Tanya Marya Dick Stock v Pantrust International SA and Richard George De Winton Wigley and James Richard De Winton Wigley and G.B. Trustees Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Thomas
Judgment Date:	08 October 2015
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Text

[2015] JRC 208

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE MANOR HOUSE TRUST AND THE RUSSIAN TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Between
Tanya Marya Dick Stock
Representor

and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley
Second Respondent

and

James Richard De Winton Wigley
Third Respondent

and

G.B. Trustees Limited
Fourth Respondent

Advocate S. M. Baker **and Advocate** S. C. Thomas **for the Representor**.

Advocate P. C. Sinel **for the First to Third Respondents**.

Authorities

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

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

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

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

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

Service of Process Rules 1994.

Trusts (Jersey) Law 1984.

Crociani v Crociani [2014] UKPC 40.

In the matter of the Fountain Trust [2005] JLR 359.

Panamanian Trust Law 1984.

Crociani v Crociani (C.A.) [2014] (1) JLR 426.

Underhill and Hayton Trusts and Trustees 18th edition.

Letterstedt v Boers [1884] 9 App Cas 371.

Virani v Virani [2000] JLR 203.

Trust — application by the 1st to 3rd respondents to set aside orders granting the representor leave to serve two representations out of the jurisdiction.

THE COMMISSIONER:

1 The first to third respondents apply to set aside orders of the Court granting leave to the representor to serve two representations, one in respect of the Manor House Trust and the other in respect of the Russian Trust, on them out of the jurisdiction. The central issue in the case is whether the representor has discharged the burden upon her of proving that Jersey is clearly the most appropriate forum for the hearing of the two representations.

2 The two representations raise the same issues and it was agreed by the parties that they fall to be considered together. The two trust deeds are virtually identical.

The Manor House Trust

3 The Manor House Trust is a discretionary settlement established by declaration of trust by Barclaytrust International Limited ("Barclaytrust") on 15 TH May, 1980. At the time of its creation, it was subject to the proper law of Jersey. The economic settlor was John Dick, Senior ("the Settlor"). The original beneficiaries were listed as the Jersey Blind Society and the Jersey Society for Mentally Handicapped Children.

4 On 3 RD April, 1984, Barclaytrust retired as trustee in favour of La Hougue Boete Société Fiduciaire avec responsabilité limitée ("La Hougue").

5 On 25 TH April, 1989, the representor (who is the Settlor's daughter), her brother and their respective issue were appointed as primary beneficiaries and the lineal descendants of the Settlor's siblings as secondary beneficiaries.

6 On 30 TH November, 2007, La Hougue retired as trustee in favour of the first respondent ("the Panamanian Trustee") and the proper law was changed to that of Panama.

7 On 15 TH May, 2015, the Panamanian Trustee retired in favour of the second respondent and his son the third respondent, who are directors, and in the case of the second respondent the beneficial owner, of the Panamanian Trustee. We will refer to them as "the first director" and "the second director" respectively and together as "the directors". The directors changed the proper law to that of England and Wales.

8 There are no accounts of the Manor House Trust and Advocate Sinel, who represents the Panamanian Trustee and the directors, seemed unclear as to the assets held within it. However, the evidence we have seen indicates that its only asset is the beneficial ownership of a Jersey company that in turn owns a substantial residential property in Jersey in which the Settlor resides.

The Russian Trust

9 The Russian Trust is a discretionary settlement established by a declaration of trust made between a Mr E Leimbacher and Barclaytrust on 20 th April, 1974. The economic settlor, however, was the Settlor.

10 The original beneficiaries are listed as a Paul Thomas Marquand and Sarah Jane Marquand, Philip Heather Smurthwhite and Graham Richard Black, all of whom live in Guernsey. They have not been convened as parties to the representation.

11 On 1 st August, 1984, Barclaytrust retired as trustee in favour of La Hougue. On 25 th April, 1989, the Settlor was excluded from benefit. The representor, her brother, and their respective issue were added to the class of beneficiaries as primary beneficiaries and the lineal descendants of the Settlor's siblings as secondary beneficiaries.

12 On 30 th November, 2007, La Hougue retired as trustee in favour of the Panamanian Trustee and the proper law was changed to that of Panama.

13 On 15 th May, 2015, the Panamanian Trustee retired as trustee in favour of the directors who changed the proper law to that of England and Wales.

14 Advocate Sinel was again uncertain as to the assets of the Russian Trust but from the evidence we have seen, its assets appear to ultimately comprise the following:–

That Jersey company would appear to be owned by a BVI company.

(i) A flat in London, the title to which is held by a Jersey company.

(ii) A flat in Jersey, the title to which is held in the same Jersey company.

15 We will refer to the Manor House Trust and the Russian Trust as “the Trusts”.

Background

16 The Court received an affidavit from the first director and two affidavits from the representor (the first being served in support of the application for leave to serve out of the jurisdiction and the second in response to that of the first director.) The Court also gave leave for the representor to file affidavits from Mr Gary Albrecht, a US attorney, who has conduct of certain proceedings in Colorado on behalf of the representor, the Settlor and others and from Mr Alvaro Alamengor, a Panamanian lawyer, as to Panamanian law.

