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EMM Capricorn Trustees Ltd as Trustees of “The Tramp Trust” v Compass Trustees Ltd and Compass Trustees Ltd as Trustees of “The Time Trust”

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	23 April 2001
Neutral Citation:	[2001] JRC 87
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Text

[2001] JRC 087

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, and Jurats A.P. Quérée and R.M. Bullen.

Between
EMM Capricorn Trustees Limited as Trustees of “The Tramp Trust”
Plaintiff
and
Compass Trustees Limited
First Defendant

and

Compass Trustees Limited as Trustees of "The Time Trust"
Second Defendant

Advocate S Young for the Plaintiff

Advocate D. Gilbert for the Defendants

Authorities.

Trusts (Jersey) Law 1984: Article 5(b)

4 Halsbury 1(1): para 355.

"*The El Amria*" [\(1981\) 2 Lloyds LR 119](#) at 123.

GKN (Jersey) Limited -v- Resources Recovery Board [\(1982\) JJ 359](#) .

Gheewala -v- Compendium Trust Company Limited [\(1999\) JLR 154](#) .

Application by the first Defendant to stay allegations of breach of trust made against it.

Whether Court has jurisdiction when there is a provision in a trust deed which confers exclusive jurisdiction on another court.

Bailiff

THE DEPUTY

- 1 The Court is considering a summons by the First Defendant to stay allegations of breach of trust made against it. The summons raises a question as to the approach which the Court should adopt when there is a provision in a trust deed which confers exclusive jurisdiction on another court.

The Factual Background

- 2 The Plaintiff is the present trustee of the Tramp Trust, a trust governed by the law of Guernsey. Compass Trustees Limited ("Compass") is a company incorporated in Jersey. It is actioned in its own right as First Defendant. It was the trustee of the Tramp Trust from 11th April 1997 to 17th October, 2000, when it was replaced as trustee by the Plaintiff. Compass was also at all relevant times and remains the trustee of a trust known as the

Time Trust. It is actioned as Second Defendant in its capacity as trustee of the Time Trust.

- 3 The Plaintiff has issued an order of justice against Compass arising out of Compass' position as the former trustee of the Tramp Trust and its position as trustee of the Time Trust. The order of justice breaks down into two quite separate parts. The first part brings three contractual claims against the Time Trust. The second part alleges a breach of trust against Compass in relation to its actions as trustee of the Tramp Trust.
- 4 It is not necessary to go into great detail as to the nature of the contractual claims but, in order to understand the issues before the Court, it is necessary to summarise them very briefly. There are three contractual claims. The first relates to a share purchase agreement ("the First Share Purchase Agreement") dated 1st August 1992 whereby the then trustee of the Tramp Trust agreed to sell certain shares to the Time Trust. A dispute has arisen over the performance of the First Share Purchase Agreement and the Plaintiff claims to be entitled to rescind the agreement. This is therefore essentially a dispute between the Tramp Trust (of which the Plaintiff is trustee) and the Time Trust (of which Compass remains trustee).
- 5 The second contractual claim relates to a second agreement (the "Second Share Purchase Agreement") dated 30th March 1994 whereby the then trustee of the Tramp Trust agreed to sell certain further shares to the Time Trust. Again, a dispute has arisen over the performance of the Second Share Purchase Agreement and the Plaintiff claims to be entitled to rescind that agreement. Accordingly the second contractual claim is also a dispute between the Tramp Trust and the Time Trust.
- 6 The third contractual claim relates to a loan allegedly made on 19th September, 1991 whereby the then trustee of the Tramp Trust loaned a substantial sum of money to the Time Trust. It is alleged that that sum has not been repaid. The Plaintiff as trustee of the Tramp Trust therefore brings an action against the Time Trust for recovery of the monies loaned.
- 7 The second part of the order of justice (contained in paragraphs 19 and 20) is quite different and contains a claim for breach of trust against Compass arising out of its trusteeship of the Tramp Trust. The nature of the claim is not at all clearly pleaded but in essence the claim seems to be that the actions of Compass (when trustee of the Tramp Trust) in relation to the matters, which are the subject of the contractual claims, has caused the Tramp Trust to suffer loss and damage. The exact nature and level of the loss and damage will clearly depend upon the outcome of the contractual claims.

