

## Representation of AA

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Liddiard, Nicolle
<b>Judgment Date:</b>	07 September 2010
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### Text

[2010] JRC 164

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Commissioner**, and Jurats Liddiard and Nicolle.

In the Matter of the Representation of AA

And in the Matter of the D Discretionary Trust

and

In the Matter of Articles 26, 32, 34 and 51 of the Trusts (Jersey) Law 1984 (as Amended)

Between  
AA

Representor  
and  
B  
Respondents

and

C

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

**Advocate J. P. Speck for the Respondents.**

### **Authorities**

Service of Process Rules 1994.

Trusts (Jersey) Law 1984.

Trusts (Guernsey) Law 2007.

[\*Koonmen v Bender and Others\*](#) [2002] JCA 218.

[\*EMM Capricorn Trustees Limited v Compass Trustees Limited\*](#) [2001] JLR 205.

[\*Helmsman Limited v Bank of New York Trust Company \(Cayman\) Limited\*](#) 11th June 2009.

[\*Alhamrani v Alhamrani\*](#) [2005] JLR 236.

### **THE COMMISSIONER:**

- 1 On 6<sup>th</sup> August, 2010, the Court set aside the service of proceedings on the respondents and stayed the representation. We now set out our reasons.

### **The D Discretionary Trust (“the Trust”)**

- 2 The Trust was declared by B on 26<sup>th</sup> March, 2007, in order to receive assets from a BVI settlement for the benefit of E and his family.
- 3 Clause 3 of the Trust provided as follows:-

*“3 PROPER LAW AND FORUM FOR ADMINISTRATION.*

*3.1 SUBJECT TO Clause 3.2 this Trust is established under and shall be governed in all respects by the laws of the Island of Jersey which shall be the*

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*proper law of this Trust and the courts thereof shall be the forum for the administration of this Trust.*

*3.2 The Trustees may at any time or times by instrument in writing declare that thenceforth, or from such date as may be specified in the instrument, this Trust shall be governed in all respects by the law of the jurisdiction specified in the instrument and thereupon that law shall be the proper law of this Trust and the courts of that jurisdiction shall be the forum for the administration of this Trust."*

- 4 We were informed by Mr Speck that Jersey law was selected on tax advice but it was always intended that the Trust would be administered in Guernsey, as indeed it has been. The Trust has no connection with Jersey other than by virtue of clause 3.
- 5 By deed of appointment dated 21<sup>st</sup> August, 2007, C, a wholly owned subsidiary of B was appointed an additional trustee. Both B and C are Guernsey registered companies and are regulated by the Guernsey Financial Services Commission. We will refer to them hereafter as "the former trustees".
- 6 The Protector of the trust was F. On 8<sup>th</sup> October, 2009, he was succeeded as Protector by G, managing director of the Representor, a company which carries on trust business in Geneva. We will refer to the Representor hereafter as "AA". The Protector has the power to appoint and remove trustees. On 25<sup>th</sup> June, 2010, G nominated E as Protector and on 1<sup>st</sup> July, 2010, G exercised his power as protector to remove the former trustees as trustees of the Trust and to appoint the Representor as trustee in their stead.

## **Background to the Representation**

- 7 From August 2007 onwards the former trustees worked closely with H as a joint venture partner, adviser and as the provider of equity and senior, junior and mezzanine debt in relation to a variety of transactions.
- 8 On 19<sup>th</sup> December, 2007, the former trustees entered into a framework agreement with H and a group of companies within the trust structure the general purpose of which was to secure long-term financing for the activities of these companies and to provide H with additional security for the provision of that financing.
- 9 According to the former trustees, the practice had been developed that if funds were required to be moved within the trust structure for working capital or other purposes, intra group transfers were made to move the relevant funds where they were needed. Apparently these were then recorded in the accounting records of the relevant companies as a series of informal loan arrangements. The arrangements were usually recorded as a series of loans streamed up the structure from the provider company to the former trustees through

any intermediate companies and streamed back down from the former trustees to the recipient companies through the intermediate companies. On occasion they may have been recorded as direct transfers between the provider and the recipient of the funds. As a consequence significant loan balances were apparently established between the Trust and some of the companies within the trust structure, which we will refer to as the “creditor companies”. These loan arrangements were made in Guernsey and are arguably governed by Guernsey law.