17 The Commissioner had, in the absence of the learned Jurats, rejected an application by Advocate Sinel to exclude the affidavits of Mr Albrecht and Mr Alamengor on the basis that they were inadmissible. In the Commissioner's view, they were clearly admissible for the purposes of the applications as affidavits of fact and law respectively but it would be a matter for the Court as to what weight, if any, to give to them. Leave to appeal that decision was refused.

18 The underlying relationship was between the Settlor and the first director, which goes back some 30 years, when the first director was employed by Barclaytrust. It would seem that the first director left the employment of Barclaytrust in the early to mid-1980's to administer La Hougue (which was beneficially owned by the Settlor) from the Jersey property.

19 In September 1991 the first director incorporated La Hougue Financial Management Services Limited to conduct his own trust business servicing his own clients as well as the Settlor. In 2006, the first director moved La Hougue Financial Services Limited from Jersey to Panama and in August 2007, obtained a Panamanian licence and incorporated the Panamanian Trustee, which was then appointed as trustee of the Trusts on the 30 th November, 2007. The directors went to live in Panama, from where it is clear that the administration of the Trusts was then carried on.

20 We have seen a memorandum dated July 2006 prepared by the first director for the benefit of the Settlor dealing with the proposed move to Panama and which describes the past and proposed future arrangements. The catalyst for the move appears to have been increasing regulatory pressures in Jersey and concerns over maintaining confidentiality. The Panamanian Trustee was to be owned wholly by the first director, but with the Settlor receiving a share of the gross income of its trust business.

21 In his affidavit, the first director stressed that it was important for the Court to appreciate the true nature of the Trusts and how they have been used by the Settlor in practice for the last 30 years. Quoting from paragraph 19 of his affidavit:–

> *"Although [the Settlor] is not expressed to be within the class of beneficiaries listed in the trusts, in practice he was the party who principally enjoyed the benefit of their assets.* The trusts are, in reality, devices by which he has sought to remove the indicia of ownership of those assets in his own name and yet still enjoy the benefits of their ownership. In an effort to shield and protect himself from wives/partners and creditors he went to great lengths to have no assets in

his name. Nevertheless, he personally controlled the affairs and assets of his financial portfolio at all times, including these trusts. Over the course of our relationship he directed me, either directly or through one of the aforementioned entities, to pay various expenditures on his behalf or on behalf of his various entities, using the assets of the trusts."

22 This *"unconventional arrangement"* worked well, he said, for many years but it was the Settlor who should be the proper plaintiff to these proceedings as he knew and controlled everything that went on. The representor was, he said, never intended to be a beneficiary, as she well knew. The deeds of 1989 formed part of a set of papers prepared at the Settlor's request in the context of his divorce proceedings should he ever have cause to use them, which he did not. Advocate Sinel described the relationship between the Settlor and the first director as one of agency, with both ignoring the various trust deeds; effectively a sham arrangement. The first director had simply done what he had been directed to do.

23 The first director's relationship with the Settlor began to sour, it would seem, from 2012 when the representor's husband became involved in the financial affairs of the Settlor's family. All out warfare commenced in Colorado, where a company known as Land Security Investors Limited is based, which holds substantial real property assets and in which other family trusts have an interest. The first shots were fired by the representor in August 2013 and concerned the alleged actions of a Mr Alan Fishman as trustee of these other family trusts, but without tracking the numerous lawsuits that have since followed and which have been consolidated, the Panamanian Trustee is now actioning the Settlor, the representor, her husband and her brother for damages alleging, inter alia, a conspiracy to defraud on their part, by seeking to escape liability in respect of a number of loans allegedly made at the direction of the Settlor for his benefit through entities affiliated with the first director and which have now been assigned to the Panamanian Trustee, not, it would seem in its capacity as trustee of the Trusts, but personally. The funds used to make these loans are alleged to have come in part from other clients of the Panamanian Trustee. These consolidated proceedings are due to come to trial next year.

24 Complaints were made by the Settlor to the Panamanian regulator about the conduct of the Panamanian Trustee, it would seem, working from the translated documents before us, in or around June 2014. Inspections were carried out by the regulator between June 24 th and August 13 th 2013, and 16 th December, 2013, and 2 nd January, 2014. The regulator concluded that the Panamanian Trustee was exercising its trust business in a harmful manner, hazardous to public interest, its customers and to the detriment of the good name and the financial centre hosted in that jurisdiction. The concerns were summarised as follows:–

> *"1. The non-structuring of the trusts in accordance with the legal provisions in force in this country.*
>
> *2. The opacity in dispensing moneys to affiliates, under the pretext of alleged non-documented loans, which introduces uncertainty about the legal possibility*

of holding these assets.

3. The merger of funds and the inexcusable existence of overdrafts, with no evidence of the manner in which the owners of the assets are to be reimbursed.

4. The obvious lack of documentation pertaining to the duty of due diligence to the clients of the company and its resources."