The summons

- 8 The Tramp Trust is governed by the law of Guernsey. We have not seen the trust deed itself but the affidavit of Mr Timothy Scott-Warren, a director of Compass, quotes the relevant provision as follows:—

“This Declaration has been made by the Original Trustee in the Island of Guernsey and the trusts hereby created are established under the law of the Island of Guernsey and the rights of all parties and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of the Royal Courts [sic] of the Island of Guernsey and construed and regulated only according to the law of the Island of Guernsey notwithstanding that one or more of the Trustees may be or become from time to time resident or domiciled elsewhere than in the Island of Guernsey ...”.

There then follows a power to change the proper law but, from the extract which has been quoted to us, there does not appear to be a power to change the exclusive jurisdiction clause. It is to be noted that, unlike the majority of trust deeds which come before this court, the jurisdictional clause is an exclusive one as opposed to a non-exclusive one.

- 9 In the light of this provision, Compass has issued a summons, which is the matter now before the Court. The summons is in two parts. By the first part Compass invites the Court to determine whether it has jurisdiction in relation to the breach of trust allegations against Compass. The second part requests that, if the Court has jurisdiction, the breach of trust allegations should be stayed pending the outcome of the contractual claims.
- 10 When Miss Gilbert, on behalf of Compass, began her submissions, the Court put it to her that the first part of the summons raised the wrong question. There could surely be no doubt but that this Court has jurisdiction over the allegations of breach of trust against Compass because of the provisions of Article 5(b) of the Trusts (Jersey) Law 1984. Miss Gilbert accepted that this was so. She accepted that the real issue which she should have raised, was whether the Court should, in its discretion, stay the breach of trust proceedings generally on the basis that they ought to be heard before the Royal Court of Guernsey in the light of the exclusive jurisdiction provision of the trust deed. The summons was argued by both parties on that amended basis.

Principles to be applied in relation to exclusive jurisdiction clauses in trust deeds

- 11 Neither counsel was able to refer the Court to any decided case in any jurisdiction which gave assistance as to the principles which ought to be applied when considering whether allegations of breach of trust should be stayed on the grounds of an exclusive jurisdiction clause.
- 12 Miss Gilbert argued that the Court should apply the rules applicable in contract cases. Although there was no Jersey authority as to the principles to be applied where there was an exclusive jurisdiction clause in a contract, the approach of the English courts should be followed and was conveniently set out in Halsbury's Laws of England (4th Edition) Volume 1(1) para 355:—

“355. Foreign jurisdiction clause. The court may stay proceedings in

England where these are brought in breach of an agreement to refer disputes to the exclusive jurisdiction of a foreign tribunal. The court is not bound to grant a stay but has a discretion whether to do so or not. Although the factors relevant to the exercise of the court's discretion are broadly similar to the criteria considered under the doctrine of forum non conveniens, the position is not precisely the same, for it is a prima facie rule that the parties should honour their agreement to refer disputes to the foreign tribunal, and accordingly the burden is on the plaintiff (or in the case of a counterclaim, on the defendant) to show a strong cause for a stay to be refused.

The following matters are relevant in considering the exercise of the discretion to stay: (1) 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 a trial as between the English and the foreign courts; (2) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (3) with what country either party is connected, and how closely; (4) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (5) 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 England, or (d) for political, racial, religious or other reasons be unlikely to get a fair trial”.

As Brandon L.J. put in “*The El Amria*” [\(1981\) 2 Lloyd's LR 119](#) at 123:–

“The discretion should be exercised by granting a stay unless strong cause for not doing so is shown”.

- 13 Miss Gilbert also prayed in aid the Jersey case of *GKN (Jersey) Limited -v- Resources Recovery Board* [\(1982\) JJ 359](#) where the Royal Court, relying upon the maximum “La convention fait la loi des parties”, ordered a stay of a contractual dispute on the basis that the parties had agreed in the contract to refer any dispute to arbitration.
- 14 Mr Young, on the other hand, argued that the Court should adopt the principles applied in cases of forum non conveniens i.e. in cases where there was no suggestion of a particular court having exclusive jurisdiction over the subject matter. These principles were authoritatively set out by the Court of Appeal in *Gheewala -v- Compendium Trust Company Limited* [\(1999\) JLR 154](#) and are conveniently summarised in the head-note as follows:–

“Whether a court should exercise its discretion to grant a stay was governed by the fundamental principle that a stay should only be granted when it was necessary to prevent injustice. That fundamental principle was applied by adopting a two-stage test. First, the burden was on the defendants to establish that there was another available forum which was clearly or distinctly more appropriate than Jersey, as ***submitted by the plaintiff***. Secondly, even if

the court concluded at that stage that the other forum was clearly more appropriate for the trial of an action, the court could nevertheless decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof lay, that justice required that a stay should not be granted”.