- 10 H collapsed financially in October 2008 and the creditor companies have gone into liquidation in the BVI. If the loan balances apparently due by the Trust to the creditor companies are found to be payable, then there are insufficient assets within the Trust to meet the same and the trust structure will effectively be insolvent.
- 11 On 12th March, 2010, the former trustees brought proceedings against the creditor companies before the Guernsey court for its determination as to whether the loan arrangements are and remain binding and, if they are enforceable, as to their terms and to the extent of the claims (in particular whether they extend to the personal assets of the former trustees). The creditor companies have counterclaimed in these proceedings for repayment of these loans. We will refer to these proceedings as “the first application”.
- 12 On 19<sup>th</sup> May, 2010, the former trustees applied to the Guernsey court for the following directions, namely:-

We will refer to these proceedings as “the second application”.

  - (i) Directions as to the steps they ought to take to ascertain the liabilities and the values of the assets and liabilities of the Trust.
  - (ii) Directions as to the basis on which assets should be used to meet liabilities if the assets of the Trust were not sufficient to meet its liabilities in full.
  - (iii) Specific directions as to what if any action they should take in relation to particular investments.
  - (iv) Directions in relation to what steps they should take in proceedings in the Commercial Court in England in which they are defendants.
  - (v) Directions for the payment of various costs and expenses of the former trustees, both administrative and legal, out of the assets of the Trust.
- 13 E has been convened to the second application, and, as we understand it, G, in his then capacity as Protector of the Trust, has been ordered to file evidence. E has submitted to the jurisdiction of the Guernsey court in the second application.

- 14 The former trustees have also given notice that they intend to apply for further directions as to the steps they should take in relation to the first application. The Guernsey court has ordered E and G to file such evidence as they wish in relation to these proposed directions.
- 15 Following the appointment of AA as trustee, it has now been convened to the second application. It has applied separately to this Court for directions as to whether it should submit to the jurisdiction of the Guernsey court. That potential application and an application by the creditor companies to be joined in as parties to the second application was due to be heard on the Monday following the hearing before us, namely Monday 9<sup>th</sup> August, 2010, in a three day hearing set aside for that purpose.
- 16 The former trustees have recognised the appointment of AA as trustee of the Trust but have declined to vest the assets in AA pending receipt of directions from the Guernsey court and in exercise of their right to withhold assets to meet liabilities, which might in this case exceed the value of the assets within the Trust.

### **The Representation**

- 17 Shortly after its appointment as trustee, AA brought the Representation with which we were concerned and obtained leave to serve it on the former trustees out of the jurisdiction, pursuant to Rule 7(j) of the Service of Process Rules 1994, namely that the claim or application is brought within the terms of Article 5 of the Trusts (Jersey) Law 1984. The former trustees appeared under protest as to jurisdiction and on 2<sup>nd</sup> August, 2010, issued a summons to set that service aside and to stay the Representation.
- 18 In the Representation AA seek the following orders as against the former trustees:-
- (i) Directions requiring the former trustees to provide AA with information and documentation relating to the Trust.
  - (ii) An injunction restraining the former trustees from dealing with the assets of the Trust without the prior approval of AA.
  - (iii) Declarations that the former trustees are not entitled to (a) a right of indemnity in respect of any liability they may have to the creditors against the assets of the trust; and (b) retain or administer the trust funds.
  - (iv) Directions requiring the former trustees to take all such steps as may be necessary to vest legal title to the assets of the Trust in AA.
- 19 We agreed with Mr Speck that this relief cannot properly be characterised as an application by AA for directions as to how it should act as trustee; rather it constitutes hostile proceedings against the former trustees. In particular an allegation that a former trustee is

not entitled to an indemnity is an allegation that it has acted in breach of trust.

- 20 AA were only proposing to proceed at this stage with the directions in relation to disclosure, the injunction and the directions requiring vesting of legal title in the assets (18 (i), (ii) and (iv) above).