25 The Panamanian Trustee's licence to conduct trust business was cancelled on 13 th February, 2015, and it was prohibited from performing any operations relating to the exercise of its trust business in that jurisdiction. There is an appeal against that decision, not it would seem on the merits of the regulator's findings, but on an alleged failure of the regulator to advise it of its right of appeal.

26 The Panamanian Trustee retired as trustee of the Trusts in favour of the directors on 15 th May, 2015, and the directors, as the new trustees, changed the proper law from Panama to England and Wales, steps to which the Settlor and the representor strongly objected. In his letter of 15 th May, 2015, to their Panamanian lawyers, the first director explained the position in this way:–

> *"We wish to put on record that the individual trusteeships of [the first director] and [the second director] are intended to be interim only.* There is no intention to preserve a connection with the [Settlor's] family beyond the date of the Colorado court cases, currently scheduled for October this year, which will determine the extent and validity of the debt obligations of the Panamanian Trusts to a series of lenders procured by [the Panamanian Trustee] at the request of [the Settlor] and his family. Until the extent and validity of those debt obligations are established we are unwilling to surrender the practical security held in consequence of the trusteeship, formerly corporate and now individual. But it is solely and exclusively to protect that practical security that the present change in trustees is being made. As soon as there is a definitive determination of the debt obligations, together with ongoing security and/or repayment, we confirm that the trusteeships will be at the disposal of Mossfon Trust Corporation."

The Mossfon Trust Corporation was a Panamanian company put forward at that stage by the family to take over as trustee from the Panamanian Trustee.

Representations

27 The principal relief sought by the representor is the removal of the Panamanian Trustee as trustee of the trusts in favour now of the fourth respondent, a Jersey incorporated and regulated company represented by Advocate Preston of Hatstone Lawyers, Jersey. It was clear from the hearing that the representor will apply to extend this relief to the removal of the directors, to the extent that they have been validly appointed as trustees in place of the Panamanian Trustee. In addition, the representor seeks to have set aside the deeds of

retirement and appointment by which the proper law of the Trusts was changed firstly to Panama and then to England and Wales (which we will refer to as the "the 2007 DORAS" and "the 2015 DORAS" respectively) and for an account of the administration of the Trusts.

28 Leave to serve the proceedings out of the jurisdiction was given ex parte by the Deputy Bailiff on 29 th May and by the Bailiff on 5 th June, 2015, respectively. A further order was made by the Bailiff on 12 th June, 2015, for substitute service.

29 By their summons, the Panamanian Trustee and the directors seek to have those orders set aside on the ground that the Court has no jurisdiction or alternatively, should not exercise its jurisdiction. In the alternative, they seek a stay of the Jersey proceedings pending the outcome of what they referred to as the Panamanian and Colorado proceedings. They also allege that the orders for service out of the jurisdiction were obtained by material non-disclosure by the representor.

The law

30 In *Spiliada Maritime Corp v Cansulex Limited* [1986] 3 All ER 843, Lord Goff, at 858c identified the key differences between cases in which a defendant in the jurisdiction was served as of right and cases in which a defendant was convened to proceedings by service out of the jurisdiction:–

> ***"These, as I see it, are threefold.*** The first is that, as Lord Wilberforce indicated, in the [service out] cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the [service out] cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant out of the jurisdiction…. Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the *Amin Rasheed* ***case*** [1983] 2 All ER 884 ***at 891*** , [1983] AC 50 and 65 ***that the jurisdiction exercised under Ord 11 [service out] may be 'exorbitant.'*** This has long been the law. In *Société Générale de Paris v Dreyfus Bros* [1885] 29 Ch DS 239 ***at 242–243 Pearson J said:–***
>
> ***"…it becomes a very serious question … whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.'***
>
> ***That statement was subsequently approved on many occasions, notably by Farwell LJ in The Hagen*** [1908] P 189 ***at 201*** , [1908–10] All ER Rep 21 ***at 26 and by Lord Simmonds in your Lordships' House in*** *Tyne Improvement Comrs v Armement Anversois SA, The Brabo* [1949] 11 All ER 294 ***at 305***,

> [1949] AC 326 ***at 350***. The effect is not merely that the burden of proof rests on the plaintiff to persuade the court that England is the most appropriate forum for the trial of the action, but that he has to show that this is clearly so. ***In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."*** (Our emphasis)

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

32 In this case the representor sought leave to serve proceedings out of the jurisdiction on the Panamanian Trustee and the directors and she therefore bears the burden of proving that Jersey is "clearly" the most appropriate forum for the hearing of these two representations. We accept that if the representor cannot discharge that burden, then leave to serve out of the jurisdiction should be set aside and jurisdiction declined. It is not open to the representor to contend that even if there is a clearly more appropriate forum elsewhere, justice requires the courts of Jersey to assume jurisdiction. In *Konamaneni v Rolls-Royce Industrial Power India* [2002] 1 All ER 979, Lawrence Collins J stated at paragraph 175:–

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

33 In *Nautech Services Limited v CSS Limited and eight others* [2014] (1) JLR 361, Bailhache, Deputy Bailiff, summarised the test to be applied in order to justify an order for service out of the jurisdiction at paragraph 39 in this way:–