- 15 As can immediately be seen, there is an important difference of approach between the two cases. Where there is an exclusive jurisdiction clause, there is a heavy burden on a plaintiff to show why a stay should not be granted. On the face of it he should be held to his bargain. On the other hand, in the case of *forum non conveniens*, the burden is on the defendant to show that there is another available forum which is clearly more appropriate than Jersey, so that a stay should be granted.
- 16 Miss Gilbert 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.
- 17 Miss Gilbert argued that a successor trustee should be held to the exclusive jurisdiction clause because it had a choice as to whether to become trustee and had, in effect, adopted the exclusive jurisdiction clause by accepting the trusteeship. We can see the force of this argument but it is to ignore the fact that, in a case such as the present, the Plaintiff, as present trustee of the Tramp Trust, is effectively suing on behalf of all the beneficiaries. We think it would be difficult, if not impossible, to adopt a different approach for actions brought by trustees as compared with actions brought by beneficiaries. In some cases it might be a matter of chance as to whether an action for breach of trust against a former trustee was brought by the present trustee or by beneficiary.
- 18 In our judgment the policy considerations which result in such a heavy burden being placed upon a party to a contract who seeks to resile from an exclusive jurisdiction clause, do not apply with equal force in the case of a trust deed and we do not think that such a clause should be given the same weight in a trust deed as it is in relation to a contract. Neither are we attracted by Mr Young's approach. In cases of *forum non conveniens* the burden lies on the defendant to make the case for a stay on the grounds that there is a better alternative forum. That would be to ignore completely the existence of the exclusive jurisdiction clause in the trust deed. The fact is that the beneficiaries and the trustee assume their rights and obligations under the terms of the trust deed. One cannot simply

ignore an important provision of the trust deed, namely an exclusive jurisdiction clause.

19 In our judgment the correct approach 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 summarise the principles to be applied as follows:–

(i) 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.

(ii) 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.

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

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

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

(a) 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.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Jersey law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in Jersey; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

20 In formulating these principles we have drawn heavily on the judgment of Brandon L.J. in the *El Amria* but have modified it so as to reduce the level of the burden on plaintiffs as compared with contractual cases.

Application to the facts of this case

- 21 As set out above, we must take account of all the circumstances of the particular case. In our judgment a very significant factor in the present case is that the breach of trust claims arise out of the facts upon which the contractual claims are based. It was accepted by both parties that the contractual claims will in any event be heard before this Court. Thus Jersey advocates for both parties will need to familiarise themselves fully with the factual background set out in the order of justice for the purposes of contesting the contractual claims. The factual background for the breach of trust claim will cover exactly the same ground. If the breach of trust claims were to be moved to Guernsey, Guernsey advocates for both parties would have to be instructed and would need to familiarise themselves with exactly the same matters as had been covered by their Jersey counterparts. There would be considerable duplication and a consequent increase in costs.
- 22 Furthermore, if the breach of trust claim were heard by this Court, findings of fact made by this Court in the contractual claims would be binding in relation to the breach of trust claim. Miss Gilbert was unable to assert that this would necessarily be the case if the Royal Court of Guernsey were to hear the breach of trust claim. Would that court necessarily feel bound by findings of fact made by this Court in the contractual claims?
- 23 We propose next to consider in turn each of the matters as set out above by reference to the facts of this case.

(a) 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.