### **Jurisdiction**

- 21 On the face of it both the Jersey and Guernsey courts have jurisdiction in this matter, pursuant to their respective laws. The Jersey Court has jurisdiction under Article 5 of the Trusts (Jersey) Law 1984 because the Trust is a trust whose proper law is the law of Jersey.
- 22 The Guernsey court would appear to have jurisdiction under section 4 of the Trusts (Guernsey) Law 2007 which provides that it has jurisdiction in respect of a trust the trustee of which is resident in Guernsey or any property of which is situated or administered in Guernsey. It was not in dispute that the assets of the Trust were and still are administered in Guernsey and the Guernsey court would therefore appear to have jurisdiction at least under that head.

### **Legal principles to be applied**

- 23 It was not in dispute that on an application to serve proceedings out of the jurisdiction in accordance with the Service of Process Rules 1994, AA must show the following three things:-

See [Koonmen v Bender and Others](#) [2002] JCA 218.

The burden in each case is on AA. The former trustees did not dispute that (i) and (ii) were made out and the issue was therefore whether AA could satisfy the Court that Jersey was clearly the appropriate forum.

- (i) That the Court had jurisdiction to hear the matter;
- (ii) That there is a serious issue to be tried; and
- (iii) That Jersey is clearly the most convenient forum for the resolution of the issues.

- 24 Mr Robinson relied essentially on clause 3.1 of the Trust deed which he submitted on its true interpretation conferred an exclusive jurisdiction on the Jersey court in connection with all disputes arising out of the Trust. In support of that submission, he relied on the Court of Appeal decision in [Koonmen](#) which he submitted was concerned with a not dissimilar jurisdictional clause in respect of which the Court of Appeal held that the Royal Court

should have given greater weight. The interpretation and jurisdictional clauses in [Koonmen](#) were in the following terms:-

*“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 1(i) (k), the interpretation clause)*

**“PROPER LAW**

*This Settlement is established under the laws of Anguilla and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law 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 shall be the law of Anguilla which said Island shall be the forum for the administration thereof” (clause 2)*

- 25 The Court of Appeal held that the reference to the “exclusive jurisdiction” of the proper law in the interpretation clause and the reference to the forum of administration in clause 2 amounted to a provision conferring jurisdiction on the Anguillan courts for the resolution of all disputes. The judgment of Rokinson JA went on to say this at paragraph 49:-

***“[49] 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 r32(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.

***[50] Certainly, in the context of service of proceedings on a foreigner out of the jurisdiction, where the burden on the plaintiff is a heavy one in any event, to give leave in the face of an express choice of a forum other than Jersey would require very special circumstances, which in my view do not exist in the present case.”***



- 26 The decision on [Koonmen](#) has been criticised by Paul Matthews in his article entitled “What is a trust jurisdiction clause?” published in the Jersey and Guernsey Law Review in October 2003 where he said at paragraphs 21 and 22:-

**“21. Secondly, the Court of Appeal thought that the reference to the forum for the administration of the trust in clause 2 (even though headed “Proper Law”, which must surely have been seen as a clue) confirmed the interpretation of clause 1 as an exclusive jurisdiction clause. Again, this cannot be right. 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.**

**22. 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 the 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”.***

- 27 Drawing from that article, Mr Speck submitted that the Court of Appeal in [Koonmen](#) had made the mistake of treating the “forum of administration” clause in the relevant trust instrument as being a contractual provision. The Court of Appeal had ignored the reasoning in [EMM Capricorn Trustees Limited v Compass Trustees Limited \[2001\] JLR 205](#) where Birt, Deputy Bailiff, said this at paragraph 16:-

***“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 court 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.”***

- 28 The Grand Court of the Cayman Islands has recently decided not to follow [Koonmen](#), holding that a “mandatory forum for administration” clause did not encompass a claim for breach of trust—see [Helmsman Limited v Bank of New York Trust Company \(Cayman\) Limited](#) 11<sup>th</sup> June 2009. In doing so, it cited Paul Matthews' criticisms with approval.