> ***"(i) There is a threshold to be passed before the court has jurisdiction to order service out of the jurisdiction.*** That threshold is that the plaintiff must establish a good arguable case that his claim falls under one or more of the paragraphs in r.7 of the Service of Process Rules .
>
> ***(ii) Once satisfied that the case does fall within one or more of those paragraphs, the court should consider whether it is appropriate to bring before it a non-resident who owes no allegiance in this jurisdiction.*** This involves an assessment of whether there is a serious issue to be tried as against the non-resident defendant. However, if the jurisdiction is established

under r.7, then, adopting what Lord Goff said in *Seaconsar (5)* [1994] 1 AC at 456 ***we think there is no good reason why we should require any particular degree of cogency to be applied in relation to the merits of the plaintiff's claim not least because it is inappropriate to have a trial on the merits conducted by affidavit at the outset of the proceedings*** .

(iii) …

(iv) The court should finally consider whether Jersey is the forum conveniens for the hearing of the action."

34 Taking the first of these, there was no dispute that the matters raised in the representations come within Article 7(j) of the Service of Process Rules 1994 which provides as follows:–

"Service out of the jurisdiction of a summons may be allowed by the Court whenever:–

(j) the claim or application is brought within the terms of Article 5 of the Trusts (Jersey) Law 1984."

35 Article 5 of the Trusts (Jersey) Law 1984 provides as follows:–

"5 Jurisdiction of court

The court has jurisdiction where –

(a) the trust is a Jersey trust;

(b) a trustee of a foreign trust is resident in Jersey;

(c) any trust property of a foreign trust is situated in Jersey; or

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

36 It was not in contention that trust property of both trusts was situated in Jersey and therefore the Court has jurisdiction for the purposes of Article 5.

37 Taking the second test, it is clear that there is a serious issue to be tried. The Panamanian Trustee has had its licence to act as trustee cancelled by the regulator and it would appear has proceeded, against an order of the regulator and the express wishes of the Settlor and the representor, to appoint two of its directors as personal trustees and this in circumstances where arguably they have a conflict of interest and where there has been a complete breakdown in their relationship with the beneficiaries.

38 Accordingly, the key issue for the Court is whether the representor has demonstrated that

Jersey is “clearly the most appropriate forum” for the hearing of the representations.

Exclusive jurisdiction clause

39 In clause 1 of the trust deeds, the interpretation clause, *“The Proper Law of this Settlement”* is defined as:–

> *“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 be subject and by which such rights construction and effect be construed and regulated.”*

40 The word *“exclusive”* is included in the Manor House Trust, but is not included in the Russian Trust. Clause 2 of the trust deeds, headed *“Proper Law”*, is worded as follows:–

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

41 Clause 12(a) of the trust deeds provide as follows:–

> *“The Trustees may at any time or times and from time to time during the Trust Period by deed declare that 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 (not being any place under the law of which (1) any of the trusts powers and provisions herein declared and contained would not be enforceable or capable of being exercised and so taking effect or (2) this Settlement would not be irrevocable and that the forum for the administration thereof shall thenceforth be the Courts of that state or territory AND as from the date of such declaration the law of the state or territory named therein shall be the law applicable to this Settlement and the Courts thereof shall be the forum for the administration thereof but subject to the power conferred by this Clause and until any further declaration be made hereunder PROVIDED ALWAYS that so often as any such declaration as aforesaid shall be made the Trustees shall be at liberty to make such consequential alterations or additions in or to the trusts powers and provisions of this Settlement as the Trustees may consider necessary or desirable to ensure that the trusts powers and provisions of this Settlement shall (mutatis mutandis) be as valid and effect as they are under the law of the Island of Jersey.”*

42 Pursuant to this, the 2007 DORAS provided at clause 4:–

> *"In exercise of the power conferred upon it by Clause 12(a) of the Settlement and all other powers it enabling the Retiring Trustee hereby declares that with effect from the Retirement Date the Trust shall take effect in accordance with the laws of the Republic of Panama and that the forum for the administration thereof shall be the courts of the Republic of Panama so that the law of the Republic of Panama shall be the law applicable to the Trust and the Courts thereof shall be the forum for the administration of the Trust."*

43 The 2015 DORAS provided at clause 3:–

> *"The new Trustees declare that from the date of this deed the proper law of the settlement and forum of administration shall change from that of the Republic of Panama to that of England and Wales."*

44 Advocate Sinel, who to our surprise completely ignored the 2015 DORAS, argued that the combination of these provisions within the trust deeds and the 2007 DORAS creates an exclusive jurisdiction clause in favour of the courts of Panama by whose law he contended the Trusts remained governed.

