees. Further, I consider that, as an important element in the structure of the trust in respect of which any would-be beneficiary claims an interest, it should prima facie be binding on such beneficiary." (para 49)

119 The general rule that the Court of Appeal refers to is identified as that set out in Dicey Morris and Collins (13th Edition) Rule 32(2) which is in the following terms:–

> ***"Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the English Court will stay proceedings instituted in England in breach of such agreement unless the claimant proves that it is just and proper to allow them to continue."***

(This in fact does not on its face provide for an exceptional circumstances test)

120 However in reaching its conclusion the Court of Appeal stated “Bearing in mind the choice of Anguillan proper law, the choice of Anguilla as the forum in the AEBT trust deed, and the fact that the Second and Seventh Defendants will not be participating in any proceedings in Jersey, I conclude that the court of Anguilla is clearly and distinctly the more convenient forum for the resolution of the dispute as a whole. This is the forum where, to adopt the formulation of Lord Goff in The Spiliada, “the case may be tried more suitably for the interests of all parties and the interests of justice”.” It thus appears not to have steered an entirely consistent course. [Moreover the Court of Appeal makes no reference in its judgment to *Capricorn*, although it was cited to it, and does not therefore expressly address or seek to overturn the approach set out by the Court in *Capricorn*].

121 The Royal Court in this case initially applied a *Spiliada* test, i.e. where the case should be tried “more suitably for the interest of all parties and for the ends of justice.”

122 On that premise in order to overturn the Royal Court's evaluation, it would be necessary for As to satisfy, mutatis mutandis, the principles articulated in the court in *UCC -v- Bender* [cit sup]

123 The factors that the Royal Court took into account in determining that even if Clause Twelfth conferred exclusive jurisdiction on the courts of Mauritius to determine disputes between a beneficiary and present and former trustees the appropriate forum was Jersey are to be found at paras 24 — 28, 45–46 and 75–82 of its judgment.

124 These are in summary the following:–

(i) The impugned transactions (arguably other than in respect of the Agate appointment) all took place when the Grand Trust was:–

(a) administered from Jersey;

(b) by a Jersey professional trustee;

(c) when the Grand Trust was governed by Jersey law.

(ii) The 2010 Appointment and the 2012 retirement were expressly made subject to Jersey law.

(iii) As under those two deeds expressly submitted to the non-exclusive jurisdiction of the courts of Jersey.

(iv) As a matter of general principle a court applies its own laws more reliably than does a foreign court, a fortiori where the legal issues are complex.

(v) As' case as to the exclusive jurisdiction of the Mauritius court is based upon the 2012 Retirement but the validity of that document is itself an issue in the proceeding.

The validity or otherwise of that Deed must be determined by Jersey law, see Clause Twelfth “This instrument shall be governed…in accordance with the laws of the Island of Jersey”

(vi) Whether as As contend the 2012 Deed was res inter alios acta, i.e. conferred no rights on the beneficiaries upon which Rs could rely or whether, as Rs contend, the exclusivity otherwise conferred by Clause Twelfth was waived was an issue that was not demurrable. At two junctures (para 74 and 75) the Royal Court indicated that it was an issue for the substantive trial.

(vii) As had accepted the jurisdiction of the Jersey Court.

(viii) As to the balance of procedural advantage on ***“discovery and limitation”***, Jersey offered certainty to Rs and Mauritius uncertainty; a concern not removed by undertakings proffered by As which did not bind e.g. Camilla or would automatically be enforced by a Mauritian Court.

125 As to the eighth point, the Court received affidavits as to Mauritius law from Mr Ivan Lesley Collendavelloo, a barrister practising in Mauritius, for Rs and from Mr Ariranga Pillay, a former Chief Justice of Mauritius, who now works as a legal consultant, for As.