- 24 We are informed that the Plaintiff is a company incorporated and administered in Malta, from where it also administers the trusteeship of the Tramp Trust. Its documents are in Malta. There is therefore no difference between Jersey and Guernsey so far as the Plaintiff is concerned. The former trustees of the Tramp Trust (prior to Compass) are British Virgin Island companies. Accordingly there is again no difference so far as they are concerned between Jersey and Guernsey. According to Mr Young, there are two individuals who will be essential witnesses; one lives in Australia and the other in South Africa. Again there is no material difference between Jersey and Guernsey for them.
- 25 However Compass is a company incorporated and administered in Jersey. All of its documents are here as are its officers who will have to give evidence. Compass is still the trustee of the Time Trust and all the documents relating to that trust are in Jersey. In summary, none of the evidence or documents is situated in Guernsey; all of the evidence and documents of the Defendants are situated in Jersey; that of the Plaintiffs is situated in other jurisdictions so that there is no material difference for them between Jersey and Guernsey.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Jersey law in any material respects

- 26 The breach of trust claim will undoubtedly be governed by Guernsey law as there has apparently been no change of the proper law of the Tramp Trust. Accordingly, if the case were to be heard by this Court, it would be necessary to obtain expert evidence as to Guernsey law. However both parties agreed that the Guernsey law of trusts is based substantially on the Trusts (Jersey) Law 1984 and is very similar to Jersey law. Accordingly it should be possible for expert evidence to be in fairly short form, possibly on affidavit. Given the similarity of the law of both jurisdictions, we do not think that this Court would find it difficult to comprehend and apply the law of Guernsey on the topic.

(c) With what country either party is connected, and how closely

- 27 As we have already stated, neither party has any connection with Guernsey. The Plaintiff is not connected with Jersey or Guernsey whereas Compass is incorporated and resident in Jersey and its officers and documents are situated here.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

- 28 Mr Young does not suggest that Compass is seeking any procedural advantage by this application.

(e) Whether the Plaintiff would be prejudiced by having to sue in the foreign court because it would: (i) be deprived of security for its claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in Jersey; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial

- 29 No point arises under (i), (iii) or (iv). However Mr Young argued that, because Compass is incorporated in Jersey, any judgment in Guernsey against Compass for breach of trust would have to be enforced in Jersey. He accepted that a Guernsey judgment would, in the circumstances of this case, be easily capable of enforcement pursuant to the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 but argued that the Plaintiff would nevertheless incur additional time and expense in registering the Guernsey judgment in Jersey as compared with the situation if judgment were obtained in Jersey in the first place.
- 30 In summary, the sole connection with Guernsey is the exclusive jurisdiction clause and the fact that the breach of trust claim will be governed by Guernsey law. However that system of law is not materially different to Jersey law. As against that, Compass, its documents and its

officers are in Jersey; the contractual dispute will in any event be heard in Jersey thereby requiring Jersey advocates to familiarise themselves fully with the facts of the case. If the breach of trust claim were to be hived off and heard in Guernsey, there would be considerable additional costs because of the need to instruct Guernsey advocates. In addition there are minor issues concerning whether the findings of fact in the contractual issues would be binding in Guernsey and whether additional costs might be incurred in having to register a Guernsey judgment in Jersey for the purposes of enforcement against Compass.

- 31 We are in no doubt that the Plaintiff has shown good reason as to why a stay should not be granted, sufficient to overcome the presumption in favour of the Guernsey exclusive jurisdiction clause. In our judgment there would be a clear advantage in terms of convenience and expense in having the breach of trust allegations heard by this Court, which would also be hearing the contractual disputes. In exercise of our discretion, we decline to order a general stay.
- 32 Finally we turn to the second part of the summons, which asks for a more limited stay until the contractual claims have been resolved. In our judgment it will be impossible to know the exact nature and level of the breach of trust claim until the contractual claims are resolved. If the contractual claims by the Tramp Trust against the Time Trust are successful, the nature and amount of any loss and damage suffered by the Tramp Trust as a result of Compass' actions as trustee of the Tramp Trust will be different to what they would be if the Tramp Trust were to be unsuccessful in its contractual claims against the Time Trust. Furthermore the nature of the alleged breaches of trust by Compass would no doubt vary depending upon the outcome of the contractual claims. Only after that outcome will it be possible to formulate with any precision what complaints are made against Compass in relation to its actions as trustee of the Tramp Trust and the degree of loss (if any) caused by those alleged breaches of trust. Accordingly we agree that the breach of trust allegation should be stayed pending the outcome of the contractual claims. However we would wish to make it clear that, once the contractual claims are resolved, we would expect to lift the stay on the breach of trust claim and to set an accelerated timetable, as we see no reason why the breach of trust claim should not be heard in a reasonably short timescale after resolution of the contractual claims.