45 However, as submitted by Advocate Baker, we agree that clauses 1(1) and 2 of the trust deeds are concerned with the proper law of the Trusts and the avoidance of *dépeçage*. As Lord Neuberger said in *Crociani v Crociani* [2014] UKPC 40 at paragraph 23:–

> ***"23 It is appropriate now to turn to the appellants' contention that the words "shall be subject to the exclusive jurisdiction" ("the exclusive stipulation") in clause 12(6) confer exclusive jurisdiction.*** As already stated, there is obvious force in the point that, at least when read on its own, the direction that certain issues should be "subject to the exclusive jurisdiction … of the said country" has the effect of conferring exclusive jurisdiction on the courts of that country. However, the respondents contend that, properly construed in its context, the exclusive stipulation has a very different purpose, namely to ensure that all issues concerning the Grand Trust are to be governed by the same law, thereby avoiding the risk of dépeçage — ie that different aspects of the Grand Trust were subject to different proper law. In the Board's view, the respondents' argument is to be preferred."

46 The reference in clause 2 to the Island of Jersey being the forum of administration is a reference to a geographical location, making it clear where the trust affairs are being organised and run (see *Crociani* paragraphs 14 and 19).

47 It is the case that clause 12(a) of the trust deeds provides that the forum for administration *"shall"* thenceforth be the courts of that new state or territory but there is nothing to suggest that this gives those courts exclusive jurisdiction for all disputes including hostile litigation of this kind. As Lord Neuberger said in *Crociani* at paragraph 22 the use of the definite

article is not enough.

48 In our view, the purpose of these provisions is to make it clear that where the proper law is changed to a new jurisdiction, then from that point onwards the domicile of the trust moves from the old to the new jurisdiction, from where the affairs of the trust will now be organised and run and “the rights of all parties and the construction and effect of each and every provision” in the trust shall be governed thereafter by the laws of that new jurisdiction. The courts of that new jurisdiction will thereafter have non-exclusive jurisdiction.

49 This is consistent with the view taken by the Panamanian Trustee, and presumably its legal advisors, when it was party to the 2007 DORAS, in that in clause 10.2 it agreed to submit “to the non-exclusive jurisdiction of the courts of the Republic of Panama” with effect from the date of the 2007 DORAS. The 2007 DORAS themselves were expressed as being governed by and construed in accordance with Jersey law, with the parties submitting to the non-exclusive jurisdiction of the Jersey courts.

Sham trusts

50 Whether or not the trust and subsequent deeds, up to and including the 2007 DORAS, are shams would be matters governed by Jersey law as the Trusts were governed by Jersey law at the time they were entered into. As it was held in the case of In the matter of the *Fountain Trust* [2005] JLR 359 at paragraph 14, in order for the Court to conclude that a document or transaction was a sham it is necessary that all the parties to it should have a common intention, that “documents are not to create the legal rights and obligations which they give the appearance of creating.”

51 We venture to suggest that there would be considerable hurdles to overcome in proving that Barclaytrust were a party to any such common intention when the Trusts were established. Even so, there has been no finding by any court that the trust and subsequent deeds are shams. They are valid on their face and we must at this stage proceed on the basis that they are valid and to treat them as valid, unless and until a court of competent jurisdiction determines otherwise; notwithstanding that, as alleged by the first director, for many years the trustee may have disregarded the trust and subsequent deeds and simply done as it was directed to do.

52 Advocate Sinel of course relies on the validity of the 2007 DORAS to found his contention that the courts of Panama have exclusive jurisdiction, which must create some impediment to any argument that the Trusts, whose trusteeships and proper laws they changed, are shams.

Litigation in Panama and Colorado

53 Advocate Sinel submitted that one of the strongest features which demonstrates that Jersey is not the appropriate jurisdiction, let alone the clearly more appropriate jurisdiction, is the presence of litigation in Panama and Colorado which he said are seized of serious disputes arising out of the Trusts.

54 At paragraph 68 of his affidavit the first director says this:–

> *"As a result of the steps taken by the [….]* Family in Panama, the Panamanian Supreme court is now seised (sic) of proceedings arising out of that investigation and by which the decisions of the Panamanian Superintendent of Banks are challenged. The Panamanian courts are therefore seised (sic) of proceedings by which they will be required to consider and resolve at least the following issues:–
>
> *68.1 The true nature of the trusts and the true role played by [the Settlor]*
>
> *68.2 The true identity of the beneficiary or beneficiaries of the Trust;*
>
> *68.3 The existence and extent of the […] Loans; and*
>
> *68.4 The conduct by [the Panamanian Trustee] of its trusteeship of the trusts."*

55 This assertion is entirely unsupported by the evidence and Advocate Sinel did not seek to argue to the contrary. The only proceedings in Panama relate to the appeal by the Panamanian Trustee against the decision of the regulator to cancel its licence. That is entirely a matter between the Panamanian Trustee and the regulator. The Panamanian courts are not seized of any proceedings which relate to the Trusts.

56 It is the case that in the Colorado proceedings, the Panamanian Trustee does allege that the Settlor controlled the affairs of the Trusts (and other trusts established by the Settlor), in particular in relation to the loans. The Trusts are described as the alter ego or mere instrumentality of the Settlor. However, the claim is made in its personal capacity and not as trustee of the Trusts and the relief it seeks is damages against the Settlor, the representor, her husband and her brother; no relief is sought in its capacity as trustee of the Trusts. The Colorado court is not seeking to exercise any supervisory role over the Trusts, which on Advocate Sinel's case would in any event be for the exclusive jurisdiction of the Panamanian courts.