Discovery

126 In my view the Royal Court were right to conclude on the basis of the expert evidence that Mauritius has no equivalent to discovery as it exists under the Royal Court Rules, i.e. that in Mauritius a party has no obligation to disclose all documents relevant to the case to the other party, including documents which are detrimental to his own case. To quote from and adopt their judgment upon which I cannot improve:–

> ***“Under section 33(1)(c) of the Trusts Act 2001 (Mauritius)in the absence of any express provision in the trust deed authorising disclosure of the information, there is no right to disclosure on the part of beneficiaries, but under the provisions of section 33(5) the Court can make an order for disclosure of information or documents for the reason mentioned in that section, namely, where it is satisfied that the disclosure is bona fide required for the purpose of any civil proceedings.*** This, in Mr Pillay's view, was a broad power to order disclosure, which the plaintiffs could utilise in order to obtain orders to a similar effect as discovery in this jurisdiction. In Mr Collendavelloo's opinion the ambit of section 33(5) was uncertain. As it was an exception to the rule that a party is not bound to disclose all documents relevant to the case, a party applying under that section must, he said, ***necessarily already be aware of the existence of the document or information sought.”*** (para 76(i))

Limitation

127 I endorse further what the Royal Court said as to limitation which it is more economical to quote than to paraphrase:–

> ***"Under section 68(2)(b) of the Trusts Act 2001 [Mauritius] (and leaving aside fraud) actions against trustees are limited to two years from the date on which the beneficiary first has knowledge of the breach of trust.*** Both experts agreed, that the Mauritius courts would apply French Privat e International law, and if a foreign law applied in respect of a claim brought in Mauritius, the rules applicable as to limitation under that foreign law (rather than their own rules) would be applied so long as they did not offend their "ordre public"; i.e. that Jersey law rules as to limitation would be applied. However that assumes that Jersey law does apply to the impugned transactions and neither counsel had been asked to opine on the effect of the Exclusive Jurisdiction Clause and the construction placed upon it by As. (para 76(ii))
>
> ***In his second affidavit Mr Collendavelloo questioned whether under Mauritius law the limitation period of two years was absolute.*** Mr Pillay advised that, whilst statutory time limits must be strictly complied with, discretion may be exercised by the Mauritius court in exceptional circumstances to extend the limitation period of two years. (para 76 (iii))
>
> ***There was a difference of opinion between the experts as to when time would begin to run against R1; time would not run against R2-R3 until they reached their majority.*** Mr Collendavelloo said it was unclear for the purposes of section 68(2) whether the knowledge of existence of facts capable of constituting a breach of trust is sufficient or of knowledge that the facts give rise to a breach of trust is required. He said there had been no case law on knowledge in the trust context in Mauritius. Mr Pillay agreed that there was no Mauritius decision on the matter but in his view the Mauritius courts would follow *West -v- Lazard Bros and Co (Jersey) Ltd* [1993] JLR 165 , ***namely that knowledge referred to in Section 62(2)(b) requires actual knowledge that there has been a breach of trust or knowledge that would lead a reasonable person to the inevitable conclusion that there had been a breach of trust.*** The point is of some significance to R1 in that the 2010 Appointment, where it is alleged***substantial value was wrongly appointed out of the Grand Trust, took place more than two years ago.*** (para 76(iv))

128 Neither of these two concerns would be wholly alleviated by an undertaking proffered by As to provide Jersey type discovery and not to take any limitation point unavailable in Jersey, not least because it is uncertain how the Mauritius Courts would police such undertakings.

Costs

129 Under Mauritius law there is a limit of MUR14,000 (which is approximately GBP300) on

the costs that can be recovered in civil proceedings. However under section 65 of the Trusts Act 2001 (Mauritius):–

> ***"the Court may order the costs and expenses of, and incidental to an application to the court under this Act to be paid from the Trust property or in such other manner and by such persons as it thinks fit."***

As noted that in any event a restriction on costs is not at all unusual and is the rule in many jurisdictions and can operate as much to the advantage of the Rs as to the disadvantage and on this basis As argued that the potential restriction on recovery of costs from the losing party was simply irrelevant, given the ubiquity of similar cost regimes in many countries.

130 The Royal Court disagreed that this is irrelevant. In its view it was one of the circumstances to be taken into account in deciding whether to override the Exclusive Jurisdiction Clause. It was unclear whether section 65 of the Trusts Act 2001 applied to hostile proceedings for breach of trust at all. Even if it did apply Rs, albeit successful, might have to bear their own (no doubt substantial) costs [alternatively the trust fund, the subject of the dispute would, to that extent, be depleted]. And if it did not apply, Rs, albeit successful, would certainly have to do so. (Judgment para 82) I accept this analysis although I would, in all the circumstances, including the size of the Trust Fund at stake, not accord it great weight.