## Decision

- 29 Whilst clause 3.1 of the Trust and clause 2 of the [Koonmen](#) deed are similar, there is no interpretation of the proper law in the Trust. This gives rise to an important distinction between the two deeds in our view as it is clear that it was the reference to the “exclusive jurisdiction” in the interpretation clause in the [Koonmen](#) deed that was central to the Court

of Appeal's interpretation of the jurisdictional clause:-

**“[46] Clause 1(i)(k) read on its own is admittedly somewhat confusing.** It purports to define the phrase “the Proper Law” but does so in terms which include an express reference to “exclusive jurisdiction”. The concept of a reference to the exclusive jurisdiction of a system of law is obscure, but if this was not intended to be a reference to the jurisdiction of the relevant forum or court, it would be redundant. This interpretation is confirmed when one considers cl 2, which, although headed “Proper Law”, clearly includes a reference to the forum for the administration of the trust.

**[47] I conclude that, looking as one must, at the deed as a whole, and construing cl 2 in the light of cl 1(i) (k) and cl 14, the clear presumed intention of the draftsman was that, unless and until the trustees decide to change the proper law under cl 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.”**

- 30 As the Court of Appeal made clear at paragraph 45, it is at the end of the day a question of the court construing the particular deed before it in order to derive from it the presumed intentions of the parties. That exercise has to be conducted against the background of the surrounding circumstances or matrix of facts existing at the time when the document was executed (see *Alhamrani v Alhamrani* [\[2005\] JLR 236](#)).
- 31 In brief the Trust was declared by a Guernsey trustee, B, to receive assets from a BVI settlement. It was intended to administer the Trust from Guernsey. It has no connection with Jersey at all save for the adoption of Jersey law as the proper law and the Jersey courts as the forum for administration. In construing clause 3.1 against that background and noting the absence of any reference to “exclusive jurisdiction” as contained in the [Koonmen](#) deed, it was our judgement that it was not the intention of the draftsman of the Trust that the courts of Jersey should have exclusive jurisdiction over all disputes in relation to the Trust. Accordingly we concluded that the Jersey courts did not have exclusive jurisdiction over the matters raised in the representation of AA. We further concluded that the Guernsey court was the most convenient forum for the resolution of such matters.
- 32 The situation in relation to the Trust is fast moving and complex. The assets of this potentially insolvent trust are administered in Guernsey by the former trustees, two Guernsey regulated trust companies. The Guernsey court is already seized of the first application which will decide whether or not the Trust is solvent and therefore in whose interests the assets are to be held (the beneficiaries or the creditors). It is also seized of the second application in which the former trustees are seeking directions. E has submitted to the jurisdiction of the Guernsey court in that application and the former Protector of the Trust has been ordered to file evidence. The creditors, who have a clear interest in the matter, are seeking to be joined in to the second application and AA have already been joined (subject

to possible challenge). The laws of the two jurisdictions in relation to trusts are of course closely related.

- 33 For the Jersey Court to seek to assert jurisdiction over the former trustees for the purpose of granting the (hostile) relief set out in the representation would in our view be exorbitant and would lead to confusion and uncertainty. The interests of all the parties and the ends of justice were best served by the matters raised in the representation being tried by the Guernsey court.
- 34 If we were wrong in our interpretation of clause 3.1 and it does purport to confer exclusive jurisdiction on the Jersey courts then in the exercise of our discretion and applying [Koonmen](#), we determined that the circumstances outlined above were exceptional, justifying the Court in overriding the express choice of forum provision. Mr Robinson was unable to explain how a clear line of separation between the roles of the two courts could be established. It was difficult to see how that could be achieved when this Court would be asserting an exclusive jurisdiction over all disputes in relation to the Trust. In essence, he submitted that the Guernsey court would be bound to accede to the submissions made by AA, if they submitted to its jurisdiction in the second application, that it had no jurisdiction to make any orders against or give any directions to the former trustees in relation to the Trust or its assets.
- 35 We therefore concluded that AA had failed to satisfy us that Jersey was clearly the most convenient forum for the resolution of the issues set out in the prayer to the Representation. Clause 3.1 did not confer exclusive jurisdiction on the Jersey court but even if it did, the circumstances were exceptional and justified the Court in overriding clause 3.1 so as to enable the Guernsey court to continue to exercise its jurisdiction without interference by this Court.
- 36 Our decision did not, of course, close the door to AA applying for directions to this Court as to how it should act as trustee of the Trust of the kind summarised by Mr Matthews in his article.