57 In his letter of 26 th August, 2006, Mr Albrecht, who has the conduct of the proceedings in Colorado on behalf of the representor and her family has compared the Colorado cases to the Jersey proceedings and has confirmed that he is not aware of any legal claims that have been asserted in Colorado that have also been asserted in the Jersey proceedings. This appears to be supported by our reading of the pleadings.

58 We do not regard the proceedings in Panama or Colorado as in any way relevant to the

jurisdiction we are being invited to accept, which is, in essence, a supervisory jurisdiction over the Trusts to ensure their good administration for the benefit of the beneficiaries.

Forum conveniens

59 Hatstone Abogados, a firm of Panamanian lawyers, have provided a letter of advice on Panamanian law dated 26 th August, 2015, which is exhibited to the affidavit of Mr Alamengor. It was not expressed as being addressed to the Court, but we were told they had been made aware that their advice would be referred to the Court. Whilst having the same name as Hatstone Lawyers, Jersey, who represent the proposed new trustee, we were told that they are separate partnerships; however there is clearly some connection and we bore that in mind.

60 Appended to the advice was a translation of the Panamanian Trust Law 1984, Articles 30 and 31 of which provide:–

> ***"Article 30 The trustee may be removed judicially for the proceedings of a summary lawsuit:***
>
> > ***1. When his interests are incompatible with the interests of the beneficiary or the founder of trust*** .
> >
> > ***2. If he administers the assets of the trust without the diligence of a good head of family*** .
> >
> > ***3. If he is convicted for an offense against property or public faith*** .
> >
> > ***4. Upon becoming incompetent or not capable to execute the trust*** .
> >
> > ***5. For his insolvency, bankruptcy or creditors' meeting, or for the administrative intervention when it is about a person authorized to conduct the trust business*** .
>
> ***Article 31 The founder of trust, the beneficiary or beneficiaries, and the representative of the Public Ministry may request the judicial removal of the trustee, in defense of the beneficiaries that are minors or incompetent, or in the interest of the moral or the law."***

61 Hatstone advise that an application for the removal of a trustee in Panama under these provisions is not a quick process and can take between two and five years. Should the Panamanian Trustee seek to challenge such an application, then it could easily be delayed with the time period being significantly extended. If the application was successful, then any subsequent appeal by the Panamanian Trustee could take an additional two years to

resolve.

62 Hatstone cast serious doubt upon the validity of the Panamanian Trustee's appointment of the directors as new trustees and their change of the proper law under the 2015 DORAS. On the 13 th February, 2015, the regulator, having cancelled its licence to conduct trust business, ordered the Panamanian Trustee: "(1) to notify each and every one of the Grantors or Settlors of the content of the present Resolution so that if they so decide, they may make the relevant decisions pertaining to their best interests, concerning their respective trusts managed by the trust company and (2) to proceed with the substitution of the trustee…." Rather than obtaining the decision of the Settlor as to the management of the Trusts, it would appear that the Panamanian Trustee exercised its powers in a manner expressly contrary to the wishes of the Settlor. It would seem that as a matter of Panamanian law, a breach of this order would render the 2015 DORAS at least voidable at the instance of the beneficiaries.

63 Hatstone further advised that for a foreign trust to come under Panamanian law, the Settlor should have been a party to the 2007 DORAS. Article 40 of the Panamanian Trust Law is in the following terms:–

> ***"Article 40 Trusts organized in accordance with a foreign law may come under the Panamanian law, provided that the founder of trust and the trustee or only the latter, if it is so authorized in the trust instrument, makes a statement in that respect, submitting to the essential requirements and the formalities established in this law for the constitution of the trust."***

64 They explained the position in this way:–

> *"1. The Settlor should have been a party to the 2007 DORAS. Panamanian trust law is based on contractual principles. The trust deeds of the […..] Trust and the Manor House Trust are unilateral declarations of trust and therefore the Settlor is not a party. Panamanian Trust Law does not recognize unilateral declarations of trust. With regards to The Russian Trust, which names the Settlor as E. Leimbacher and who we understand is not the economic Settlor, it is important that the contract is made with the main economic Settlor and not a minor or initial Settlor."*

65 There had also been no designation of a registered agent as required by Article 9 of the Panamanian Trust Law. Accordingly, they advised that the change of proper law had not been effective for Panamanian Law purposes and the Panamanian courts would be unlikely to accept jurisdiction.

66 Their advice is supported by one of the findings of the regulator namely that there was no contract between the Panamanian Trustee and the Settlor covering the requirements of Article 9, specifically the appointment and identity of the Settlors, the objects of the trust, the

actual amount of the assets held in trust, the origin and source of the resources handled under the structure of the trust company and the express appointment of the resident agent for each trust.

67 Hatstone concluded that the Trusts were still governed by Jersey law and strongly recommended that any application should be made to the Jersey courts.