131 As referred to *Trendtex Trading Corp -v- Credit Suisse* [1982] AC 679 where it was held that the advantages to *Trendtex* of obtaining an order for discovery in England could not outweigh the other reasons in favour of leaving the parties to what was in that case the forum of their choice in Switzerland (per Lord Roskill at p 705). *Trendtex* was cited by Lord Goff in *Spiliada* where he said:–

> ***"No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas".*** (p 482) (My emphasis)

132 As The Royal Court aptly put it:–

> ***"In other words where an appropriate forum has been established then the parties have to accept the virtues and vices of that forum."***

but equally aptly noted:–

> ***"What is different in the case before us is that the plaintiffs are being asked to accept uncertainties in a forum which, applying ordinary principles, is not the appropriate forum; the appropriate forum where none of these uncertainties exist is Jersey."*** (para 81)

133 While rejecting factors such as convenience and location of documents as having, in an age of international litigation and electronic conveyance of information, no weight (para 27), but taking into account all the circumstances set out above, the Royal Court concluded that there is “good reason to override the Exclusive Jurisdiction Clause.” (para 83)

134 Importantly it found for the same reasons that the circumstances here were exceptional (para 83). As submitted that it is clear that the Royal Court focused very much on its preferred *Spiliada* approach, but while I have some sympathy with the submission, the fact remains that I cannot ignore the Royal Courts' reliance, albeit in the alternative, on the test that As themselves canvassed as correct. Absent a finding the Royal Court's evaluation was perverse or otherwise flawed, we cannot overrule it. I do not detect any such flaw.

Crica

135 I turn finally to the Crica claims. As raised justified criticisms of Rs' order of justice in relation to these claims in that Camilla, one of the transferors, had not been made a party, nor had the entity to which the shares were actually transferred, namely BNP Paribas Jersey Nominee Company Limited, nor had the trustees of the Fortunate Trust in that capacity. Rs have, however made clear that they intend to apply to amend to add Camilla and BNP Jersey Nominee Trustees Ltd as parties to the Jersey proceedings and add with some force that it does not lie in As' mouth to criticise Rs for not having made such amendment since the forum challenge, since in September 2013 As themselves submitted to the Court of Appeal that these Jersey proceedings should be stayed and that no further costs should be incurred until this disposal of the present appeal.

136 As further submitted that the Crica claims had scant connection with Jersey or Jersey law. Each of the transfers was governed by BVI Law being the lex situs of the shares (following *MacMillan Inc -v- Bishopsgate Investment Trust plc and Ors (No3)* [1996] 1 All ER 585). Accordingly the claims should be hived off and sent to the BVI following the approach of the English High Court in *Pacific International Sports Clubs* [2009] EWHC 1879 (Ch).

137 The Royal Court disagreed that these transfers have scant connection with Jersey. The shares were transferred to the Fortunate Trust of which BNP Jersey and A1 were trustees, which was governed by Jersey law and which was administered from Jersey by BNP Jersey. It is clear from Mr Le Cornu's second affidavit that he organised the transfers. It all forms part of the chain of events which surround the Grand Trust claims. (para 86) I concur.

138 In *Pacific International Sports Clubs Limited -v- Surkis* the claimant had brought his claim in England notwithstanding the fact that the only connection between the claims brought and England was that one of the defendants to a minor part of the claim was an English company SMI. The Court could not decline jurisdiction in respect of the claim against SMI because of the effect of the Council Regulation (EC) 44/2001. Having determined that the vast majority of the claims brought by the claimant ought to be determined in the Ukraine,

Blackburne J refused to allow the claim against SMI to prevent him from ordering that the remainder of the claims be stayed in favour of the Ukrainian proceedings explaining himself thus:–