68 Advocate Sinel made no reference at all in his written and oral submissions to the 2015 DORAS. The first director made no reference to them at all in his affidavit and they were not appended as an exhibit. Advocate Sinel was unable to produce copies at the hearing and they had to be forwarded to us after the hearing. The representor had obtained copies through the Colorado proceedings but was enjoined from using them in any other proceedings. When they were raised by the Court with Advocate Sinel he felt unable to comment on their validity, maintaining his position that the Panamanian Trustee was the trustee of the Trusts, that the Trusts were governed by Panamanian law, and that the courts of Panama had exclusive jurisdiction. It is a difficult position for him to maintain, when his own clients were parties to the 2015 DORAS changing both the trustee and the proper law.

69 There is no doubt that the administration of the Trusts was genuinely carried out from Panama from 2007; the directors had moved to Panama for that purpose. If there was no question as to the effectiveness of the 2007 DORAS in changing the proper law to Panama and if the 2015 DORAS had not been executed, then we accept that any application for the removal and appointment of trustees would be more properly brought before the Panamanian courts. However, that is not the position.

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

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

72 The matter does not rest there in that the 2015 DORAS have been executed. They were drafted by English lawyers and appear valid on their face. According to these deeds the Trusts are now governed by English law and the Panamanian Trustee is no longer the trustee. However they appear to have been executed in direct contravention of the order of the regulator, rendering them voidable at the instance of the beneficiaries.

73 The position is thoroughly confused. Any application by the representor to the Panamanian court, leaving aside the advice about delay, is now handicapped by uncertainty as to whether the trusts were ever or are still governed by Panamanian law and as to the identity of the trustees. Any application she may bring before the English courts is similarly handicapped. The English jurisdiction is one with which the Trusts have had no connection whatsoever, save for the presence there of one flat.

74 This court has the advantage that the Trusts were established under Jersey law and Jersey law would govern any issue as to the validity of all of the deeds up to and including the 2007 DORAS. Furthermore, this court is in the unique position of being able to put any new trustee it may appoint in possession of the trust property, all of which is held through Jersey companies.

75 There are a number of further factors which indicate that the good administration of the Trusts in the interests of the beneficiaries requires urgent action:–

(i) Whether the Panamanian Trustee is trustee or the directors, all of them would appear to have a conflict of interest. The claims brought by the Panamanian Trustee against the Settlor and the family in Colorado in respect of the loans are personal claims and yet the first director's letter is quite open in stating that they are holding on to the trusteeships to secure their own personal position. The duties of trustees where a conflict arises is made clear in paragraph 57.29 of Underhill and Hayton Trusts and Trustees 18th edition at paragraph 57.29:–

> ***"57.29 Duty of undivided loyalty***
>
> ***More fundamental than the prescriptive duties laid down by trust law and the trust instrument is the proscriptive fiduciary obligation of undivided loyalty owed to the beneficiaries.*** This fiduciary obligation is the obligation to put the interests of the particular beneficiaries above all other interests (unless otherwise authorised). Thus for example no profit can be made from the trust property or the office of trustee (unless authorised), and (unless authorised) the trustee must not place himself in a position where his own interest conflicts with the interests of his beneficiaries or his duty in one capacity conflicts with his duty in another capacity or in a position where there is a sensible possibility of such conflict arising. If however there is a conflict or possibility of conflict the trustee must prefer his duty to his interest, except as permitted by the trust

instrument, the beneficiaries or the court to consider his interest."

(ii) There is open hostility between the Panamanian Trustee and the directors on the one hand and the beneficiaries on the other. There would seem to be no possibility of them working in harmony in the interests of the trusts and Advocate Sinel did not suggest otherwise. As Lord Blackburn said in *Letterstedt v Boers* [1884] 9 App Cas 371:–

> ***"In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule beyond the very broad principle … that their main guide must be the welfare of the beneficiaries.*** Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of greater nicety … It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate, is not of itself a reason for the removal of trustees. But where the hostility is grounded on the mode in which the trust has been administered, … it is certainly not to be disregarded … If it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground he refuses to do so, it seems to their lordships that the court might think it proper to remove him."

Advocate Sinel was quite unable to put forward any justification for any his clients holding on to the office of trustee.

(iii) There is a large mortgage over the Jersey residential property and the interest is not being paid. There are allegations as to whether injunctions obtained by the representor and the family in Colorado may be the cause of this, but it is clear that the Trusts require a trustee, who can work in harmony with the beneficiaries and who is not suffering from any conflict of interest, able to administer these assets for the benefit of the beneficiaries.

76 In all of these quite exceptional circumstances, we have no doubt that Jersey is "clearly the most appropriate forum" for the hearing of the representations. We do not think that the exercise of our jurisdiction in this way would be regarded as exorbitant either by the Panamanian courts or by the English courts or by the Colorado courts but rather as being necessary to end the confusion that has arisen and to ensure the ongoing good administration of the Trusts in the interests of the beneficiaries.

Non disclosure

77 It was not in contention that in making an application ex parte for permission to serve out of the jurisdiction, the representor was under a duty of full and frank disclosure (see *Konamaneni v Rolls Royce* [2002] 1 All ER 979 at paragraph 179–181), i.e. those facts which it is material (in the objective sense) for the judge to know in dealing with the application made. Advocate Sinel made the following allegations of non-disclosure:–

(i) That the representor failed to apprise the Court that an appeal had been made to the Panamanian Supreme Court in respect of the regulator's findings. We do not regard that as material. The representor is not a party to that appeal or in any way involved in the regulatory proceedings in Panama.

(ii) The representor misled the Court in relation to the amount of interest being paid or that it is alleged that its payment was interrupted by the family's own actions. We do not regard this as in any way material.

(iii) The representor informed the Court, in her first affidavit in support of the application for leave to serve out of the jurisdiction, that she and the Settlor had signed a unilateral instrument of removal and appointment of trustees on 26 th May, 2015, but had failed to inform the Court that this instrument was to their knowledge of no effect or relevance. In his response, Advocate Baker submitted that the representor had never represented in her affidavit or submitted through counsel that this instrument was effective and indeed, if she had thought it was effective, then she would not have commenced the proceedings in Jersey to remove the Panamanian Trustee as trustee. We do not regard this as material.

(iv) The representor stated in her affidavits that since 2013 the Settlor had repeatedly asked for and been denied financial information in relation to the Manor Trust, which the first director asserts is completely untrue. In the first director's affidavit he has exhibited a schedule of dates when he says the financial reporting was provided (not the information itself) but we are not in a position to determine whether this allegation is untrue. In any event, we do not regard it as material to the issue of service out of the jurisdiction.

(v) In a letter to the Bailiff's Chambers dated 3 rd July, 2015, it was said by Advocate Thomas that the directors had refused to accept personal service in Panama on 10 th June, 2015, hence the application for substituted service. They were not present, and so could not possibly have refused to accept personal service. We have considered the affidavit of Cesar Rivera, a Panamanian attorney who dealt with the service of the proceedings in Panama, from which, in our view, it was not unreasonable for Advocate Thomas to say the respondents had refused to accept personal service on 10 th June, 2015.

(vi) The representor wholly failed to apprise the Court of the fashion in which the trusts have been operated from Panama at the behest of the Settlor; the true factual matrix was simply not before the Court. In her second affidavit, the representor strongly denied the allegation that these trusts were devices used to hide the Settlor's assets but it is not clear to us how knowledge of those allegations would have been

material to the application before the Deputy Bailiff, as he would have proceeded on the same basis as we have namely that the Trusts must be assumed to be valid until a court has determined otherwise.

78 We therefore do not accept that there has been material non-disclosure on the part of the representor but if we are wrong in this respect and there have been failures, then in our view there are clearly valid grounds for leave to serve out of the jurisdiction (see *Virani v Virani* [2000] JLR 203 at 213).

Conclusion

79 In conclusion for all these reasons we decline to set aside the orders giving leave to serve out of the jurisdiction, finding as we have that Jersey is clearly the most appropriate forum for the hearing of the two representations. For the reasons set out in paragraphs 53 to 58 above we also decline to order a stay of the Jersey proceedings on account of the proceedings in Panama and Colorado; indeed, we think they should proceed as a matter of urgency.

Issue of removal

80 We have received a very substantial body of evidence in relation to this matter and it is difficult to think what further evidence the parties would wish to adduce on the issue of removal. We accept that we have not heard any formal argument as to the issue of removal and so a short opportunity for the parties to file further evidence must be given.

81 From what we have seen to date, it is very difficult to envisage any court permitting Advocate Sinel's clients to remain in office. He was quite unable to put forward any reasons based on sound principles of trust law as to why they should remain in office. He questioned what practical effect their removal would have, as he said no more assets would appear as a result. If there were any beneficiaries, he said they didn't need protection — there was nothing to protect them from. He could not see how changing the trustee would advance the Colorado proceedings as if that were relevant. None of this stands up to scrutiny. By continuing to resist their removal, it may well be argued that they are acting unreasonably, which could have consequences in relation to costs.

82 There may well be issues as to security for his clients, if they are removed from office, for liabilities they have properly incurred as trustees, but in the absence of any accounts and on the basis of their assertion that the Panamanian Trustee has disregarded the trust documentation and presumably therefore its duties as trustee for many years, it is difficult at this stage to see what liabilities should be secured.

83 The ongoing good administration of the Trusts and the interests of the beneficiaries require

that the issue of removal proceed as a matter of urgency and we therefore fix 27 th October, 2015, at 2:30pm for the hearing of that part of the application and, we agree to the amendment of the representations to extend the relief sought to the removal of the directors to the extent that they may be trustees.

84 Pending that hearing the Panamanian Trustee and the directors shall procure that there is no change in the way the assets of the Trusts are currently held and they will not exercise any powers they may have as trustees, to the extent that they are trustees, without the prior written consent of the representor's Jersey legal advisors.

85 Skeleton arguments and any further affidavit evidence which the parties wish to file must be filed with the Court by close of business on 16 th October, 2015.