> ***"It follows therefore that neither the doctrine of forum non conveniens nor the application "reflexively" of articles of the Judgments Regulation provides grounds for staying the pursuit by Pacific in this jurisdiction of its claims against SMI.*** Does this mean that, given Pacific's wish to pursue its claims against SMI in this jurisdiction, this court should allow Pacific to continue to pursue its claims against the other defendants in this jurisdiction notwithstanding that, as against those other defendants, application of the doctrine of forum non conveniens, unaffected in the case of those other defendants by the impact of the Judgments Regulation, indicates that Pacific's claims against those others should be pursued in the Ukraine. (para 111)
>
> ***I am not persuaded that it does.*** According to the particulars of claim in this action, SMI is, like the BVI defendants, a relatively minor player in the dispute: it was no more than the means whereby Mr Surkis held and was able to take control of Dynamo. The principal dispute is undoubtedly between Pacific on the one hand and Mr Surkis and Mr Zgursky on the other. To allow the fact that the doctrine of forum non conveniens cannot be applied in SMI to dictate where the dispute as a whole must be tried would be, in my view, to allow the tail to wag the dog. In particular, I see no reason why, given my conclusions in relation to the application of the doctrine of forum non conveniens to the other defendants, I should not stay the action against Mr Surkis and set aside the permission order, and with it the service of the claim form on the BVI defendants, leaving it to Pacific to pursue its dispute with those persons (and SMI if it wishes) in the courts of Ukraine." (para 112)

139 In the case before us, A4 played a relatively minor role. The principal dispute is between Rs on the one hand and A1 — 3 on the other. The fact that A4 is a party cannot be allowed to dictate where the dispute as a whole should be tried; that would indeed be to allow the tail to wag the dog, an exercise that I would not for my part endorse. There is no question here of the Crica claims being the tail wagging the dog. They represent a minor part of the claims brought in this jurisdiction and have been added, it seems to us, because it is convenient and cost effective to do so. Common sense dictates that this relatively minor part of the claim, which is part of the same factual matrix as the rest of the claim, should be resolved at the same time and in the same place. The dog must wag the tail.

140 The only point As can marshal to justify fragmentation, with all the expense and trouble that it will cause, including the risk of inconsistent findings of fact, is what they say is the proper law i.e. BVI law applicable to the claim (although in relation to the Grand Trust claims they seek to play down the importance of the proper law applicable to the claim being the law of Jersey).

141 Rs contend that As assertion that the claim falls to be determined by BVI law is wrong,

since on analysis the claim is based in part on the equitable jurisdiction to set aside a gift made by mistake. Where the gift is of personalty and made to a Jersey settlement (as the Fortunate Trust was), the applicable law of mistake is that of Jersey; *Re S* [2011] JRC 117; 14 ITELR 663.

142 The Royal Court concluded that even if As' disputed contentions that BVI law rather than Jersey law applied were correct, it would still exercise its discretion not to stay the proceedings in Jersey:–

> ***"We make no finding as to the proper law governing the [Crica] transfers but we see absolutely no point in fragmenting off this relatively minor part of the claim and requiring the parties to go to the expense and inconvenience of litigating separately in the BVI.*** The transfers concern parties to these proceedings (apart from Camilla and BNP Jersey's nominee company who no doubt the plaintiffs' will now seek to join) and as we said previously they all form part of the chain of events which surround the Grand Trust claims." (para 90)

143 There is no error of principle here, nor any failure to take into account all and only proper factors. The decision is not ***"plainly wrong"***. On the contrary, in my view it is plainly correct.

144 As the Guernsey Court of Appeal held in *Carlyle Capital Corporation Ltd -v- Conway and Ors* CA Guernsey 5 March, 2012, paragraph 47:–

> ***"This feeds into a third point on which the Deputy Bailiff, in our respectful view, erred.*** Stating (correctly) that all the parties accepted the desirability of proceedings in a single jurisdiction, he continued "none of them persuaded me that it is imperative to do so" (DB para 152). ***This inverts the proper approach.*** Presumptively all proceedings should be heard in a single jurisdiction; modern cases from Spiliada to Altimo Holdings require the court to choose which jurisdiction is forum conveniens. It is for a party who contends for fragmentation to contend that (exceptionally) fragmentation is imperative, rather than vice versa.

145 My freestanding conclusion is provisionally reinforced by what has happened in Florida.

146 In Jersey the As have contended that the BVI is the appropriate jurisdiction for hearing the Crica claim. In spite of this contention, A1 has procured that separate proceedings in Florida have been issued against R1 and her husband in relation to the Miami properties which are the underlying subject-matter of the Crica claim.

147 The Florida Court has for the moment directed that, provided the present Jersey proceedings are amended to join Camilla and BNP Jersey Nominee Trustees Ltd as

parties, then the Florida proceedings may be stayed pending the outcome of the Jersey proceedings. [See Judge Sigler's ruling of 24 December 2013 in Case No 13– 13768 CA (42).] So in the two extant proceedings in relation to the Miami properties both jurisdictions are at present in agreement that the claims should be resolved in Jersey.

148 Like the Royal Court I do not therefore find it necessary to make a finding as to the proper law governing the transfers since I see no purpose (whatever be the position) in fragmenting this relatively minor part of the claim and requiring the parties to go to the expense and inconvenience of litigating separately in the BVI. The transfers concern parties to these proceedings (apart from Camilla and BNP Jersey's nominee company who no doubt Rs will now seek to join) and they all form links in the chain of events which surround the Grand Trust claims.

149 In conclusion I would grant As' application for permission to appeal but refuse As' application for a stay of the proceedings.

SIR JOHN NUTTING JA

150 Having had the advantage of reading in advance the judgments of the President and Martin JA, I also agree.

151 In *In Re Wilson* 1985 AC 750 Lord Bridge in departing from a view expounded by him in an earlier case said at p 760 “A white sheet is always a becoming garment and I gladly don it”. I don a similar garment with no less gladness in relation to the decisions in both *Glazebrook* and *Koonmen* to which I was a party.

MARTIN JA

152 I entirely agree with the President's judgment.

153 The problem for As is that their argument proves too much. The critical part of Clause Twelfth reads “thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder”. If that wording has the effect, as As contend it does, that after the 2012 Retirement all matters are to be litigated in Mauritius, it must also — as the President points out in paragraph 67(4) and (5) — have the effect that the new law governs past transactions, and existing proceedings are to be transferred to the new jurisdiction. Neither consequence can have been intended, and neither was contended for by As. Whatever the effect of Clause Twelfth, it can only have been intended to apply in relation to matters occurring after the change.

154 In *Koonmen -v- Bender* at [45] this Court disapproved of a statement in the judgment at first instance that it was axiomatic that clear words were required to create an exclusive jurisdiction clause in a trust deed. I accept that that statement went too far, and that there is no special rule of construction applicable to such clauses; but it nevertheless seems to me that the statement reflects what I consider to be the position, namely that clauses designed to prescribe that the courts of a particular country shall have exclusive jurisdiction over all disputes are rare in trust documents. For that reason, I consider that courts having to construe what are said to be such clauses should be alert to the possibility that expressions such as *"exclusive jurisdiction"* and *"forum for administration"*, which may mean different things to a trust draftsman and a commercial litigator, were used in a special sense in the trust instrument.

155 In paragraph 67(7), the President quotes Professor Matthews as saying that, if the judges of the Court of Appeal in *Koonmen v Bender* had had any serious acquaintance with the drafting of trust instruments, they must have known that such expressions had a specialised meaning to trust lawyers. I can claim to have some such experience; but the sense in which the expression *"exclusive jurisdiction"* was being used in Clause Twelfth was nevertheless far from immediately obvious to me. It seems to me that to use the expressions *"exclusive jurisdiction"* and *"forum for administration"* in trust instruments is to invite misconstruction. If the intention is to identify that the proper law is to apply to all aspects of the trust, from its inception to its execution, there are better and clearer ways of saying so than by referring to the exclusive jurisdiction of the proper law. If the intention is to tell the world — or its tax authorities — that a trust is domiciled and administered in a particular place, there are better and clearer ways of saying so than by referring to the forum for administration. Moreover, a reference to exclusive jurisdiction may have the consequence that, whatever the intention of the draftsman, exclusive jurisdiction is conferred over all trust disputes for the purposes of Article 23(4) of the Judgments Regulation (Council Regulation 44/2001). Similarly, a reference to the forum for administration may have the effect of conferring jurisdiction for all disputes under Article 5(6) of the Regulation. In my view, it would be better if the expression *"exclusive jurisdiction"* were reserved for cases where it is genuinely intended to confer exclusive jurisdiction over all trust disputes on the courts of a particular country; and better if the expression *"forum for administration"* were abandoned altogether.

156 I also endorse what the President has said about the adjustment of the test for leave to appeal to this Court.